

JUDICIAL REGULATION OF ADMINISTRATIVE POLICIES THAT INFLUENCE THE EXERCISE OF STATUTORY DISCRETIONS

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ADDMEG001

Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements of the degree of LLM (Constitutional and Administrative law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Supervisor: Professor Hugh Corder

Word Count: 24 733 (with footnotes)

19 298 (without footnotes)

Abstract

This paper argues that, in light of the prevalence of administrative policies, the normative force they carry and the reliance placed upon them by the public, there is a need for the courts to develop the law regulating the way that administrators use policy to structure and guide the exercise of their statutory discretions. It will be argued that such developments would give effect to both the 'controlling' and the 'facilitating' objectives that underpin administrative law, and, would strike an appropriate balance between the competing values at play so as to foster good governance. First, the nature

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of administrative policies, their rise as a regulatory tool of government and the growing administrative preference for policy over delegated legislation are explored. It is argued that there is a necessity for the courts to develop the law regulating the administrative use of policy to foster the democratic principle of accountability. The current legal principles regulating the use of administrative policies in a discretionary context, under the broad banner of the 'fettering by rigidity principle' are explored and assessed. It is argued that the fettering by rigidity principle has been applied in a nuanced and variable way, and that it plays an important role in fostering good governance, particularly by promoting flexibility, responsiveness and participation, but does not go far enough in promoting the values of certainty, fairness and consistency. It is argued that a more appropriate balance between these values could be struck by developing a duty for administrators to apply policy consistently and only to depart for good reasons. Finally, it is argued that the principle of legitimate expectations should be developed to allow for substantive protection where an administrator unjustifiably frustrates the trust and reliance which individuals may have placed in an existing policy where that policy is subsequently replaced by a new one.

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Table of Contents

1. INTRODUCTION	1
2. THE CASE FOR NEW PRINCIPLES ABOUT POLICY	3
2.1. The need for policy.....	3
2.2. The nature of policy	5
2.3. The prevalence and influence of policy.....	8
2.4. The preference for policy rather than regulations	9
2.5. Judicial engagement with policy	12
3. FETTERING OF DISCRETION BY RIGIDLY APPLYING POLICIES	18
3.1. Decision-maker may formulate a policy to inform the exercise of their discretion as long as the policy is <i>intra vires</i> and rational	21
3.1.1. <i>May formulate policy</i>	21
3.1.2. <i>Policy must be intra vires</i>	26
3.1.3. <i>Policy must be rational</i>	29
3.2. Policy may not preclude or fetter the exercise of the decision-maker’s discretion	30
3.2.1. <i>Unpacking the principle</i>	30
3.2.2. <i>Variability, weight and relevance</i>	34
3.3. Policy must be disclosed to affected parties who must be given an opportunity to make representations	39
3.3.1. <i>Publication</i>	40
3.3.2. <i>Representations</i>	41
3.4. Synthesis.....	41
4. THE DUTY TO APPLY POLICIES CONSISTENTLY UNLESS THERE IS GOOD REASON TO DEPART	43
4.1. The position in the United Kingdom.....	43
4.2. The position in South Africa	47
5. LEGITIMATE EXPECTATIONS	52
5.1. Values underpinning the substantive protection of legitimate expectations	54
5.2. Legitimacy.....	56
5.3. Balancing.....	57
6. CONCLUSION.....	63

JUDICIAL REGULATION OF ADMINISTRATIVE POLICIES THAT INFLUENCE THE EXERCISE OF STATUTORY DISCRETIONS

1. INTRODUCTION

'The universe maintained a balance, moving first one way and then the other in a forever equalizing of opposites.' - Diana Lanham

Lawyers tend to maintain a bright line between law and policy. However, over the past century there has been a growing politicization of the law which has gone hand in hand with the proliferation of administrative policy-making to guide the exercise of statutory discretions. Many lawyers when faced with such administrative policies will respond that they are not law and, therefore, are not binding. Administrators may give a similar response.

At a formal level, this statement is correct. However, it conceals far more than it reveals and it elides the reality that, in practice, such policies often carry the normative force of laws within the context of administrative decision-making. Confronted with this reality the question is what can courts do to guide administrators in striking an appropriate balance between flexibility and certainty; between the attainment of public purposes and the need to treat individuals with respect? It is, arguably, only through the development of principles that recognise the significance of the role that policy plays in the modern South African regulatory context and the influence it exerts, that courts can begin to develop principles to guide administrators and hold them accountable for the way in which policy is applied.

Part 2 explains the relationship between discretion and policy. It demonstrates that policy has become prevalent throughout almost all fields of administrative regulation and exercises a significant influence over the exercise of statutory discretions and often functions in a manner similar to subordinate legislation. I argue that the courts have an important role to play in both facilitating and controlling the exercise of government power, and, in particular, to ensure that certain good governance values, that are fundamental to the Constitution, underpin administrative decision-making, including certainty, rationality and equality. The duty of courts is to develop principles

of administrative decision-making to give effect to these values and to hold the administration accountable to them. In applying these principles courts have regard to the legitimate role and purposes of the administration.

Part 3 explores the current state of the administrative-law principles, primarily the fettering-by-rigidity principle, which regulate the use of policies that have a non-trivial influence on the exercise of statutory discretions. This part demonstrates that courts have developed the fettering-by-rigidity principle in nuanced ways in recognition of the need to strike a balance between flexibility and certainty, and in particular that the principle plays a significant role in fostering participation in decisions governed by policy. However, from this exploration it is apparent that courts have not yet done enough to formulate principles to guide administrators so that the use of policy in decision-making is wise and humane and shows respect for individuals, and to hold the administration to account for the way it uses policy.

Part 4 argues that the courts should develop a principle that obliges administrators to apply their policies consistently unless there is good reason for departure. Such a development would be consistent with important constitutional values and would function as a logical development of the nuanced way the fettering-by-rigidity principle has been applied by courts. It would also serve an important function in holding the administration to account for the way that it applies its policies.

Part 5 argues that the courts should develop the principle of substantive legitimate expectations, in very limited circumstances, where an administrator unjustifiably frustrates the trust and reliance which individuals have placed in an existing policy when it replaces that policy with a new one.

2. THE CASE FOR NEW PRINCIPLES ABOUT POLICY

2.1. The need for policy

The 20th century saw the demise of the night-watchman state, predicated on liberal individualist values, and the birth of state interventionism, rooted firmly in collectivism.¹ In the night-watchman state, state interference in the private actions of individuals was limited and mediated through settled rules aimed primarily at preventing interference with individual liberties.² The autonomy and privacy of individuals had primacy and was protected through legal rights.³ However, as a result of the myriad social, economic, scientific and technical transformations that occurred over the 19th and 20th centuries, societies came to believe that they could take control of their collective destinies through central planning of social and economic activities; people embraced the idea that rather than just regulating society ‘government should seek to improve it’⁴ and confer ‘benefit on the mass of people’.⁵ Thus, governments began to pursue social welfare goals and took a more interventionist approach to maintaining social order than they had previously.

As a result of changes to the role of the state, society could no longer be regulated through formal mechanical rules and the common law alone.⁶ First, the sheer magnitude of the task of regulating all the facets of modern societies for the common good is daunting and complex. The factors relevant to decision-making may be so numerous and varied that it would be impossible to foresee them in advance. In other cases, the factors and standards relevant to decision-making may best be determined through the expertise of a functionally-specialised administrator.⁷ Second, the complex and variable nature of collectivist regulation would in certain circumstances make the

¹ See Harlow, C and Rawlings, R *Law and Administration* 3ed (2009) at 1-8; Baxter *Administrative Law* (1984) part 2.

² See Harlow (n 1) at 5 and Galligan, DJ *Discretionary Powers: A Legal Study of Official Discretion* (1986) at 86 – 88.

³ Galligan (n 2) at 87.

⁴ Harlow (n 1) at 2.

⁵ Baxter, L ‘Legal Education and Public Policy’ 1 *Natal University Law & Society Review* at 15 – 16.

⁶ Sedley, S ‘Policy and Law’ in Andenas, M and Fairgrieve, D (eds) *Judicial Review in International Perspective* (2000) at 265.

⁷ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) at para 53 and see also Galligan (n 2) at 72 -79.

generalisations that are characteristic of rules inappropriate (particularly where the situations encountered are so variable that generalisations are impossible).⁸ The job of the administrator is to achieve the political purposes for which the power was granted as effectively as possible (not just to apply a set of given rules formally and impartially), which creates a broad tendency towards more individualised decision-making.⁹

Consequently, it became necessary to confer discretion on administrators so that abstract and general legal standards could be applied to particular circumstances in a fair manner and adapted to changing social realities.¹⁰ Administrators were given broad powers where they, rather than the legislature, were largely responsible for determining standards according to which the power was to be exercised, because the circumstances necessitated greater freedom in exercising the powers than rules, which limit the factors to be taken into account, would ordinarily permit.¹¹ However, this is not to say that discretion connotes an unbounded, freewheeling power to be exercised according to the personal dictates or whim of the administrator upon whom the power is conferred. As Dworkin has noted, discretion is like a hole in a doughnut.¹² It is always constituted and constrained by a surrounding belt of rules. It is a choice of options that is available within statutorily-defined boundaries and it must be exercised in a manner that is rationally connected to the purposes for which the power has been granted. The grant of discretion will provide varying degrees of guidance as to the policy goals to be achieved and the standards by which they are to be achieved. Thus, depending on how it is conferred, the breadth of discretion may be wider or narrower.

Lawyers, under the influence of Dicey¹³, have traditionally been suspicious of discretion which, by granting flexibility to decision-makers, reduces certainty and predictability, potentially opening the door to arbitrary and unfair actions affecting the

⁸ Galligan (n 2) at 131.

⁹ Galligan (n 2) at 69.

¹⁰ This is what Galligan refers to as discretion in the 'central sense'. Discretion may also arise in finding facts, applying standards to facts or filling an interpretive gap.

¹¹ Galligan (n 2) at 2-3.

¹² Dworkin, R Is Law a System of Rules in *The Philosophy of Law* (1977) 52

¹³ Dicey's theory of constitutional law was grounded in his belief in limited government and a negative conception of liberty. He feared collectivism and saw it as a threat to the values he had identified as core to constitutionalism. As the administration (primarily through discretionary powers) was the primary means for implementing collectivism he was deeply mistrustful of the administration. Through broad grants of discretionary power the administration also came to perform adjudicative and legislative functions which Dicey viewed as a threat to the legislature and the courts. See generally Harlow (n 1) 16 -24.

individual.¹⁴ While it is widely-accepted that ‘discretion plays a crucial role in any legal system,’¹⁵ there remains a need to structure it: to provide certainty and consistency, and to guide officials in their decision-making.¹⁶ The primary means that has emerged to achieve these goals is policy:

[policy] possesses virtues of flexibility which legal rules lack, and virtues of consistency which simple discretion lacks. If the first of these virtues ... offers us government with wings, it is the second which ... shields individuals from government by accident.¹⁷

2.2. The nature of policy

O’ Regan has referred to policy as ‘a course of action adopted or pursued by a government.’¹⁸ The American Heritage Dictionary defines it as ‘a plan or course of action, as of a government, political party, or business, intended to influence and determine decisions, actions and other matters’. What is apparent from these definitions is that, by its very nature, policy is intended to be applied consistently so as to influence the outcomes of decisions or actions in particular areas. Policy is generally expressed in the form of standards.¹⁹ Standards vary – at one end of the spectrum there are broad abstract standards that grant a wide degree of discretion and at the other end there are precise standards that take the form of rules. These policy standards may be encapsulated in primary legislation, subordinate regulations, or they may take the form of guidelines and instructions to the administration or, in certain circumstances, may not be made express but may be pursued through the conduct of officials.²⁰

In the government context, policy is generally collectivist in nature, focusing on the collective interests of citizens (e.g. maintaining social order and advancing social welfare) rather than individual interests. Policy serves to facilitate the implementation of public programmes designed to regulate some form of human activity, provide some

¹⁴ Discretion is no longer thought of in Diceyan terms as necessarily leading to arbitrariness.

¹⁵ *Dawood* (n 7) para 53 and footnote 73.

¹⁶ *Ibid.* The courts’ conclusions are informed by the work of K. C. Davis. Davis was of the view that ‘the degree of administrative discretion should often be more restricted; some of the restricting can be done by legislators but most of the task must be performed by administrators’.

¹⁷ Sedley (n 6) at 265.

¹⁸ O’ Regan, C ‘A forum for reason: Reflections on the role and work of the Constitutional Court’ Discourse and debate: Helen Suzman memorial lecture 2012 28 SAJHR 116 at 126

¹⁹ See generally Galligan (n 2) at 1-14.

²⁰ O’ Regan (n 18) at 126.

service, or execute some plan of public action. It is the active pursuit of community goals and thus is often referred to as ‘the purposive activity of government’.²¹ It can be formulated in a rationalist manner, where the policy sets out in advance the measures that are intended to be used to achieve the predefined objectives, or an incremental manner, where the policy is formulated in an evolutionary and experimental way, taking into account the interests of those affected, and continuously adjusted in light of accumulated experience.²² Most policy formulation involves a combination of both rationalist and incremental methods in variable relationships with one another, depending on the context.²³ Further, over time there are usually good reasons, in the interest of certainty, guidance and accountability, for the standards that have developed through the incremental determination of various matters to be formalised in a more comprehensive manner.

This paper focuses on policy in the form of instructions or guidelines that are made by the executive and administration, rather than primary or subordinate legislation. The formulation of policy in this sense is closely linked to the grant of discretion to administrators and is a mechanism through which discretion is structured. In other words, there is no stark choice between rules and discretion. Discretion will always be directed at achieving goals and from those goals it will be possible to derive some standards to guide decision-making, which may be more or less precise: pointing at some direct outcome or merely specifying factors to be taken into account.²⁴ Importantly, the extrapolation of such standards from purposes is a minimum requirement if decision-making is to be rational. It is also a mistake to think that there is something inherent in the nature of discretion that precludes it from being translated into precise standards.²⁵ One of the reasons to confer discretion is to allow a functionally-specialised administrator with relevant expertise to determine how best to regulate the situation and achieve the statutory purposes, and in certain circumstances the best way

²¹ Baxter (n 5) at 16.

²² Galligan (n 2) 162 - 165 and Baxter (n 5) at 17.

²³ As Galligan notes, there is a complex relationship between rational purposive decision-making and general standards. The configuration of standards and openness, and planning an incrementalism is complex and variable. Policy formulation consists of a blend of both.

²⁴ Galligan (n 2) at 9.

²⁵ Galligan (n 2) at 22.

to do that will be to formulate standards with the precision of rules.²⁶ So discretion effectively means that the power to fix the standards for decision making is granted to the administrator. It does not mean that there are no standards.²⁷

How tightly or loosely those standards are framed must be determined in a particular context. The nature of decisions that administrators are faced with varies considerably. Here, too, there is a spectrum. On the one hand, are decisions, that are unlikely to recur, involving the formulation of general standards with a high policy content, affecting a wide range of interests and requiring the consideration of a number of different factors that may be in tension with each other.²⁸ On the other, are decisions that more closely resemble adjudication, involving the more individualised determination of how a person or a situation should be treated.²⁹ In the latter type of decisions, the range of interests affected is generally limited to those parties before the decision-maker (with perhaps a minor indirect impact on a limited group of others). The policy factors that influence the decision are either simple or have been settled in advance of the decision and the circumstances in which the decisions occur differ only in marginal ways. The closer the decision is to the 'high policy content type' the looser and more flexible the standards for decision-making are likely to be, whereas the closer the decision is to the adjudicative type the more appropriate it becomes to make decisions based on more precise rule-like standards coupled with the power to depart in exceptional or unforeseen circumstances. A significant proportion of administrative decision-making leans towards adjudicative decision-making.

Thus, the type of policies that are of concern in this paper are those which are intended to exert a significant influence on the exercise of statutory discretions granted to administrators. This has two important implications. First, the primary focus is on those policies that tend toward specificity and prescriptiveness and those that contain written norms or criteria made by the administration which do not have legislative pedigree but have the purpose or effect of influencing administrative decision-making in

²⁶ Galligan (n 2) at 22.

²⁷ Galligan (n 2) at 1.

²⁸ See generally Galligan (n 2) at 114 – 117, where his classification of decisions is set out and explained.

²⁹ Ibid.

a non-trivial fashion.³⁰ In other jurisdictions such policies are referred to as ‘soft law’, ‘grey letter law’, ‘fuzzy law’ or ‘quasi legislation’.

Second, the focus on policies which guide the exercise of statutory discretions in adjudicative situations means the nature of the policy formulation being considered is what O’ Regan J referred to in *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College*³¹ as policy formulation ‘in the narrower sense:’

Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision ... However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation.

The formulation of policy in this narrower sense will often constitute administrative action and thus be subject to the requirements of the Promotion of Administrative Justice Act, 3 of 2000 (“**PAJA**”).³²

All further references to ‘policy’ in this paper will relate to policy in the sense described above unless otherwise specified.

2.3. The prevalence and influence of policy

Policy exerts a significant influence on administrative decision-making and the behaviour of individuals. This is so, first, because as government regulation has increased to meet the growing demands of modern societies, there has been a concomitant mushrooming of policies to guide administrative decision-making – this is because rationality requires that there should be at least some standards to inform decision-making. The regulation of land-use planning, environment, fishing, public procurement, property, tax, broad based black economic empowerment, companies, labour, immigration, social security, energy and natural resources bristles with policies in a myriad of forms including guidelines, circulars, memoranda, instructions and directives.

³⁰ Sossin, L and Smith, C “Hard choices and soft law: ethical codes, policy guidelines and the role of courts in regulating government” 40 *Alta. L. Rev.* 867 2002 – 2003 at 871.

³¹ *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College* 2001 (2) SA 1 (CC) para 18.

³² *Ed-U-College* (n 31) para 18.

This is true not only in South Africa, but world-wide. An Australian study on business and regulation revealed that as early as 1997 there were more than 30 000 policies concerning business regulation alone.³³ It appears unlikely that there will be a diminution in this trend. If anything, the pace at which policy is proliferating seems ever greater.³⁴

Second, policy is a source of guidance not only to decision-makers but also to individuals. It is 'now a major source of people's expectations of how government will treat them'.³⁵ Many individuals and companies plan their activities in accordance with government policy, since in the modern world, in which broad grants of discretion are made to administrators, policy fulfils the guiding role that laws themselves are supposed to perform.

Third, decision-makers tend to treat policy in the same way as regulations or legislation.³⁶ In certain contexts, studies have found that decision-makers rely almost exclusively on policy and rarely use legislation or regulations in their decision-making.³⁷ It has become the 'principle administrative mechanism used to elaborate the legal standards and political and other values underlying bureaucratic decision-making',³⁸ particularly in view of the 'discernible retreat from primary legislation in favour of government by informal rules.'³⁹

2.4. The preference for policy rather than regulations

Policy is attractive to the administration primarily for reasons of ease, expediency and pragmatism. Studies from around the world indicate that administrators view policy as a user- friendly and comprehensive source of guidance, whereas they view legislation

³³ Creyke, R "'Soft law' and administrative law: a new challenge" *ALAL Forum no 61* at 17 However it is important to note that the 30 000 policies include subordinate legislation.

³⁴ See generally Sossin (n 30) and Creyke (n 33).

³⁵ Sedley (n 6) at 262.

³⁶ Pottie, L and Sossin, L 'Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare' 38 *U.B.C.L. Rev.* 147 2005 at 149. See too Harlow (n 1) at 41.

³⁷ Pottie (n 36) at 152.

³⁸ Creyke, R (n 33) at 17.

³⁹ Baldwin, R and Houghton, 'Circular arguments: The status and legitimacy of administrative rules 1986 *Public Law* 239. See also Harlow (n 1) at 192: administrative rule-making is 'the most important way in which the bureaucracy creates policy and in some respects rivals even the legislative process in its significance as a form of governmental output.'

and regulations as intimidating and find them difficult to read and interpret.⁴⁰ A key aspect of policy, therefore, is its flexibility: it is not binding in the way that rule-based regulations are, operating in an all-or-nothing fashion, but it instead allows for justice to be done in the circumstances of a particular adjudication.

Policy is also attractive because it can be made without the delay and complexity of legislation.⁴¹ It is inexpensive compared to the drafting of legislation and regulations, swiftly structures discretion to achieve the purposes for which it was given, and is easy to change in an incremental fashion as and when necessary.⁴² Thus policy is a useful way to test and experiment with principles that are not yet ripe for precise articulation in regulations and may be used to structure discretion where there is no power to enact regulations.

However, many legal academics have expressed concern that the line between policy and ‘extra-statutory regulation’ may be narrow and sometimes difficult to draw.⁴³ What seems to underlie this concern is the unease that, while policy will often have an effect similar to regulations, it may not be subject to the same requirements of procedural fairness in its formulation; it may not be accessible to the public; it is not subject to a common set of standards as to form and presentation; it may be prepared by lay people rather than legislative drafters, resulting in ‘unclear’ or ‘conflicting’ policies; and, most alarmingly to lawyers, it may be used to subvert the law and extend the powers of the administration without the concurrence of the legislature, thus undermining the rule of law and separation of powers.⁴⁴

These concerns, at least in so far as policy is being compared unfavourably with regulations, may be overstated. As Baxter and O’ Regan have pointed out, there certainly is a need to increase participation, responsiveness and accountability in

⁴⁰ Pottie (n 36) at 154.

⁴¹ Creyke (n 33) at 17

⁴² Creyke, R and McMillan, J “ Soft law v Hard Law ” in Administrative law in a changing State: Essays in honour of Mark Aronson, Pearson, Harlow Taggart (eds) 388 – 389.

⁴³ Galligan notes that this is not entirely satisfactory because the distinction between legislating and guidelines is not compelling because both may constitute legislating in some sense and the differences are a matter of subtle emphasis. Harlow and Rawlings also note that rules are not always strict and binding and as has been seen can incorporate discretion can be open textured and operate at the level of principles. Thus flexibility is not the sole preserve of policy and rigidity is not the sole preserve of rules. There is no bright line.

⁴⁴ Pottie (n36); Creyke (n 42) at 389; Molot, H.L ‘The self created rule of policy and other ways of exercising administrative discretion’ (1972) 18 McGill Law Journal 311 at 316.

administrative rule-making, since administrative rules are made by administrative officials who are not directly accountable to the public, rather than by the legislature which is politically accountable.⁴⁵ However, this concern applies equally to regulations and policy, since the legal standards of procedural fairness for each are similar.⁴⁶ In terms of the Constitution, regulations must be accessible to the public and national legislation may specify the manner and extent to which regulations must be tabled and approved by Parliament.⁴⁷ Accordingly, regulations are published in the Government Gazette. Yet legislation rarely requires regulations to be tabled in or approved by Parliament. Admittedly, there are no similar requirements for policy. Nevertheless, most government departments have developed a practice of making their policies available on their websites and/or of distributing them to stakeholders on their data bases via e-mail. Thus, although the legal standard for accessibility of policies and regulations differs, in practice the variance in their accessibility is not as pronounced as may be assumed.⁴⁸

The preference for legislative drafting is, arguably, a lawyer's bias. As mentioned above, both administrators and the public generally find legislation intimidating and difficult to follow and, while there is undoubtedly value in the precision and formal structures of legislative drafting, they do not guarantee clarity and coherence. In the context of the drafting of standards, norms and criteria by the administration, there is arguably value in formulating such documents in plain language that is accessible and clear to both the administrators who will use them and the public.

Finally, in response to the separation of powers and rule of law concerns, it is worth noting that policy, in the sense used in this paper, is prepared primarily to guide the exercise of statutory discretions. Like regulations, policy helps to flesh out the broad grants of power conferred in primary legislation. In the absence of statutory authorisation, administrators cannot exercise plenary legislative powers through policy;

⁴⁵ See generally Baxter, L 'Rule-making and Policy Formulation in South African Administrative-law Reform' (1993) *Acta Juridica* 176 and O'Regan, C Rules for Rule-Making: Administrative Law and Subordinate Legislation 1993 *Acta Juridica* 157.

⁴⁶ Regulations and policy (in the narrower sense) are both likely to constitute administrative action and are thus both subject to the procedural fairness requirements in PAJA. In relation to policy see *Ed-U-College* (n31) para 18 and in relation to regulations see *South African Dental Association v Minister of Health* (20556/2014) [2015] ZASCA 163 para 41.

⁴⁷ Sub-sections 101(3) and 101(4) of the Constitution.

⁴⁸ In relation to the need for improved rules for rule-making in the policy context see generally Sossin (n 30) and Creyke (n 33).

the powers they exercise are akin to subordinate regulatory authority within the framework of primary legislation. Should the policy exceed the bounds of the discretionary power conferred on the administrator through primary legislation, the action taken on the basis of the policy and the policy itself will be *ultra vires* and unenforceable.⁴⁹

The complaint that it is inappropriate for administrators to exercise powers similar to delegated legislation through policy, particularly where the power has not been expressly delegated by the legislature, is one of form rather than substance. The executive and the administration are responsible for preparing and initiating legislation and, as such, could readily empower themselves to make policies through primary legislation, and regularly do so, and it is doubtful that the legislature would object. Both the legislature and the courts are aware, at least peripherally, of the growing trend towards policy-making and, indeed, the courts, who are the guardians of the rule of law and the separation of powers, have recognised the usefulness of policy and accepted that it may be formulated even where the legislature has not expressly empowered the administration to do so.⁵⁰

Although there is, arguably, scope to improve the standardisation, drafting and accessibility of policies, the courts have found the formulation and use of policy legally unobjectionable – even ‘inevitable’⁵¹ and ‘sensible’⁵² – and it will undoubtedly remain a key element of regulation for the foreseeable future.

2.5. Judicial engagement with policy

As is apparent from the above, administrative officials often treat policy no differently from legislation or regulations, whereas courts have tended to see a bright line between policy and law, between the province of the administration and the province of the judiciary.⁵³ Unsurprisingly, courts prefer to focus their attention on the

⁴⁹ See Part 3 below where this is discussed in more detail.

⁵⁰ *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (CPD) at 754 B and C and the further discussion of this point in Part 3.

⁵¹ *Britten v Pope* 1916 AD 150 at 158.

⁵² *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 155A-B and *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Another* ([2006] 2 All SA 17 (SCA) para 19.

⁵³ *Pottie* (n 36) at 149.

law. But, there is a risk that adjudication will become unduly formalistic if there is excessive focus on the source of the power, rather than its substance. The consequence may be to remove a key basis for executive and administrative accountability for the exercise of discretion.

How, then, should judges react to the prevalent use of policy by administrators in ways that frequently resemble the application of subsidiary legislation? A principled answer to this question is dependent upon answering two further, more primary, theoretical questions: what does administrative law seek to accomplish and how does it seek to accomplish it?⁵⁴ The answers to these questions will determine the broader 'stance of administrative law *vis a vis* public power'.⁵⁵ The Constitution arguably contemplates two primary objectives for administrative law.

The first objective, which arose from and has become firmly established as a result of the Diceyan theory of the rule of law,⁵⁶ is controlling and constraining the administration. Control and constraint of administrative power protects individuals from abuses of power by a disproportionately powerful administration, and ensures that the administration does not stray beyond the bounds of power that the democratically elected legislature has granted to it. In this way administrative law is framed as a negative constraint on power, telling administrators what they may not do.⁵⁷ It is rooted in a deep mistrust of the administration.⁵⁸ This objective is also 'reactive'⁵⁹ and 'backward-looking'⁶⁰ in nature in that it culminates in courts scrutinising and diagnosing

⁵⁴ In *Proportionality and Legitimate Expectations in Administrative Law* (2000), Thomas phrases the same question in a slightly different way, he asks 'what is the appropriate role of law in government?' and 'how should law intervene in public administration?'

⁵⁵ Farina, CR 'Administrative law as regulation: the paradox of attempting to control and to inspire the use of public power' (2004) 19 SAPL 489 at 489. Farina conceptualizes administrative law as 'the regulation of regulation'.

⁵⁶ Dicey's legacy was to leave lawyers with a distrust of administrative action and in particular the exercise of discretionary power. He believed that the administration was capable of arbitrarily encroaching on the rights of individuals and should be controlled. A significant failing was that Dicey's theory of constitutional law, and particularly his conception of the state left the courts without any theoretic basis to exercise control over the administration. With no theoretical understanding of the purposes and powers of the state (no theory of the state) the courts' powers of intervention were limited to the *ultra vires* doctrine, in terms of which the court understood its role as policing and controlling the administration to keep it within the bounds of the laws promulgated by the sovereign legislature.

⁵⁷ The broad list of prohibited conduct, amounting to reviewable irregularities, is set out in section 6 of PAJA.

⁵⁸ In addition, at least historically, it was rooted not only in a mistrust that the human frailty of administrators clothed with broad regulatory powers will lead to abuse but also in the entire project of the administrative state.

⁵⁹ Farina (n 56) at 503.

⁶⁰ Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 SALJ 484 at 489.

past improper conduct and, where appropriate, setting aside, correcting or granting another appropriate remedy. However, as Tomkins point out:

Administrative law should seek not merely to stop bad administrative practice ... the goal [is] to enhance individual and collective liberty conceived in positive and not just negative terms.⁶¹

The second, more positive, objective is facilitating the accomplishment of public purposes the administration was created to perform. This objective implies a fundamental transformation of the attitudes and assumptions that underpinned the Diceyan view of the administration. Our constitutional arrangements reflect the democratic choice we have made in favour of centralised government regulation as a means to improve our social and economic circumstances. Accordingly, administrative lawyers and judges must accept that the law may be used ‘constructively as a means of not just controlling the state, but guiding it to achieve the legitimate purposes it pursues’.⁶²

‘Facilitating’ implies that the law also has a proactive role in positively shaping the normative framework for administrative decision-making to foster governance that is not only effective in achieving social goals but is also ‘good’.⁶³ This second sense of ‘facilitating’ is, perhaps, for some more closely associated with ‘controlling’ than truly facilitating administrative action. The ideas of good government are rooted in a concern with ‘respect for persons’ and an acknowledgement that an unadulterated utilitarian focus on achieving social goals takes insufficient account of the status and autonomy of individuals in society on whose behalf government exercises power.⁶⁴ Thus in some ways it is true that this form of facilitation is linked to controlling because principles of good government do function as constraints on government action in the interest of individuals. However, such principles also play a facilitating role in shaping administrative decision-making in a positive and proactive way, informing administrators of the values that should underpin their decisions if they are to be

⁶¹ Harlow (n 1) at 44 quoting from A Tomkins ‘in defence of the political constitution’ 2002 22 OJLS 157.

⁶² Indeed courts have evidenced an intention to do so through the development of a model of purposive interpretation of statutes, the creation of a ‘distinctly South African’ model of separation of powers⁶² and the injunction for courts to show ‘respect’ for the institutional role and expertise of the other branches of government.

⁶³ See Farina (n 56) at 501 where she suggests that the facilitating role of administrative law includes ‘developing legal rules to induce ... the wise and humane use of public power’.

⁶⁴ Galligan (n 2) at 93.

justifiable and legitimate, in the eyes of not only the courts, but also the general public on whose behalf the powers are exercised. This sense of ‘facilitating’ is therefore different from ‘controlling’ as its objective is to ‘promote the validity of administrative action, rather than struggling to prevent its abuse’.⁶⁵

There are a number of constitutional values and principles that can and should inform exercises of administrative decision-making to instil ‘ideals of good governance’ and encourage the development of an ‘internal morality of the administration’. The first important principle is the rule of law, a founding value of the Constitution, which requires as a minimum, that every exercise of public power should be rational and should not be arbitrary.⁶⁶ The rule of law also places value on certainty, predictability and reliability so that people may conform their conduct to the law.⁶⁷ Equality, too, which includes the idea of fair and equal treatment in similar cases, is a value inherent in the rule of law and underpins the Bill of Rights. The founding values of the Constitution also emphasise ‘democratic government to ensure accountability, openness and responsiveness’.⁶⁸ In this way the Constitution envisions not merely a ‘snapshot’ representative democracy, but a participatory one in which individuals are afforded an opportunity to participate in decisions that affect them and the government (and the administration in particular) must justify its decisions to the governed.⁶⁹

The relevance of these values and principles to the administration is echoed in section 195 of the Constitution, which sets out the principles applicable to the public administration. It provides, among others, that services must be provided impartially, fairly, equitably and without bias, that people's needs must be responded to and the public must be encouraged to participate in policy-making, that the public administration must be accountable and that transparency must be fostered by providing the public with timely, accessible and accurate information. Further, it is clear from section 33(3) of the Constitution that all of these values and principles must be applied

⁶⁵ Farina (n 56) at 507.

⁶⁶ *Minister of Home Affairs & another v Somali Association of South Africa & another* 2015 (3) SA 545 (SCA) para 18

⁶⁷ *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 102.

⁶⁸ Section 1(d) of the Constitution.

⁶⁹ See generally Mureinik, E ‘Reconsidering review: participation and accountability’ (1993) *Acta Juridica* 35.

in a manner that is not overwhelming for the administration to implement, a manner which 'promotes an efficient administration'.⁷⁰

The objectives discussed above are both legitimate and necessary, but they are in creative tension with one another. The central challenge for administrative law, and for judges, is to reconcile them and to contribute towards the effectiveness and realisation of social interests, while at the same time safeguarding individual interests. This is the framework within which courts must conceptualise their response to the prevalence and growing use of policy by the administration, and the values from which more specific principles of administrative regulation can be derived. The intensity with which the principles are applied will depend on a proper application of the 'distinctly South African separation of powers' and accompanying imperative for judicial deference.

Judicial engagement with administrative use of policy has primarily been limited to the 'fettering by rigidity principle', which pertains to situations where administrators elect to apply policy in the exercise of their statutory discretions and do so rigidly and inappropriately. Galligan argues that the fettering-by-rigidity principle functions as a 'negative constraint' on the exercise of administrative discretion in that it prevents administrators from fettering their discretion by applying policies in a rigid way, like legal rules, that leaves no room for variation in the circumstances of a particular case.⁷¹ It is aimed at telling administrators what they must not do, and so operates within the 'controlling and confining' paradigm. By limiting themselves in this way he suggests that courts have 'neglected to consider whether they may play a more active role in positively shaping other aspects of the normative framework'.⁷²

The next part argues that Galligan is only partially correct. The fettering-by-rigidity principle is not as blunt an instrument as it may first appear. It plays an important role in facilitating good governance and effective decision-making by fostering participation and transparency. Over time, the principle has also been developed by courts to recognise the importance policy plays in shaping the exercise of administrative discretion, first, by improving the rational basis of decision-making, and,

⁷⁰ See section 33(2) of the Constitution.

⁷¹ Galligan (n 2) at 284.

⁷² Galligan (n 2) at 284.

second, in fostering equality through consistency, transparency and participation. Galligan is correct that, although courts have recognised the potential of policy to facilitate rational and consistent decision-making, they have failed to take steps to shape the normative framework for decision-making to ensure that potential is realised. In part 3, I consider the potential for the courts to develop new principles to promote consistency in situations where administrators depart from their policies in the circumstances of the particular case without good reason for doing so. Finally, in part 4, I consider the potential for the further development of principles to protect the public trust in the administration in circumstances where a new policy is introduced where individuals have detrimentally relied on a prior policy.

3. FETTERING OF DISCRETION BY RIGIDLY APPLYING POLICIES

This part considers the principles that apply when it is alleged that an administrator fettered her discretion by applying a policy too rigidly and failed to have regard to the particular circumstances before her. It explores the nuanced way in which this principle has been developed and applied by the courts to give effect to the values of good governance.

The principle that is primarily applicable is that administrators should not fetter their discretion by rigidly applying policies. Fettering of discretion by blind or rigid adherence to pre-existing policy was, at common law, a ground upon which administrative decisions could be reviewed and set aside ('the fettering by rigidity principle'). Although, it is not one of the grounds of review expressly enumerated in section 6 of PAJA, it has, on many occasions, been applied as a ground of review by our courts without express reference to PAJA.⁷³ It would, in any event, fall under section 6(2)(e)(iii) (taking into account an irrelevant consideration or failing to consider a relevant one), section 6(2)(f)(ii) (the absence of a rational connection between the decision and the purpose for which it was taken) or section 6(2)(i) (an action that is otherwise unconstitutional or unlawful).⁷⁴

The most recent authoritative statement of the principle was made by Nugent JA in *Kemp NO v Van Wyk*⁷⁵:

A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy... [G]enerally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding, with the result that no discretion is exercised at all.

As can be seen from this exposition, the fettering by rigidity principle aims to

⁷³ For example see *National Lotteries Board and others v SA Education and Environment Project and another* [2012] 1 All SA 451 (SCA); *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) and *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA).

⁷⁴ *Booth and others NNO v Minister of Local Government, Environmental Affairs & Development Planning and another*; *City of Cape Town v William Booth Attorneys and others* [2013] 2 All SA 275 (WCC) para 28.

⁷⁵ *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) para 1.

achieve a balancing of values, or a compromise.⁷⁶ It is primarily a balancing of or compromise between the values of flexibility and responsiveness, on the one hand, and the values of certainty, fairness and consistency, on the other. The principle allows for consistency and certainty through the use of policy ‘but insists that the full rigour of certainty and consistency is tempered by a willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case...’⁷⁷.

One of the primary virtues of individualised discretion is that it avoids all-or-nothing results produced by rules that may sometimes result in injustice to the individual. Discretion enables decision-makers to ensure that a particular applicant is treated justly in accordance with her circumstances.⁷⁸ After all, a person who demonstrates exceptional circumstances shows that she is not like everyone else and should be treated differently.⁷⁹ One of the main instances in which the rigid application of a policy may result in injustice is where, although the conduct of the applicant may fall, strictly speaking, within a prohibition contained in a policy, the relevant purposes of the policy would not be undermined by allowing the applicant to continue to act in this way.⁸⁰ For example, there may be a policy requiring companies applying for funding to ensure that the same company name is reflected on all documents submitted with the application to prevent fraud. If some of the documents used the company’s shortened name where it was clear the same company was being described, there would be no risk of fraud.

Although, strictly speaking, the application would not comply with the rule as the names used were not exactly the same, this is an appropriate case in which an exception should be made as the purpose would not be undermined.⁸¹ Applying the policy strictly in these circumstances would result in legalism and arbitrariness causing ‘technical violators’ to lose respect for the public administration. Consequently, tailoring results to

⁷⁶ Baxter (n 1) at 416; Hoexter, C *Administrative Law in South Africa* (2007) at 319; De Ville, J *Judicial Review of Administrative Action in South Africa* (2005) at 113; and Hilson, C ‘Judicial Review, policies and the fettering of discretion’ (2002) *P.L.* 111 at 112 – 114.

⁷⁷ Woolf, H *et al De Smith’s Judicial Review* 6 ed (2007) at 9-005.

⁷⁸ Hilson (n 77) at 113. Although, it will not necessarily promote consistency between different applicants – resulting in injustice as between different applicants. Thus there is a fine balance between applying policies and discretion to produce justice to the individual applicant and between different applicants (through consistency).

⁷⁹ Hilson (n 77) at 114.

⁸⁰ See *Booth* (n 75) para 32.

⁸¹ These facts were taken from *National Lotteries Board* (n 74) which is discussed in more detail later in this part.

unique facts and circumstances of a particular case is generally preferred to rigidity.

However, courts have on occasion evidenced a dogmatic insistence on high levels of flexibility irrespective of the context of decision-making. This is demonstrated in the frequently cited dictum in *Computer Investors Group v Minister of Finance*⁸²:

Where a discretion has been conferred upon a public body by a statutory provision such a body may lay down a general principle for its general guidance, but it may not treat it as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. (My underlining)

This dictum suggests a preoccupation with minimising the influence of policy so that policy standards may never become norms which determine the outcome of discretionary decisions. As explained in part 2, this preoccupation is misplaced since discretion may be conferred for the purpose of allowing a more functionally specialised expert administrator to make rules to govern the outcome. There is nothing inherent in the nature of discretion to prevent this. The level of specificity and prescriptiveness of the standards in the policy should ultimately be determined by the particular circumstances of the case. The dictum is legitimately concerned that there should be room for flexibility since there is often little virtue in making decisions on the basis of binding rules without reflecting on the special features of particular cases. But to suggest that a policy can never ultimately be a deciding factor in a decision is inappropriate because it places undue emphasis on flexibility at the expense of certainty. Luckily, as evidenced below, the courts have developed this principle significantly and it is now applied in a more nuanced way that takes into account the variability of the different contexts in which decision-making occurs.

Essentially, the fettering-by-rigidity principle, as it has been developed by the courts, has three elements. First, decision-makers may formulate policies to inform the exercise of their discretion as long as the policies are *intra vires* and rational. Second, the policy may not fetter the exercise of the decision-maker's discretion. Third, the policy must be disclosed to affected parties, who must be given an opportunity to make

⁸² 1979 (1) SA 897 (T) at page 22.

representations. These elements are explored below.

3.1. Decision-maker may formulate a policy to inform the exercise of their discretion as long as the policy is *intra vires* and rational

3.1.1. *May formulate policy*

In certain circumstances decision-makers are expressly obliged or empowered by a statute to formulate a policy to inform the exercise of a particular discretion. For example, the National Housing Act, 107 of 1997 provides that the Minister of Housing (now Human Settlements) must publish a National Housing Code, containing national housing policy⁸³ and the Local Government: Municipal Systems Act, 32 of 2000, provides that each municipality must adopt an Integrated Development Plan, for the development of the municipality.⁸⁴ However, even if a statute does not expressly confer the power to formulate and rely on guidance from policies, South African courts have recognised that the power to make policy choices that aim to further the ends sought to be achieved by the empowering provision is inherent in the nature of discretion.⁸⁵ Therefore, it is lawful, and in many cases desirable, for reasons of fairness, coherence and consistency, to formulate policies to guide the exercise of statutory discretions.⁸⁶

There may be, in certain circumstances, not only a power but a duty to formulate a policy. The failure to formulate a policy where such a duty exists, may be irrational or unconstitutional. Whether such a duty exists will be based primarily on the interpretation of the relevant statute concerned, particularly the nature and breadth of the discretion and the subject matter which it regulates. The values of certainty and consistency are the primary considerations that will move a court to infer such a duty.

In circumstances where decision-makers must make complex decisions, considering, balancing and applying various factors across a number of applications or situations, considerations of fairness and consistency may obligate the decision-maker to

⁸³ Section 4 the National Housing Act, 107 of 1997.

⁸⁴ Section 25 of Local Government: Municipal Systems Act, 32 of 2000.

⁸⁵ *Kemp NO v Van Wyk* (n 74) para 1; see also Galligan, DJ 'The nature and function of policies within discretionary power' [1976] PL 332 at 332; Harlow (n 1) at 218.

⁸⁶ Booth (n 75) paras 29-30.

adopt some sort of policy. For example, in *In re Findlay*⁸⁷ the Secretary of State was empowered to release prisoners on parole and had adopted a parole policy to guide him in balancing and weighing the complex policy and personal circumstance considerations relevant to the exercise of this discretion. Primarily on the basis of the need for 'consistency of treatment as between one prisoner and another'⁸⁸ Lord Scarman noted, *obiter*, that:

I have difficulty in understanding how a Secretary of State could properly manage the complexities of his statutory duty without a policy ...the duty of the Secretary of State in this case is, as I have already shown, a very complex one. Indeed, the complexities are such that an approach based on a carefully formulated policy could be said to be called for.⁸⁹ (My underlining).

Resource allocation decisions provide a further example. When making resource allocation decisions, government authorities often need to formulate criteria and priorities in advance to ensure that finite resources are allocated rationally and appropriately. In another English case, *R v North West Lancashire Health Authority Ex p. A*⁹⁰, the North West Lancashire Health Authority, an authority with the statutory obligation to apply its limited financial resources to 'care for all within its area', had formulated a policy for the allocation of public funding for clinical procedures. In these circumstances the court observed that:

regional health authorities have to establish certain priorities in funding different treatments from their finite resources. It is natural that each authority, in establishing its own priorities, will give greater priority to life-threatening and other grave illnesses than to others obviously less demanding of medical intervention. The precise allocation and weighting of priorities is clearly a matter of judgment for each authority, keeping well in mind its statutory obligations to meet the reasonable requirements of all those within its area for which it is responsible. It makes sense to have a policy for the purpose—indeed, it might well be irrational not to have one...⁹¹ (My underlining).

⁸⁷ [1985] 1 AC 318. In this case the Secretary of State adopted a policy of refusing parole to certain classes of offenders in all but the most exceptional circumstances.

⁸⁸ *In re Findlay* (n 88) para 335C.

⁸⁹ *In re Findlay* (n 88) para 335D–H.

⁹⁰ [2000] 1 W.L.R. 977 In this case the health authority had adopted a policy that allocated a low priority to procedures, including gender reassignment surgery, which it considered to be clinically ineffective, procedures that had not been tested by carefully conducted scientific research and procedures that had not clearly been demonstrated to be effective.

⁹¹ *t Lancashire Health Authority* (n 91) at 991. As in the case of *In re Findlay*, this statement is *obiter* because the decision-maker had in fact formulated a policy.

There may also be a duty, primarily in the interest of legal certainty, to adopt a policy when wide discretionary powers are granted in circumstances in which human rights may potentially be infringed.

The English case of *R (Purdy) v Director of Public Prosecutions*⁹² provides an illustration of such circumstances. Ms. Purdy who suffered from multiple sclerosis, an incurable and progressively debilitating condition, would (as a result of the nature of her condition) need her husband's assistance to commit suicide when her condition became intolerable. Her concern was that, if he were to assist her, he could potentially be prosecuted under the Suicide Act of 1961. This Act criminalised assisted suicide, providing that no prosecution should be instituted 'except by or with the consent of the Director of Public Prosecutions', after taking into account whether there was sufficient evidence and whether a prosecution would be in the public interest. A Code for Crown Prosecutors ('**the Code**'), setting out general factors to be considered for and against prosecution, had been published to guide the exercise of the discretion to prosecute in all cases but it had almost no relevance to assisted-suicide cases. The Director of Public Prosecutions had also published reasons for the decision not to prosecute in the specific circumstances of one prior case. However, there was no offence specific policy setting out the factors that would be taken into consideration by prosecutors in deciding whether or not to bring a prosecution in cases of assisted suicide. Ms Purdy argued that there was a duty to formulate and publish such a policy and that the failure to do so was unlawful.

The court accepted that decisions to end one's life were to be protected by article 8(1) of the European Convention on Human Rights ("**the ECHR**"), which protects the right to respect for private life, and therefore any interference would have to be 'in accordance with law' as required by article 8(2). This standard requires that the law must be sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable the affected person to understand its scope (known as the accessibility requirement) and foresee the consequences of his actions so that he can regulate his conduct without breaking the law (known as the foreseeability

⁹² [2009] UKHL 45.

requirement).⁹³ In view of this standard the court held that where a discretionary power has the potential to affect human rights there must be a reasonable degree of certainty as to the factors that will influence the exercise of the discretion:

...whilst a law that confers a discretion is not necessarily inconsistent with this requirement, the scope of the discretion and the manner of its exercise must be indicated with sufficient clarity to give the individual protection against arbitrary interference.⁹⁴

In concluding that insufficient clarity had been provided and that there was a consequent duty to prepare and publish an assisted suicide specific prosecution policy the court emphasised the central role that the subject matter of the decision had played in its decision. It highlighted that clarity and consistency of practice are particularly important in a case like Ms Purdy's, where the subject matter is 'controversial' and 'of such sensitivity'.⁹⁵

In the South African context, support for the existence of such a duty in the human-rights context can be found in the judgment of O' Regan J in *Dawood and Others v Minister of Home Affairs and Others* ("**Dawood**").⁹⁶ *Dawood* concerned a constitutional challenge by three sets of spouses to certain provisions of the Aliens Control Act, 96 of 1991, ("**the Aliens Act**") on the basis that they fail to identify the criteria relevant to the exercise of the discretionary power to grant or refuse a temporary residence permit.

In recognition of the importance of family life, the Aliens Act permitted spouses of permanent residents to remain in South Africa until their immigration permits were granted, as long as they were in possession of a valid temporary residence permit (while

⁹³South African courts have also accepted accessibility and foreseeability as requirements of the rule of law: see *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) paras 155 -156 and *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) para 108. One of the best expositions of these principles, quoted in the *Purdy* case, is *Hasan v Bulgaria* (2000) 10 BHRC 646 at para 84, where the court said: 'In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise. The level of precision required of domestic legislation-which cannot in any case provide for every eventuality-depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.'

⁹⁴ *Purdy* (n 93) para 41.

⁹⁵ *Purdy* (n 93) Para 27. See also *R (Lumba) v Secretary of State for the Home Department* (2011) UKSC 12.

⁹⁶ 2000 (8) BCLR 837 (CC).

other applicants would have to wait outside the country). However, another provision of the Aliens Act granted authorities a broad discretion whether to grant or refuse temporary residence permit applications. In the absence of any guidance, this broad discretion had the potential to significantly undermine the privilege granted to spouses and ‘[introduce] an element of arbitrariness’ the effect being that the spouses would both be forced to leave South Africa to remain together, or, if finances did not permit this, they would be forced to separate, while the alien spouse waited outside South Africa to be granted an immigration permit.

The government failed to demonstrate any rational purpose for failing to provide the guidance which the court found in the circumstances was required:

rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.⁹⁷ (My underlining).

Consequently, the court held that the relevant provisions of the Aliens Act were unconstitutional because they infringed the dignity of persons married to people lawfully and permanently resident in South Africa and directed that, among others, Parliament rectify the infringement.

Dawood can be read as laying down the principle, derived from the rule of law, that the law must be sufficiently clear, accessible and precise so that those who are affected by it can ascertain the extent of their rights and obligations, particularly in contexts where human rights may be affected. The court held that the primary obligation to ensure that appropriate guidance is provided in circumstances where a broad discretion could limit fundamental rights rests on the legislature. This obligation could

⁹⁷ *Dawood* (n 7) para 54.

be discharged, so the court said, by providing guidance in the relevant legislation itself, or where this was not practical or possible,⁹⁸ by imposing an obligation on the executive to enact delegated legislation. The court erred in not explicitly considering policy as a means through which standards could be developed to provide guidance in the exercise of statutory decision-making. There is no reason that the legislature could not impose an obligation to create a policy.⁹⁹ As the *Purdy, Lancashire* and *Findlay* cases demonstrate, policy provides a flexible means for guiding discretion to ensure certain, consistent and responsive decision-making i.e. it can be used to supplement the law to ensure that it meets the requisite standard of clarity, accessibility and precision. In any event, where legislation does, in error, confer broad discretions in circumstances in which fundamental rights could be limited and fails to provide guidance or oblige the enactment of delegated legislation,¹⁰⁰ the administration could ensure that constitutional standards of clarity, precision and accessibility are met by the formulation and publication of appropriate policies to supplement the legislation and guide the exercise of those discretions.

As is clear from the above, the circumstances in which discretions are exercised vary enormously and the optimum balance between policy and discretion consequently also varies from area to area.¹⁰¹ However, where human rights are engaged and in certain other contexts in which equal treatment is pivotal, it is proper, in furtherance of the well-established values of consistency, certainty and fairness, for the judiciary to require decision-makers to formulate specific and clear policies.¹⁰²

3.1.2. Policy must be *intra vires*

Any policy that is developed to guide the exercise of a statutory discretion must be within the scope of the powers conferred in the empowering statute, having regard to the

⁹⁸ The court noted that there are times when it will be impossible or unnecessary for the legislature to formulate guidance itself: '[t]he scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.'

⁹⁹ For example, see the sections referred to footnotes 84 and 85 which introduce just such a requirement.

¹⁰⁰ This will be the case for much legislation enacted prior to *Dawood* and may by oversight occur in spite of the judgment.

¹⁰¹ Craig *Administrative Law* 3 ed (1994) at 517- 521.

¹⁰² See Hilson (n 77) at 115.

purposes of the statute as a whole.¹⁰³ In other words, the policy may not be based on irrelevant considerations and may not pursue improper purposes.¹⁰⁴ This principle functions as a legal constraint on the permissible content of policies. Determining whether the policy is *intra vires* is a matter of interpretation of the provisions and the purposes of the empowering statute.¹⁰⁵

The manner in which this principle is applied is illustrated in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and another*.¹⁰⁶ The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (“GDACELA”) was empowered, in terms of the Environmental Conservation Act 73 of 1989, to issue environmental authorisations for certain listed activities that are potentially detrimental to the environment including the construction, erection or upgrading of storage, and handling facilities for dangerous or hazardous substances (such as petroleum products). To guide the exercise of its discretion, the GDACELA issued guidelines stating, among others, that it would not approve the construction of new petrol filling stations situated within 100 m of residential properties, schools, or hospitals (unless it could clearly be demonstrated that no significant impacts would occur) or within 3 km of existing filling stations in urban or built up residential areas. Sasol’s application for environmental authorisation in respect of its proposed petrol filling station was refused primarily because it failed to comply with the spatial stipulations in the policy and it, therefore, sought to argue that the policy was *ultra vires* the Environmental Conservation Act. The case turned primarily on the interpretation of the scope of the empowering provision read with the listed activity. The main question was whether GDACELA had the power to regulate only the environmental aspects of the *storage* and *handling* of petroleum products or whether it could regulate the environmental aspects of petrol filling stations more generally. If the former interpretation was correct, the policy would be *ultra vires*.

The court held that the scope of the activity must be read consistently with the

¹⁰³ Baxter (n 1) at 416, Hoexter (n 77) at 319 and De Ville (n 77) at 112.

¹⁰⁴ The interpretation of purpose and the relevance of the considerations is inextricably linked.

¹⁰⁵ See Allan, TRS ‘Pragmatism and theory in public law’ (1988) 104 *L.Q.R.* 422 at 424 and 427 where Allan explores the idea that the exercise of interpretation is not value neutral and argues for the development of proper principles to guide judicial intervention.

¹⁰⁶ *Sasol* (n 52)..

purpose of the empowering statute, the environmental right in section 24 of the Constitution and other relevant statutes including the National Environmental Management Act, 107 of 1998 (“NEMA”), which contains principles that guide all decision-making affecting the environment. In other words, the court took a broad and purposive approach to interpreting the scope of the activity in light of the wider statutory and constitutional context. The principle of sustainable development which requires that social, economic and environmental impacts of activities be considered and balanced in decisions that impact on the environment is central to both the environmental right and NEMA. Viewed within this broad statutory framework the court held that to separate the commercial aspects of filling stations from storage and handing would defeat the purposes of the empowering provision and the Environmental Conservation Act more broadly. Consequently, the scope of the powers conferred on GDACELA included the power to regulate 'commercial aspects' and, consequently, the policy was not *ultra vires*.

In a similar matter also decided in terms of the Environmental Conservation Act, *SLC Property Group (Pty) Ltd and Another v Minister of Environmental Affairs and Economic Development and Another*,¹⁰⁷ the policy addressing spatial planning considerations relied upon by the administrator was found to be *ultra vires* the empowering provision. The Minister of Environmental Affairs and Development Planning, Western Cape, decided, in an appeal against the grant of an environmental authorisation, to impose a further condition requiring the developer to make twenty percent of the land forming part of its development available for low income housing. In making this decision, the Minister relied predominantly on a policy document, the Western Cape Spatial Development Framework, which is aimed at redressing past spatial policies, through among other measures, inclusionary housing. The court held that ‘the imposition of a condition which is aimed at the implementation of housing policy is not rationally related to the purposes for which the powers under the ECA were given.’¹⁰⁸ This suggests that the policy itself was *ultra vires*.

¹⁰⁷ Unreported judgment of Erasmus J in High Court (Cape Provincial Division) (Case No. 5542/2007) dated 26 October 2007).

¹⁰⁸ In *Hangklip/Kleinmond Federation of Ratepayers Associations v Minister for Environmental Planning & Economic Development, Western Cape & others* [2009] JOL 24371 (WCC) it was argued that *SLC* was wrongly decided on this point. Louw and Bozalek JJ, found that the facts in *Arabella* were distinguishable and declined to make a finding that the case was wrongly decided. See paras 40 and 63.

In addition, policies that are inconsistent with express statutory powers and duties may also be *ultra vires*. This principle was applied in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*.¹⁰⁹ The national law regulating gambling made it clear that control over gambling, including licensing, vested in independent boards (“Boards”). The Western Cape Gambling and Racing Law, 4 of 1996, (“the Provincial Legislation”) provided that control over gambling vested in Boards subject to the provisions of that Act and policy determinations of the provincial executive regarding the size, nature and implementation of the industry. The provincial executive issued a determination that successful applicants must provide irrevocable bank or other financial institution guarantees acceptable to the Board within 7 days of the grant of the licence.

The Provincial Legislation specifically empowered the Board to impose *licence conditions* regarding financial guarantees and to set the terms for such guarantees once the licence had been awarded – in other words the Provincial Legislation expressly made this function a competence of the Board, not of the provincial executive.

The court held that the policy determination obliging an applicant to provide a circumscribed financial guarantee prior to the award of the licence emasculated the Board as it could not then exercise the power expressly conferred on it by the provincial legislature to impose licence conditions regarding the need for financial guarantees. Consequently, the policy determination was found to be *ultra vires*.¹¹⁰

3.1.3. Policy must be rational

A closely-related constraint is that the policy itself must be rational. There must be a rational connection between the policy and the purpose for which it was formulated and it must produce rational results.¹¹¹ *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism & Others*¹¹² provides an example of a policy which was set aside because it produced irrational results. The matter involved the allocation of commercial fishing rights for pelagic fish (pilchards and anchovies) for

¹⁰⁹ 2001 (4) SA 501 (SCA).

¹¹⁰ A further relevant issue was that The Board had then adopted the financial guarantee requirement as one of its own pre-conditions to the award of a licence (but the period of time was extended, with the permission of the provincial executive, as 7 days was impractical and unrealistic).

¹¹¹ As noted above, where there is no rational connection between the policy and purposes of the empowering legislation the policy will be *ultra vires*.

¹¹² 2006 (2) SA 191 (SCA).

2002-2005 in terms of the Marine Living Resources Act, 18 of 1998 ('the MLRA'). The Minister had determined the total allowable catch for the pelagic species and had determined which applicants would qualify for quotas using a points system devised to ensure that the objects of the MLRA were realised. A mathematical formula was developed to determine the allocation of the total allowable catch between those who qualified for quotas. The mathematical formula produced inexplicable results. One of the applicants, the appellant in the case, who had a canning facility at which pilchards could be processed, was granted a very minor increase in its allocation when compared to the previous season's allocation. While two other applicants, who did not have canning facilities, and would therefore create less value through their operations, received increases in their quota allocation relative to the appellant's quota allocation of 87 000% and 457% respectively. The Department of Environmental Affairs and Tourism could not offer any rational justification for these disparities which 'inexplicably and unreasonably favoured' some applicants at the expense of others and had, in fact, not been aware of the disparities at the time of the allocation. The court took the view that a reasonable decision-maker would have applied the mathematical formula but would then have applied its mind to the results to consider whether they were justifiable in relation to the facts. The formula produced irrational results and was consequently irrational.

3.2. Policy may not preclude or fetter the exercise of the decision-maker's discretion

3.2.1. *Unpacking the principle*

The classic exposition of the requirement not to fetter or preclude the exercise of discretion is that of Bankes L.J. in *R v Port of London Authority; Ex parte Kynoch Ltd*¹¹³:

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,

¹¹³ *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176. In this case the Port of London Authority ('Authority') had a discretionary power to grant licences for a variety of purposes including the construction of a private wharf. The Authority had an obligation to provide wharf facilities and therefore adopted a policy refusing all applications for licences to build wharves with similar facilities to those that it was obliged to provide and on this basis the applicant's application was refused. The court held that the application has been properly considered on its merits in accordance with the principles quoted above.

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...(If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection can be taken to such a course. 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 between these two classes. (My underlining).

Banks L.J. distinguishes between two scenarios, the first of which is permissible and the second of which is not. The second scenario, passing a rule ‘not to hear any application of a particular character by whomsoever made’ involves a complete disregard of the merits and is impermissible. Policies must be used as a guideline and should not be applied formulaically, in an all-or-nothing way, automatically determining all cases falling within their purview (in the way that rules do). Where a decision-maker fails to consider the individual circumstances of the applicant to determine whether those circumstances justify a change in policy or an exception to it, the decision-maker will have failed to exercise any discretion at all.¹¹⁴

*Johannesburg Town Council v Norman Anstey & Co*¹¹⁵ provides an illustration of this second scenario. A committee of the Johannesburg Town Council had refused to grant a tearoom licence on the basis of its policy that refreshment shops could not have internal means of communication with other shops. This it did solely because the applicant had stated it would be impossible to make necessary alterations to prevent communication. In addition, there was evidence that on previous occasions the policy had been applied rigidly and applications had been refused without regard to representations made by applicants. The court therefore held that the committee had laid down a hard and fast rule applied to all applications. In other words, once the Committee had established that there was internal communication between the refreshment room and another shop, no other circumstances were taken into consideration and the general rule was applied.

The *Johannesburg Town Council* case makes it clear that, at a minimum, the decision-maker must listen to and be willing to consider the particular circumstances of

¹¹⁴ On this topic see Galligan (n 86) at 346-348.

¹¹⁵ 1928 AD 335.

the case and must demonstrate some willingness to entertain exceptions in a deserving case. It is a principle that ‘directs attention to the attitude of the decision-maker, preventing him from rigidly excluding the possibility of an exception ...to [a] policy in a deserving case’.¹¹⁶

It is not appropriate to infer from the mere fact that a policy is applied without more that the decision-maker was not aware of his discretion and of his duty to consider the circumstances of the case.¹¹⁷ Nor is it possible to conclude from assertions by the decision-maker that he had listened to the applicant and was willing to make exceptions that those assertions are true. The willingness to entertain exceptions will be assessed by a court with reference to all the circumstances of the case, including the wording of the policy (where it is in written form) and related documents (including the reasons for the decision)¹¹⁸ and the conduct of the decision-maker. For example in *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd*¹¹⁹ the decision-maker had adopted a set of criteria and a system of scoring to assess applications for the allocation of fishing rights which in effect rigidly circumscribed the factors that the decision-maker could take into account and the weight each one would carry in deciding the allocation of fishing rights. However, it was apparent from the circumstances that the decision-maker and his advisory committee applied the policy in a manner that provided for exceptions since adjustments were made in circumstances where the criteria and weighting were, for any reason, inappropriate.

Where a policy is in writing there should be some evidence on the face of the policy that exceptions will be made.¹²⁰ For example ‘applicants who already have an

¹¹⁶ Woolf (n 78) at 9-004.

¹¹⁷ *Booth* (n 75) para 30.

¹¹⁸ The decision-maker’s reason for the decision was one of the key factors that lead to the finding of unlawful fettering in the *Johannesburg Town Council* case.

¹¹⁹ 2005 (6) SA 182 (SCA).

¹²⁰ See Woolf (n 78) at 9-011 and 9-013 and Hilson (n 77) at 116 to 120. A blanket policy may be acceptable in circumstances where it is unrealistic and impractical to consider each individual case. See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC), which is discussed in detail below, *British Oxygen Co Ltd v Minister of Technology* 1971 AC 610 in which the Board of Trade adopted a policy not to give industrial development grants towards expenditure of less than £25 and Lord Dilhorne expressed the view that where a decision-maker had legitimately adopted a policy of this nature ‘[i]t seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail’ (and that in those circumstances the decision-maker may have to consider representations that the policy should be changed) and *Union Teachers Associations of SA v Minister of Education and Culture, House of Representatives* 1993 (2) SA 828 (C) in which the blanket policy not to appoint substitute teachers for teachers who take leave was justified by severe budgetary constraints.

undergraduate degree will not be considered for bursaries unless exceptional circumstances are present’ or ‘applicants who already have an undergraduate degree will normally not be considered for bursaries but applications will be considered on their merits.’ The importance of this requirement is that the public rely on policy documents for guidance and where a policy is formulated in blanket terms, for example ‘applicants who already have an undergraduate degree will not be considered for bursaries’, then the public may understand the policy as a rule and be dissuaded from applying.¹²¹ In circumstances where a policy that specifies that exceptional circumstances will be considered but in reality no exceptional circumstances could be envisaged, the policy would in effect amount to a blanket policy which unduly fetters the decision-maker’s discretion.¹²² Thus it should be apparent that the wording of the policy alone is unlikely to be a decisive factor as to whether there has been a fettering of discretion.

The conduct of the decision-maker will also be an important factor. Evidence that the decision-maker refused to make exceptions to its policy in all previous applications (that is to say it has consistently rejected applications of a certain class), as occurred in the *Johannesburg Town Council* case, may be an indication that, irrespective of the flexible manner in which the policy is framed, the decision-maker has determined that it will apply its policy rigidly.¹²³

The decision-maker must generally approach each decision with an open mind but it need not be a mind ‘untrammelled by existing principles or policy’ such that each new matter is considered afresh, without preconceptions. Where the decision-maker is independently satisfied that the policy applies, it may legitimately influence the decision-maker, in effect creating a presumption which the applicant will have to rebut.¹²⁴ The decision-maker will, therefore, only be required to depart in ‘exceptional’ or ‘unusual situations’, where the applicant has something to say that renders the policy

¹²¹ Hilson (n 77) at 117.

¹²² *Lancashire Health Authority* (n 91). In this case the health authority adopted a policy allocating a low priority to gender reassignment treatment except in the event of overriding clinical need or exceptional circumstances. The court found that although the health authority acknowledged that transsexualism was an illness, it did not in truth treat it as such, but instead viewed it as an attitude or state of mind which did not warrant medical treatment. In these circumstances there was no chance of an exception being made and the policy effectively functioned in a blanket manner.

¹²³ Hilson (n 77) at 124 – 125.

¹²⁴ Hilson (n 77) at 113.

inappropriate or improper in the circumstances. These principles are aptly illustrated by Innes CJ in *Britten & Others v Pope*¹²⁵:

[T]he Committee adopted the general view that, save under special circumstances, companies of the class referred to, should not be allowed to acquire the ownership of retail businesses because it tended to promote monopolies and other abuses. They did not exclude such companies from the acquisition of retail interests, but they regarded their applications with disfavour, and only consented if, upon investigation, special circumstances in support were found to exist. Such an attitude was not, in my judgment, illegal or improper. It certainly involved the exercise of discretion in each instance; and if it imposed a fetter upon that discretion (whatever that may mean), so in varying degree, would every application of general principles to the facts of a particular case. Yet it could surely not be contended that each set of facts should be considered without reference to policy or principle lest the resulting decision should be invalidated. (My underlining).

Another way of expressing the same point is that it is acceptable for the policy to become a norm which, subject only to the decision-maker directing itself whether in light of the particular situation the policy should apply, should be modified or an exception should be made, determines the outcome of particular decisions.¹²⁶ However, ‘courts are not always consistent in their attitudes to the relationship between [policy] and the particular case, and may take a more or less restrictive view’.¹²⁷

3.2.2. *Variability, weight and relevance*

The fettering by rigidity principle, like many other grounds of review, is elastic. It is not applied in an all-or-nothing manner, but flexibly with different degrees of intensity¹²⁸ depending on the context.¹²⁹ The circumstances of the case are all-important. In some circumstances a court will not intervene, even where policies have been applied in a ‘rigid’, rule-like fashion. For example, where there are numerous applications in similar circumstances fairness, certainty and consistency may dictate that the applications should be considered against similar criteria to prevent arbitrariness.¹³⁰ Similarly, it may be more acceptable that enforcement policies are applied more rigidly

¹²⁵ *Britten* (n 51) at 158 -159.

¹²⁶ *Galligan* (n 86) 348.

¹²⁷ *Galligan*,(n 2) at 281.

¹²⁸ This is referred to by academic writers as ‘variability’ or a ‘sliding scale of scrutiny’ and means that judges may choose not to open judicial toolbox fully in all circumstances.

¹²⁹ For a detailed discussion on variability in the administrative law context see Hoexter (n 61) at 502- 505.

¹³⁰ For example, see *Bato Star* (n 123) which is discussed further below.

than deterrence policies. At the other end of the spectrum, where applications are few, decision-making factors are complex and circumstances vary greatly, more flexibility will be required as pre-determined rules have less relevance. For example, where authorities are required to make decisions in the best interests of a child it will almost always be necessary to consider the particular circumstances of the child concerned.¹³¹ In such cases courts are far less likely to tolerate the blanket application of policies. Also, a related point is that where human rights are engaged a greater degree of flexibility will be required as the impact of the policy on the individual will carry more weight in the decision-making process (although it is preferable that policies that impact on human rights are formulated with clarity and precision so that the individual whose rights are affected knows where he stands).¹³²

It is unsurprising that a variable approach has been taken to applying the fettering-by-rigidity principle as the principle is essentially a particular instance of relevancy review. A policy is a particular type of relevant consideration, or set of relevant considerations,¹³³ that influences the exercise of statutory discretions.¹³⁴ In other words, in terms of the general principles of administrative law, policy must be taken into account and may be, but is not necessarily, decisive of the outcome of a particular application. When a decision-maker fails to consider the merits of a particular case at all, he or she fails to consider relevant considerations. Slavish adherence to a policy would lead to that result.

Relevance and weight are determined on a proper interpretation of the statute concerned in light of the particular circumstances of the case and are closely related to questions of reasonableness and rationality.¹³⁵ As Allan explains:

The extent to which an authority may be permitted to confine its exercise of discretion by adopting a policy must also depend on the circumstances of the case. There can be no general principle dictating the limits of such a policy, such

¹³¹ See Attorney-General Ex Rel. *Tilley v Wandsworth London Borough Council* [1981] 1 W.L.R. 854.

¹³² The interference will have to be proportionate to the purpose seeking to be achieved.

¹³³ Policies are in effect a decision in advance as to the weight of certain factors which will be common to the exercise of a particular discretion.

¹³⁴ De Ville (note 77) at 113-115; Allan (n 34) at 424 - 425 and Woolf (n 78) 9-012. In other words, policy cannot be considered or ignored at the whim of the decision-maker. The decision-maker may not depart from its policy without good reason. This is explored in more detail in Part 4 below.

¹³⁵ *Bato Star* (n 123) para 55, where O' Regan J acknowledged the similarity between grounds of review based on reasonableness, relevant considerations and fettering by rigidity.

that it should never be more than one relevant factor influencing the tribunal's decision: it is entirely a question of what the particular context requires.¹³⁶

Questions concerning the weight of relevant factors are ordinarily for the decision-maker, not the court, to determine. Making determinations as to the weighting of relevant factors could be seen to be usurping the functions of the administration in violation of the constitutional separation of powers. However this doesn't mean that courts will never make determinations regarding the weight afforded to particular relevant considerations. They should simply exercise caution and should only do so where there are compelling reasons of legal principle in the circumstances of the particular case. Thus it would be inappropriate for a court to make a blanket determination that policy-related factors can never carry such weight that they determine the outcome of a decision. However, where decision-makers fail to consider the special circumstances of the case at all, a court is justified in setting the decision aside since this is not a question of weight, but rather of relevancy, which is within the remit of the courts. The strictness of scrutiny in enforcing these requirements will vary according to the specific facts of the case.

This contextual approach to the fettering-by-rigidity principle is apparent in the decisions in *Bato Star* and *National Lotteries Board and others v SA Education and Environment Project and another*.¹³⁷

In *Bato Star* the court held that, in the context of allocating fishing quotas for hake, a complex and policy-related decision, it was acceptable for the Chief Director to adopt and apply a policy of a blanket nature which precluded the consideration of any factors other than the criteria he had adopted.

The deep sea trawl hake allocation decision was based on a guideline, which set

¹³⁶ Allan (n 107). The oft-cited dictum of Human J in *Computer Investors Group v Minister of Finance* 1979 (1) SA 879 (T) at 898, at odds with Allan's position, states: 'Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits.' (Emphasis added). However, *Bato Star* (n 123) case confirms that the *Computer Investors* dictum was not appropriate in the circumstances of that case. This confirms Allan's view is that it is inappropriate to limit the weight of a policy such that it can 'never be decisive'.

¹³⁷ National Lotteries Board (n 74).

out the relevant competing policy considerations provided for in the Act and provided further detailed requirements. Based on the guideline, a range of criteria were adopted and each applicant was scored, by an advisory committee, against each of the criteria with reference to a pre-determined points system. The scores calculated by the advisory committee formed the basis of the Chief Director's evaluation of the applications. Five percent of the quota granted to each applicant in 2001 was deducted from their new quota and put into a redistribution pool. The redistribution pool was then distributed amongst rights holders in direct proportion to their scores.

The applicant argued that other relevant considerations pertaining to its individual circumstances had not been taken into account. Specifically, the applicant alleged that, by rigidly applying the guidelines, the Chief Director did not apply his mind to the tonnage it had applied for and did not take into account the applicant's increase in capacity since the previous allocation.

In response the court emphasized the fairness of the procedure as between applicants and in relation to each individual applicant. This resource-allocation decision involved a large number of applications that had to be considered for the allocation of limited resources. In the interest of fairness as between applicants, it was desirable to adopt and apply relevant general criteria to ensure that the applications were evaluated consistently. Further, individual applications were treated fairly as the individual merits of each application were carefully considered against a range of criteria, identified as being relevant in relation to the objects of the Act. In essence the court held that the tonnage that the applicant had applied for was not relevant as the total allowable catch was limited and the total allocation applied for by all the applicants had significantly exceeded the available allocation. In these circumstances it was the nature of the decision that dictated that the approach by the decision-maker was appropriate, whereas in other contexts this most likely would not have been the case.¹³⁸

In *National Lotteries Board*, also a resource-allocation decision, a policy similar

¹³⁸ Even in a similar resource-allocation context, in the English case of *R v Lambeth LBC, ex p. Anderson* 19 November 1999, QBD, unreported, discussed in Hilson (n 77) the court held that the application of criteria amounted to fettering.

in nature to that considered in *British Oxygen*¹³⁹ was adopted. The court, although conceding that the policy was of the type that did not readily admit of exceptions, nevertheless found that there had been fettering since the approach taken by the National Lotteries Board ('the Board') was so technical as to amount to a misapplication of the policy. By adopting an unduly technical approach the decision-maker had undermined the important purposes for which the power was given.

The Board was empowered in terms of the Lotteries Act, 57 of 1997, to consider applications for financial grants from the National Lottery Distribution Trust Fund. In relation to the nature and purpose of the power the court noted that the Board held *public funds in trust* and *had a responsibility to distribute the funds to socially worthy causes* such as charitable pursuits and arts, culture and heritage, for which there was an *overwhelming need*. However, there was evidence that it had miserably failed in its duty to distribute these funds, in certain circumstances distributing only 15% of the available amount.

The Board published an application guideline ('the Guideline') aimed at achieving a number of related purposes, namely, to ensure that applications were treated consistently, to ensure that funds were allocated only to organizations capable of administering them for their intended purpose and to minimize the risk of fraud. For example, one requirement was the submission of audited financial statements by all applicants. The court accepted that the Guideline was within the scope of the empowering statute and generally served useful and legitimate purposes.

The Board applied its policy strictly, and without exception, justifying its approach on administrative efficiency and consistency grounds. It argued that it could not be expected to investigate every application that did not comply with the clear and not unduly burdensome requirements of the Guideline. This is because since it was dealing with finite resources, it had received a significant number of applications and it had limited human-resource capacity. The court acknowledged that the nature of the Guideline was such that in most cases it would be justifiable to treat the requirements as peremptory since it would be untenable to insist on compliance from one applicant but

¹³⁹ *British Oxygen* (n 123).

not from others. Generally, any non-compliance would result in a failure to achieve the purposes of the policy and the decision-maker would therefore be justified in refusing to admit exceptions.¹⁴⁰ However, in this case the Board applied the policy literally, without considering the purposes of the policy, amounting in effect to a misapplication of the Guideline.

One of the requirements set out in the Guideline, among others that the court considered, was that the same name must be used throughout the application. The purpose of the requirement was to prevent fraud. One application for funding was refused due to non-compliance with this provision. The application documents referred to the full name of the applicant organisation, Claremont Methodist Church Social Impact Ministry, Sikhula Sonke, while other supporting documents referred to the shortened name, Sikhula Sonke. The court held that it was apparent on the face of the application that the documents referred to the same organization since the company registration number was the same.¹⁴¹ Most importantly, since it was clear that it was the same organization there was no risk of fraud in these circumstances and the purpose of the guideline would not have been undermined by accepting such an application. Therefore, the court held that the Guideline had been applied rigidly without justification.

Ultimately, the court's decision turned on the nature and purpose of the power, namely the pressing need to ensure that funds were distributed to assist in socially-worthy causes. The Board's approach of formalistically refusing applications in circumstances where the legitimate purposes pursued by the Guidelines were not undermined had the effect of subverting the purpose for which the power had been given and was inappropriate and improper in the context.

3.3. Policy must be disclosed to affected parties who must be given an opportunity to make representations

One rationale for the fettering-by-rigidity principle is that it creates space for

¹⁴⁰ Hilson (n 77) 117 – 119. Hilson argues that it is legitimate for policies not to provide for exceptions in cases where the aim of the policy would be undermined by doing so.

¹⁴¹ To the extent that there was any concern it would not have been unduly burdensome to call the auditors of the organization to confirm this.

meaningful participation. Where policy is applied rigidly, interested and affected parties are unable to influence the exercise of discretion because by closing his ears the decision-maker forecloses participation.¹⁴²

Two aspects related to procedural fairness are implied by the fettering-by-rigidity principle – first, that the policy should be published or made accessible to those affected and, secondly, that they should be afforded the opportunity to make representations.

3.3.1. Publication

In terms of South African administrative law the content of the requirements of procedural fairness depends on the circumstances of each case. Section 3(2)(b)(i) of PAJA requires that the decision-maker must give ‘adequate notice of the nature and purpose of the proposed administrative action’. Where a decision-maker has a policy that materially influences the decision it should be disclosed to an affected party so that she can make meaningful and informed representations to the public body before the decision is made.

*Tseleng v Chairman, Unemployment Insurance Board, and Another*¹⁴³ illustrates this principle. In this case the Unemployment Insurance Board refused the extension of the applicant’s unemployment benefits on the basis of its policy that further benefits would not be granted unless the applicant had sought employment during the period in which the initial unemployment benefits had been paid to him. The applicant had not been aware of the policy and thus had failed to demonstrate that he had met the requirement (although he had in fact done so). In considering whether the failure to advise the applicant of the policy was procedurally unfair the court held:

[p]erhaps the policy is a sound one, but if a statutory body considers that such a consideration is so material as of itself to determine the fate of an application, then it should at the very least afford an applicant the opportunity of dealing with its difficulty and not keep the policy to itself ... To hold otherwise would be to countenance injustice, since persons who might otherwise be fully able to justify their application would be deprived of the opportunity of doing so.

...

¹⁴² Woolf (n 78) at 9-004.

¹⁴³ *Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (3) SA 162 (T). This case was decided in terms of the Constitution of the Republic of South Africa Act 200 of 1993 but remains relevant.

It is beyond question administratively unfair to fail to draw to the attention of an applicant that a board relies upon a particular policy and, by such failure, to deprive the applicant of the opportunity of making submissions as to why he should be treated as one who qualifies within the terms of that policy.

The publication of pre-existing administrative policies is a requirement of good administration as it promotes the values of certainty, openness and accountability.¹⁴⁴

3.3.2. *Representations*

In *British Oxygen Co. Ltd. v. Board of Trade* Lord Reid had the following to say about the duty on decision-makers to listen:

What the authority must not do is to 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 almost certainly have 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.¹⁴⁵ (My underlining).

Galligan argues that the fettering-by-rigidity principle is essentially a procedural protection to ensure that individuals are heard.¹⁴⁶ There is no doubt that the obligation to hear an affected party is a central aspect of the principle. Exactly what the requirements of procedural fairness will be depends on the facts of the particular case, but, at a minimum, an affected party should be permitted, after having considered the policy, to address the decision-maker on the application of the policy to the particular case.

3.4. *Synthesis*

As long as a policy is *intra vires*, it may become a norm which subject to the obligation to consider whether to apply, change or make an exception to the policy in a particular case, may determine the outcome of decisions. If decision-makers properly apply their minds to the merits of cases, courts will generally be hesitant to second-

¹⁴⁴As mentioned above, particularly in circumstances where the policy in effect defines the scope of the entitlement, where the subject matter of the relevant decision is important to the individual or where human rights may be limited, the rule of law may require that the circumstances in which decision-makers will exercise broad statutory discretions be accessible and foreseeable and, consequently, there may be a duty to publish a policy to give effect to this requirement. See the *Purdy* (n 93) para 40; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 para 49.

¹⁴⁵*British Oxygen* (n 123) at 170 – 171.

¹⁴⁶Galligan (n 86) 352.

guess their decisions to act in accordance with policies because of the potential of undermining the separation of power by usurping the legitimate functions of the administration. However, the principle is applied with some degree of variability and the context, particularly the nature of the decision and its subject matter, will influence the intensity of scrutiny applied by the courts.

4. THE DUTY TO APPLY POLICIES CONSISTENTLY UNLESS THERE IS GOOD REASON TO DEPART

This part considers whether there is a positive role for courts to play in shaping a purposive rationality within the administration when administrators elect not to follow existing policies in the circumstances of particular cases (as opposed to permanently changing policies, which will be considered in the next part).

4.1. The position in the United Kingdom

English courts have long recognised that there is a duty for administrators to apply policy consistently unless there is a good reason to depart (“the consistency principle”). As early as 1984 Dunn LJ, in *R v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan*,¹⁴⁷ held that the Home Secretary’s departure from his own circular on adoption of children living outside the United Kingdom, for reasons not contemplated in the circular, was unjustified, unfair and unreasonable:

[The Home Secretary] caused the circular letter in common form to be sent to all applicants setting out the four criteria to be satisfied before leave could be given. Thereby, in my judgment, he in effect made his own rules, and stated those matters which he regarded as relevant and would consider in reaching his decision. The letter said nothing about the natural parents’ inability to care for the child as being a relevant consideration, and did not even contain a general “sweeping up clause” to include all the circumstances of the case which might seem relevant to the Home Secretary. The categories of unreasonableness are not closed, and in my judgment an unfair action can seldom be a reasonable one... [T]he Home Secretary is under a duty to act fairly, and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision upon a consideration which on his own showing was irrelevant. In so doing, in my judgment, he misdirected himself according to his own criteria and acted unreasonably. (My underlining).¹⁴⁸

Although this case did not expressly articulate the consistency principle, it is implicit in the court’s reasoning that departing from self-made rules is ordinarily unreasonable. As Sir Stephen Sedley has noted, these were the ‘bons mots which

¹⁴⁷ *R v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 at 1352.

¹⁴⁸ In this case the prescriptive manner in which the policy was framed and the adoption context in which the decision-making occurred – such decisions having the potential to a significantly impact on human dignity and family life – evidently influenced the court’s strict application of the consistency principle and its refusal to entertain the Minister’s proffered reason for departure.

advocates in later years were able to borrow and build on’¹⁴⁹ to frame the well-established consistency principle that exists in English law today.

The idea, that by adopting a prescriptive policy the decision-maker has in effect ‘made its own rules’, is significant. It highlights that when discretionary power is granted, it implicitly includes the power for the decision-maker to prepare its own standards to guide decision-making. If a decision-maker does put in place a policy setting out precise and prescriptive standards for decision-making, then it has selected in advance (and publicised) the relevant policy considerations and has allocated them a pre-determined weight (i.e. that those factors will determine the outcome of the decision). The public may then legitimately structure its affairs, relying on that guidance in the knowledge that unless there is something special or exceptional, the policy will be consistently applied. Thus, when courts require an administrator to apply its policy consistently (unless there is good reason to depart) they are not unjustifiably, in contravention of the separation of powers, usurping the function of the administrator by determining the weight that policy considerations should carry in a decision, but are instead giving effect to the administrator’s own assessment of the relevance and weight of those factors. The more difficult consideration is the level of scrutiny that courts will apply in assessing whether the reasons given by the administrator for departing in the particular circumstances are ‘good reasons’. This will be considered in more detail later in this part.

The consistency principle has recently been confirmed and elucidated by the United Kingdom Supreme Court in two decisions, *Lumba v Secretary of State*¹⁵⁰ (“*Lumba*”) and *Mandalia v Secretary of State for the Home Department*¹⁵¹ (“*Mandalia*”).

Lumba related to the detention of two foreign nationals prior to their deportation. The issue was whether an unpublished policy imposing a near blanket ban on the release of certain sentenced foreigners, could be applied despite it being in direct conflict with a long-established published policy stating that there was a presumption of release prior to

¹⁴⁹ Sedley (n 6)at 260.

¹⁵⁰ *Lumba v Secretary of State* [2011]UKSC 12.

¹⁵¹ *Mandalia v Secretary of State for the Home Department* [2015]UKSC 58.

deportation in such cases. The majority held that there was a duty not only to comply with published policy, but to apply it consistently:

a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be applied consistently is not in doubt . . . As it is put in *De Smith's Judicial Review*, 6th ed (2007) at para 12-039:

“there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness.”¹⁵²

Inconsistent application of policy demonstrates arbitrariness because decisions are reached haphazardly for reasons other than those publically stated to be pertinent to the outcome. This undermines commonly-accepted notions of justice, brings the decision-making process into disrepute, and erodes trust in government.¹⁵³ In other words, it is bad for the public administration if like cases are treated differently: it creates a perception that the administration is unfairly discriminating between individuals. If policy is applied consistently it allows people to order their affairs, leads to fairness as between members of the public (or what is referred to as 'horizontal equality'), fosters trust in the government and generally produces decisions that are more just. This is the basis for the 'independent duty' to consistently apply policies.

In *Mandalia*, the Supreme Court considered the lawfulness of the UK Border Agency's decision to refuse a visa extension. Contrary to its stated policy, the agency had refused the application without allowing the appellant to submit relevant additional information. Lord Wilson held that the Agency's action was unlawful, citing with approval the judgment in *R(Nadarajah) v Secretary of state for the Home Department* [2005] EWCA Civ 1363:

Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in

¹⁵² *Lumba* (n 153) 265 at 26. Lord Walker, in his judgment at 307 para 190, highlights that the need for consistency is heightened in circumstances where the same type of decision is being taken by a number of different officials: "Decisions are taken by a small army of officials at different levels, and they need guidance in order to achieve consistency in decision-making. Members of the public, or those in the public liable to be affected, should know where they stand, and so they are entitled to know, at least in general terms, the content of the official policies."

¹⁵³ Johnson, E "Should 'inconsistency' of administrative decisions give rise to judicial review?" *AIAL Forum* no 72 at 51.

fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.

This dictum relies on the importance of consistency itself. Principles of consistency, equality and predictability are fundamental to the rule of law, and have been recognised for over 100 years.¹⁵⁴ Consistency advances both good administration and individual justice.¹⁵⁵

Importantly, the court in *Mandalia* distinguished the consistency principle from the principle of substantive legitimate expectations (This could be, and in the past had been, successfully relied upon to seek the consistent application of policy in situations where an administrator had elected to depart from his policy in the circumstances of a particular case). It was held that the applicant's right to have his application determined in accordance with policy is 'generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing'. The distinction is best illustrated in a situation where the individual is unaware of the existence of the policy until after the decision has already been made. That individual could hardly then be heard to argue that she had an *expectation* that the policy would be applied in her case. As will be explained in the next part, legitimate expectations are grounded in the trust that the public places in representations made by the administration. If no trust has been placed in the representations made in the policy then there is nothing to protect.¹⁵⁶

However, it would be unfair to treat the more curious person who is aware of the policy differently from the less curious person who is not. The duty to apply policies consistently should not depend on whether the individual has knowledge of the policy. It is inherent in the idea of policy as a guide to decision-making that it be used consistently so that decisions do not result in arbitrariness or discrimination. Consequently, the use of the consistency principle is to be preferred to the substantive legitimate expectation

¹⁵⁴ See *Kruse v Johnson* [1898] 2 QB 91 in which Lord Russell elaborated the forms of unreasonableness applicable to delegated legislation including rules that are 'partial and unequal in their operation as between different classes', if they were manifestly unjust or gratuitous interference with rights. These principles have been accepted into South African Law and applied by our courts in numerous cases.

¹⁵⁵ *Johnson* (n156) 50.

¹⁵⁶ Forsyth "Legitimate Expectations Revisited" ALBA/BEG Paper, May 2011 at 6.

principle in the context of departures from policy in the particular circumstances of the case.¹⁵⁷

Thus, the position in England is that the courts will hold administrators to their current policies unless there are good reasons to depart from them. The values which underpin this principle are, primarily, equality and fairness, both of which require that like cases should be treated alike.

4.2. The position in South Africa

While the consistency principle has not explicitly been adopted in South African law, from the analysis above, it is apparent that it is consistent with our fundamental constitutional values, and particularly those that are central to administrative law.¹⁵⁸ Further, if South African courts were to adopt the consistency principle they could draw on and develop their existing jurisprudence on the fettering-by-rigidity principle, with which the consistency principle is compatible and to which it would function as a corollary. As explained in the Part 3, the fettering-by-rigidity principle is not concerned with maintaining flexibility at all costs (since it could not plausibly be argued that each new decision, irrespective of its nature and context, should be considered afresh, free of policy constraints and the insights gained from past experience). It seeks to achieve a *balance* between flexibility and responsiveness, on the one hand, and certainty and consistency, on the other.

South African courts have recognised that the adoption of policy to guide discretion is 'legally permissible' and 'eminently sensible'¹⁵⁹ and, in certain circumstances, is even 'necessary to the intelligent exercise' of administrative

¹⁵⁷ Originally the English courts, including the court of appeal, had relied on the substantive protection of legitimate expectations to ensure the consistent application of policy. In *R (Rashid) v Home Secretary* [2005] EWCA Civ 744 Pill LJ observed that 'there plainly is a legitimate expectation in a claimant for asylum that the Secretary of State will apply his policy on asylum to the claim. Whether the claimant knows of the policy is not in the present context relevant. It would be grossly unfair of the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy, especially one unknown to relevant Home Office officials'. However, over time it has been acknowledged that the term expectation adds little to the public law duties of officials in this context and may in fact dilute their essence. Thus the trend has been instead to reply on the consistency principle.

¹⁵⁸ The consistency principle could arguably be accommodated under section 6(2)(e)(iii) of PAJA, failing to take into account a relevant consideration, 6(2)(e)(vi) the administrative action was taken arbitrarily and capriciously and/or 6(2)(h), the administrative action was unreasonable.

¹⁵⁹ *BP* (n 52) at 155A-B and *Sasol* (n 52) para 19.

discretions'.¹⁶⁰ The particular virtues of policy, which have caused the courts to look favourably on its adoption, are lucidly and succinctly captured in *Booth*¹⁶¹:

The formulation and adoption of policy documents, particularly after a process of public participation and with external expert assistance, is a valuable tool of government.... A properly researched and formulated policy aids rational, coherent and consistent decision-making. It provides a large measure of useful predictability to the public. It avoids the need for time-consuming investigations ...[each time an application is made] – ‘reinventing the wheel’ as Prof Hoexter puts it. (My underlining)

None of these virtues will be realised if policy is not applied consistently. If a policy is adopted but only applied selectively at the whim of the administrator, then it could hardly be said to provide 'useful predictability' to the public or to aid 'rational and coherent¹⁶² decision-making'¹⁶³, or, most importantly, to 'aid consistent decision-making'. Thus the mere adoption of a policy is insufficient to foster the values of certainty, fairness and consistency. To advance these values the policy must be applied with reasonable consistency: 'where a policy is published it is not difficult to ask and not easy to answer the question: what is the point in publishing your policy if you are going to ignore it or apply it randomly?'¹⁶⁴

So it is an implicit expectation in all of the judgments referred to above that once a policy is adopted it will be applied consistently.¹⁶⁵ This expectation was explicitly articulated by the Constitutional Court in *Kaunda and others v President of the Republic of South Africa and Other*¹⁶⁶

The government's policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen...The applicants are entitled to the benefit of this policy,

¹⁶⁰ *Britten* (n51) at 158.

¹⁶¹ *Booth* (n 75) para 29. See also *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 (5) SA 161 (W) para 13 where the court observed that policy guidelines can be 'of enormous assistance in ensuring consistency and predictability in application of policy'.

¹⁶² Adopting a policy and applying it consistently contributes towards the purposive rationality of the decision by specifying the considerations and goals that inform the exercise of the discretion. Where the administrator fails to take relevant policy considerations into account the decision is likely to be not only formally bad (for failing to take relevant considerations into account), but also unjust.

¹⁶³ Where policy is applied consistently it aids rational decision-making where a range of factors are considered by policy makers underpinned by policy goals and ways of achieving them

¹⁶⁴ *Sedley* (n 6) at 260. In other words: it is irrational to adopt a policy and then act as if it does not exist.

¹⁶⁵ This is not a strange expectation to have. As explained in part 2, it is implicit in the very notion of policy that it should be applied consistently to guide action and decision-making.

¹⁶⁶ *Kaunda and others v President of the Republic of South Africa and Other* 2005 (4) SA 235 (CC) para 99.

and if capital punishment were to be imposed on them, then consistently with its policy, government would have to make representations on their behalf. There is no evidence to suggest that this would not happen.(My underlining).

Thus there is a strong basis, in our existing jurisprudence, for the recognition of the consistency principle.

Some commentators have argued that the consistency principle undermines individual justice, signalling a shift in legal focus from the individual circumstances to good administration, from flexibility and responsiveness to a principle of horizontal equality.¹⁶⁷ Rigid adherence to the consistent application of policy without regard to the special circumstances of the particular case would have this result. However, this is not what the consistency principle demands: the principle permits administrators to depart from their policies where there is good reason for doing so (and this includes the special or exceptional circumstances of an individual's case). What the principle requires is a 'strict but not unbending' regard for policy.¹⁶⁸ In this way the consistency principle mirrors the fettering-by-rigidity principle: they are two sides of the same coin.

Both principles shape the normative framework for decision-making and engender accountability from the administration for the way its power is exercised and both are concerned with individual justice. The problem, when policies that are generally treated as law by officials remain 'soft' (i.e. where there is no enforceable obligation on administrators to apply them consistently), is that they become asymmetrical in their operation:¹⁶⁹ Administrators can hold individuals to administrative policies (in a manner similar to legal rules, subject to flexibility), but individuals cannot hold administrators to their own policies. Through the application of the consistency principle the administration is held accountable for implementing policies consistently and if it departs it is obliged to justify the decision: to explain to courts and affected individuals the reasons for departure. Without the consistency principle, the administration is

¹⁶⁷ Johnson (n 156) at 57. The ideal of individual justice can be undermined by both the rigid adherence to policy and inconsistent application of policy, and can concomitantly be protected both by the flexible application of policy where rigidity is inappropriate and the consistent application of policy where there are no good reasons to depart.

¹⁶⁸ Sedley (n 6) at 260.

¹⁶⁹ Greg Weeks, 'The Use of Soft Law by Australian Public Authorities: Issues and Remedies' (Paper presented at the Practice and Theory of Soft Law Academic Symposium, Peking University Soft Law Centre, 9 July 2011 at 3.

unaccountable. It becomes the judge in its own case.¹⁷⁰ Therefore the consistency principle fosters accountability, transparency and openness which are all founding values of the Constitution.

The difficult question is what constitutes a 'good reason' to depart from a policy and what is the appropriate intensity with which to scrutinise the reasons put forward by the decision-maker. Both questions raise separation of powers concerns as courts will be required to directly engage with the merits of the decision. For the executive, the recognition of the consistency principle (and the principle of substantive legitimate expectations discussed in the next part) may seem like the 'arrival of a judicial tank on the departmental lawn'.¹⁷¹ However, these principles are not new for courts. The courts have been clothed with potentially awesome power by the Constitution and are required themselves to determine the limits to those powers.¹⁷² However, they must uphold the separation of powers, they must respect legitimate public purposes pursued by government, be cognisant of their own institutional limitations and refrain from usurping the functions of other organs of government. These requirements are crucial to maintaining the moral authority and public confidence that are central to the efficacy of the judicial function.¹⁷³ A further requirement of the separation of powers doctrine is that the courts should provide a check on public power, particularly in a one party dominant democracy where loyalty to the party undermines the effectiveness of the legislature's oversight of the powers of the executive. It is pivotal that courts do not shrink from their duty to protect individuals from abuses of power and to develop 'legal rules to induce ... the wise and humane use of public power'.¹⁷⁴

The standard of review employed by the courts is variable and will be determined by the context, ranging from bare rationality to reasonableness.¹⁷⁵ This flexibility ensures that courts can strike an appropriate balance, not only between consistency and flexibility, but between controlling the administration and holding it accountable on the

¹⁷⁰ See *R. v. North and East Devon Health Authority, ex parte Coughlan* [2001] Q.B. 213 at para 66.

¹⁷¹ Sedley (n 6) at 264.

¹⁷² Section 167(4) of the Constitution.

¹⁷³ For a more general discussion of the courts' role within the separation of powers doctrine see Kohn, L "the burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?" (2013) 130 *SALJ* 810.

¹⁷⁴ Farina (n 56) at 501.

¹⁷⁵ Hoexter (n 77) at 151.

one hand, and facilitating and guiding it on the other. The manner in which the courts will go about balancing these considerations is considered in more detail in Part 5.

5. LEGITIMATE EXPECTATIONS

This part examines the scope for South African law to be developed to accommodate the substantive protection of legitimate expectations arising from policy in circumstances where the administration has replaced its old policy with a new one. This is an area where the courts have an important, but limited, role in promoting respect for persons within the administration. The claim made by the individual is a more radical one than those considered so far: it is a claim that her expectation carries such weight that not only should the pre-existing policy be applied, but it should be applied in the face of a change in policy.¹⁷⁶ It presents a slight variation on the theme that has been explored throughout this paper: the balancing of certainty and flexibility. The expectation engages the values of certainty and fairness but also raises a fundamental constitutional question about the freedom of public bodies to alter their policies in the public interest.¹⁷⁷

Administrators may, through their conduct or representations, give rise to an expectation on the part of an individual or class of individuals of some benefit or advantage. The expected benefit is usually substantive but may be procedural (in other words, the expectation that a hearing will be held before a decision is taken). The doctrine of legitimate expectation seeks to resolve the conflict between protecting the individual's confidence in expectations created by the administration and the need for the administration to pursue changing policy objectives. The upshot is that, in certain circumstances, the law will afford protection to such expectations.

The doctrine of legitimate expectations was accepted into South African law by the Appellate Division in *Administrator, Transvaal v Traub*,¹⁷⁸ where it was recognised that a legitimate expectation may arise 'from an express promise given on behalf of a public authority or from the existence of *a regular practice which the claimant can reasonably expect to continue...*'. A legitimate expectation may be engendered through established policy (which is effectively a statement of the administration's intended course of action for the future and, for the reasons discussed in the prior two parts, will

¹⁷⁶ Woolf (n 78) 12-024.

¹⁷⁷ Woolf (n 78) 12-023.

¹⁷⁸ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 760 I to 761 E.

ordinarily give rise to a regular practice).¹⁷⁹ As mentioned previously, due to its prevalence, policy has become one of the most significant sources of people's expectations of how they will be treated by the government. However, in view of the constitutional principles that government is entitled to change its policies, there cannot be an expectation that the representations made in a policy may be relied upon indefinitely. In *Premier Mpumalanga*,¹⁸⁰ the Constitutional Court held that:

Citizens are entitled to expect that government policy will ordinarily not be altered in ways that would harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.

This reflects a recognition of only the procedural protection of legitimate expectations (irrespective of whether the expectation itself is substantive or procedural in nature). However, there have been strong indications that legitimate expectations will receive substantive protection under South African law¹⁸¹ in future, and there have, in fact, been some instances where substantive protection has effectively been afforded to expectations (although it was not conceptualised or articulated as the substantive protection of a legitimate expectation).¹⁸² However, the substantive protection thus far

¹⁷⁹ Hoexter (n77) at 421.

¹⁸⁰ *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) par 41.

¹⁸¹ The principle could also arguably be accommodated within the existing legal framework provided by PAJA, under the established ground of failing to take into account relevant considerations, rationality, reasonableness coupled with the discretionary power of the court to substitute its decision for the decision of the administrator in exceptional circumstances. A potential stumbling block is the requirement that administrative action should adversely affect rights. However, courts have generally favoured a determination, rather than deprivation, theory of rights and thus expectations could arguably be accommodated. Should they not be, PAJA would then arguably be open to constitutional challenge for failing to give effect to section 33 of the Constitution.

¹⁸² See for example *Premier, Province of Mpumalanga* (n 183) and *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC). *Premier, Province of Mpumalanga* which concerned a government scheme aimed at providing schools with bursaries for needy students. After giving an assurance that the scheme would run at least until the end of 1995, the government cancelled the scheme in August 1995 with effect from July 1995. Although the expectation was couched in procedural terms (that a particular procedure would be followed before the decision was made) the effect of the court's order was substantive since the bursaries were payable until December 1995. *Joint Liaison* was similar. It concerned the retrospective reduction of subsidies which had been promised to independent schools by the government for the 2009 school year. The applicant had disavowed reliance on the doctrine of substantive legitimate expectations and thus, constrained by the pleadings the court ultimately ordered the enforcement of a 'publicly promulgated promise to pay' on the grounds of 'reliance accountability'. Although it falls short of the full protection on offer under the protection of substantive legitimate expectation it relies on values very similar to underpinning substantive legitimate expectation.

offered by the courts does not extend to protect legitimate expectations, in the face of a change in policy, in the manner contemplated here.¹⁸³

Much has been written about the potential forms that substantive protection may take.¹⁸⁴ I will not focus on these intricacies since the arguments here are made at the level of principle, rather than form, and in any event, as Quinot correctly concludes, in the end ‘there seems little real difference’ in substance between the different forms that have been proposed.¹⁸⁵

In essence, in assessing whether a legitimate expectation should be protected substantively, courts will first determine whether any legitimate expectations exist and, if so, the expectations will then be balanced against the public purpose underpinning changes in policy. A variable standard of scrutiny will be applied taking into account the separation of powers and judicial deference. I set out below a more detailed overview of the values underpinning the substantive protection of legitimate expectations, examine the requirements for an expectation to have legitimacy in a change of policy context and, finally, explain the nature and application of the ‘balancing’ assessment undertaken by the court and illustrate, through an example, the manner in which it would function in practice.

5.1. Values underpinning the substantive protection of legitimate expectations

As mentioned above, the main values underpinning the substantive protection of legitimate expectations, as in the context of fettering by rigidity and the consistency principle, are fairness and certainty weighed against flexibility. In the context of substantive legitimate expectations ‘flexibility’ refers to the need to preserve the liberty of the administration to change its policies in the public interest in changing

¹⁸³ *Joint Liaison* did not establish a fully-fledged principle of substantive legitimate expectations. The principle was framed narrowly; namely that, provided that there is no over-riding public interest, a promise of payment that has been relied upon cannot be retracted once the date for payment has fallen due provided that there is no over-riding public interest for reasons of accountability and rationality. In other words it applied only once the obligation had already accrued. See Hoexter ‘The enforcement of an official promise: form, substance and the constitutional court’ (2015) 132 *SALJ* 207 at 224 - 229 for a discussion explaining why *Joint Liaison* does not reduce the need to explore substantive enforcement of legitimate expectations in future.

¹⁸⁴ See Quinot, G ‘The developing doctrine of Substantive Legitimate Expectations in South African Administrative Law (2004) 19 *SA Public Law* 543; Campbell, J ‘Legitimate Expectations: The Potential and Limits of the Doctrine of Substantive Legitimate Expectation in South Africa’ (2003) 12 *SALJ* 292 and Campbell, J ‘Legitimate Expectations: Developments at Home and Abroad’ (2004) 121 *SALJ* 538.

¹⁸⁵ Quinot (n 187) at 562.

circumstances to ensure the effective realisation of government purposes. It is a central feature of our Constitution that public policy should not be ossified or unduly fettered. For this reason the substantive protection of legitimate expectation is 'hedged with qualifications and contingent upon a number of different factors',¹⁸⁶ while certainty and fairness underpin the need to protect the trust¹⁸⁷ that individuals or groups place in representations made by the administration through its policy documents.

The question for the court, then, is 'the degree to which an individual's expectations may be safeguarded in the face of a change in policy which tends to undermine them.'¹⁸⁸ So, on the one side of the scale is the unfairness of frustrating the expectation and undermining the public interest in legal certainty and on the other is the duty to pursue the public interest 'which is never static' and may conflict with the legitimate expectations created by prior policy.¹⁸⁹ Consequently, a balancing exercise must be performed, first by the administration but ultimately by the courts, with the overarching aim of ensuring that administrative powers are exercised with due respect for those whose benefit the power exists (in so far as it is possible to do so without undermining the public interest).

In complex modern societies, individuals have little choice but to rely on representations made by the administration to order their lives so as to avoid adverse consequences or obtain certain benefits because so many aspects of social and economic life are regulated by the administration. The rule of law requires stability in the legal relationship between the public and the government; it requires regularity, predictability and certainty in government's dealings with the public.¹⁹⁰ The purpose is for the law to provide guidance to individuals enabling them to predict with reasonable accuracy the nature and extent of state action in so far as it affects their affairs and to order them accordingly. Thus the basis for the legitimate-expectation doctrine is that the law should protect the trust that has been reposed in undertakings made by government about the way it will behave in the future:

¹⁸⁶ Woolf (n 78) at 12-013.

¹⁸⁷ Forsyth (n 169) at 3.

¹⁸⁸ Thomas (n 55) at 41.

¹⁸⁹ Woolf (n 78) at 12-043.

¹⁹⁰ Woolf (n 78) at 12-002.

‘Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and individuals will not order their affairs on that assumption. “Government becomes a choice between chaos and coercion.”’¹⁹¹

It is unfair to raise expectations of future conduct which are subsequently disappointed without good reason. Thus, the substantive protection of legitimate expectations plays a positive role in obliging the administration to take account of special individual expectations that may be thwarted by a change in policy and attempt to optimise them to the extent possible within the new policy.¹⁹² This facilitates the task of governance because people feel able to put their faith in what government says and does.¹⁹³

The role of courts, therefore, is to ensure minimal standards of treatment for individuals, generally without defeating the public-interest objectives pursued by the administration. It involves a concern on the part of the court to ensure that public interest is effectively and efficiently furthered and that the legitimate objectives of government are achieved but also guards against overzealous policy implementation that unfairly prejudices individuals who placed trust in, and reliance on, government policy.

5.2. Legitimacy

Whether an expectation has been created is a question of fact that will be determined in the circumstances of a particular case. The expectation must be legitimate, the question being 'whether viewed objectively, such expectation is, in a legal sense legitimate'. In *National Director of Public Prosecutions v Philips*¹⁹⁴ Heher J laid down the requirements for legitimacy as being a reasonable expectation that was induced by the decision-maker based on an unambiguous representation which it was competent for the decision-maker to make.

As has been discussed in Part 2, policies may vary in their specificity, precision and prescriptiveness. Therefore, the nature of the policy and the way it is framed would

¹⁹¹ Forsyth (n 159) at 2. The notion of legitimate expectations derives from the German concept of *vertrauensschutz*.

¹⁹² Thomas (n 55) at 45.

¹⁹³ (Ng Siu Tung v Director of Immigration 1 HKLRD 561 at 349 .

¹⁹⁴ *National Director of Public Prosecutions v Philips* 2002(4) SA 60 (W) para 28. The requirements for legitimacy were endorsed by the Supreme Court of Appeal in *South African Veterinary Council v Symanski* 2003 (4) SA 42 (SCA) para 20.

have to be considered to determine whether it establishes a legitimate expectation. However, policies that take the form of 'soft law', which are the subject of this paper, are framed in a precise and prescriptive way and thus would generally give rise to a legitimate expectation. The expectation would likely be of a substantive benefit arising from the prior policy or (given that policies may be subject to exceptions) that the prior policy will be fairly applied (without necessarily guaranteeing a favourable outcome). An expectation will not be regarded as legitimate if a change to the policy was reasonably foreseeable.¹⁹⁵ The change must have occurred without warning, without transitional measures and with immediate effect.¹⁹⁶

Detrimental reliance is not ordinarily essential to establish the existence of a legitimate expectation. However, in the context of a change in policy, for the expectation to carry sufficient weight to ultimately prevail in the balancing assessment, it will generally be necessary that the individual has suffered some hardship or detriment as a result of the frustration of reliance on the expectation. Mere disappointment will not ordinarily suffice.¹⁹⁷

5.3. Balancing

Once a legitimate expectation has been established the administrator must establish a public interest sufficient to justify its frustration. It is for the administration to determine requirements of the public interest and how to achieve them, including whether a policy change is necessary to do so. The court will seek to accommodate the individual's legitimate expectations to the extent that the public purpose sought to be achieved through the new policy remains attainable.¹⁹⁸ In this way the court is sensitive to the legitimate constitutional functions of the administration by ensuring that its goal is achieved.¹⁹⁹ If the frustration of the expectation is indispensable to the achievement of the public purpose it is almost inevitable that the expectation will be frustrated. However, the court will examine whether the frustration of the expectation was indispensable to the achievement of the public purpose sought to be achieved and may,

¹⁹⁵ Craig (n 103) 20-011.

¹⁹⁶ Thomas (n 55) at 55.

¹⁹⁷ Craig (n 103) 20-017 and Woolf (n 78)12-041.

¹⁹⁸ Rather than a balancing test, the enquiry could be reframed as: should an exception be made to the new policy given the exceptional circumstances of the case.

¹⁹⁹ Thomas (n 55) at 61.

depending on the standard of review employed, scrutinise the availability of alternative measures.²⁰⁰ In this way, one of the outcomes may be that the administration is required to reorganise the implementation of its policy.²⁰¹ For this reason courts must be aware of the needs of the administration and the consequences of their decisions.²⁰²

Questions of substantive legitimate expectations arise most regularly in the context of changes of policy in situations of ‘apparent retroactivity’.²⁰³ Apparent retroactivity occurs where a person plans and takes action on the basis of a policy publicised by the administration; for example, she takes some steps towards obtaining some kind of benefit under the policy, but has not completed the process when the policy is changed. She then seeks redress when the policy is altered because even though the alteration applies prospectively rather than retrospectively, it may frustrate the steps she has already taken in reliance on the old policy.²⁰⁴ In these circumstances there is a temporal limit to the applicant’s claim.²⁰⁵

The administration must be free to change its policy. The claim under the doctrine of legitimate expectations merely impacts on when and for whom that policy takes effect.²⁰⁶ It does not involve the courts determining a preference for the new policy or the old policy. Where an individual or class of individuals have acted in reliance on a prior policy, which they had no reason to expect would change, the administration should take this into account in determining the class of people to whom the new policy applies. Where possible, it should protect those who had acted in reliance on the prior policy through the inclusion of transitional provisions in the new policy.²⁰⁷ In other words, legitimate expectations cannot be used to frustrate the adoption of new policies, nor is everyone who operated under the old policy likely to have a legitimate expectation that it will be applied to them. Even those who do have such a legitimate expectation may have their expectations frustrated if the expectation cannot be

²⁰⁰ Thomas (n 55) at 68.

²⁰¹ Thomas (n 55) at 52.

²⁰² Thomas (n 55) at 52.

²⁰³ *Ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 1995 at 726.

²⁰⁴ Craig (n 103) 20-011.

²⁰⁵ Thomas (n 55) at 62.

²⁰⁶ Craig (n 103) 20-011.

²⁰⁷ Sedley (n 6) at 264 and Craig (n 103) at 20-025.

accommodated within the public purpose pursued by the administration.²⁰⁸ The courts' task is not 'to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interest or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or extant promise.'²⁰⁹

This approach ensures that the administration respects the trust placed in it. However courts must be careful not to conflate ends with means. A court cannot substitute its view of the policy objective for that of the administration (provided that the objective is lawful and rationally connected to the purpose for which the power was given). It can, however, examine whether the frustration of the individual expectation is necessary to achieve that public purpose or whether alternative means could be adopted that achieve it while accommodating the expectation.²¹⁰ It is necessary for courts to be willing to scrutinise the reasoning offered by the government with the appropriate degree of intensity required by the circumstances to ensure that people are treated with sensitivity and respect by government.²¹¹

The protection of substantive legitimate expectations has the benefit of increasing trust in government and enhancing the acceptability of administrative decision-making and promoting a more co-operative relationship between the individual and the state.²¹² It facilitates the structuring of discretion by informing the administration of the underlying values and factors it should consider before changing policy.

*Ex parte Hamble (Offshore) Fisheries Ltd*²¹³ provides a good example of how the balancing exercise would work in the context of the adoption of a new policy. In *Hamble*, a company sought to compel the government to grant it a beam trawl fishing licence to fish for 'pressure stock' (threatened fish species) in the North Sea because it had acted in reliance on a prior government policy that permitted the grant of such licences.

²⁰⁸ Craig (n 103) at 20-025.

²⁰⁹ *R v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B 213 para 65.

²¹⁰ Thomas (n 55) at 60.

²¹¹ Thomas (n 55) at 60.

²¹² Thomas (n 55) at 62.

²¹³ *Hamble* (n 206). Note that Sedley J applied the balancing test in the way that it is applied in Europe where the legitimacy of the expectation is determined through the balancing test itself. This structure would not fit comfortably within our law. However the principles remain the same.

The Department of Agriculture, Fisheries and Food (“the Department”) was responsible for the licensing of fishing activities. In determining its policy for the grant of licences it had to balance the needs of the fishing industry and its customers, on the one hand, against its obligations, under European community law, to ensure the preservation of a sustainable fish stock within the shared-fishing area. The Department’s initial policy was that fishing licences could be transferred together with a vessel when it was sold and then licences from smaller vessels could subsequently be transferred to and aggregated in a larger vessel, so long as the total vessel capacity units of the overall fleet were not increased.

Hamble owned a vessel, the *Nellie*, that could be, but had never been, used for beam trawling. In reliance on the Department’s policy Hamble purchased two smaller vessels with pressure stock beam trawl licences which it intended to transfer to the *Nellie*. However, the vessel capacity of the *Nellie* needed to be reduced before the transfer could take place. Hamble made enquiries with the Department regarding the transfer and aggregation of licences and explained its plans to the Department.

In March 1992, the Department then announced an immediate moratorium on the transfer and aggregation of pressure-stock licences onto beam trawlers fishing in the North Sea. It did so because the existing measures to protect pressure stocks in the North Sea had proven inadequate and the Department thus sought to restrict the entry of any new beam trawlers into the North Sea. There were three exceptions to this policy that applied to (a) those with a prior record of beam-trawl fishing in the North Sea, (b) those who had already made applications for the transfer of such licences prior to the announcement of the moratorium and (c) those who had concluded certain types of binding contracts (and satisfied certain other requirements).

Hamble did not fall within any of the exceptions. Further, it was only after the intention to implement the moratorium was announced, that the vessel capacity units of the *Nellie* were reduced, and even then its capacity was still too high for the licences to be aggregated to it (as the capacity of the fleet would then have been increased contrary to the Department’s previous policy). Thus Hamble had to acquire a further vessel for the purpose of aggregation. In other words, at the time the moratorium came into effect

the applicant had made an investment but was still a substantial way from fulfilling its terms.

Hamble accepted that the Department had the power to change its policy from time to time in the interests of conservation. However, it argued that where radical and severe measures such as a moratorium are imposed, the legitimate expectations of those who had already irrevocably entered into transactions at that time (by acquiring beam trawl pressure stock licences for aggregation and demonstrating a genuine intent to fish in the North Sea) should be protected by appropriate transitional provisions.

The Department defended its exclusion of individuals in the position of the applicant from the transitional provisions because on the evidence there were a large group of individuals in a similar position to Hamble. As such, if protection were afforded to this group it would seriously impede, if not completely undermine, the Department's duty to monitor and control the intensity of fishing.

Sedley J ultimately declined to order the substantive protection of Hamble's expectations. First, he held that Hamble was distinguishable from the other categories for whom 'transitional provision' type exceptions had been made, since those classes had all the necessary entitlements or sufficient existing commitments to make it plainly unfair to frustrate them (and it was unnecessary to do so to achieve the aims of the new policy). Whereas, although Hamble had made an investment prior to the moratorium, its expectations were a long way from fulfilment 'to the extent much was still in the realms of hope or planning' (and in any event the investment would not be lost completely; at worst the value may have been reduced by the change in policy). He held that those falling within the pending application and binding-contracts exception represented a small and limited group, whereas the group in a similar position to Hamble, was large and open-ended. The Department was entitled to draw a line as tightly around the fleet of existing beam trawlers in the North Sea as could fairly be done to give effect to the objective of preserving pressure stocks. It could permissibly exclude the category of persons in the position of Hamble because by including them the purpose of the new policy may eventually have been subverted.

Clearly, the main reason for the court declining to protect the expectation in this case is that such a wide class of people would potentially be entitled to the same protection that it would have undermined the legitimate government purpose if the expectation were to have been protected.

6. CONCLUSION

The use of policies by government has become prevalent and these policies exert a significant influence over decision-making that affects individuals. The courts are in a constant dance with the administration over the right balance between flexibility and certainty, the attainment of public purposes and the need to treat individuals with respect. To date, the courts have developed the fettering-by-rigidity principle which plays an important role in fostering participation and transparency in discretionary decisions governed by policy. It has also, over time, been developed by courts so that it applies in a variable way that takes into account the important role that policy plays in shaping the exercise of administrative discretion. However the courts have not gone far enough in holding the administration accountable for how it applies policy.

At present the legal regulation of policy functions in an asymmetrical way such that the administration can hold individuals to their policies but individuals cannot similarly hold the administration to its policies. The right balance between flexibility and consistency has not been struck. The courts should develop the consistency principle and provide for the substantive protection of legitimate expectations, first, to guide administrators as to the considerations that should be taken into account in striking the appropriate balance and, second, to hold them accountable where the manner in which the power has been exercised does not accord with the vision of good government espoused by the Constitution.

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