Judicial review and administrative policies



Kenny Chng
Brasenose College
Faculty of Law
University of Oxford

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Supervisor: Dr Adam Perry

Abstract

Administrative policies—also described as ‘tertiary rules’ or ‘soft law’—play a central role in modern governance and feature prominently in English judicial review. Although the courts have developed a substantial body of doctrine governing their use, important questions remain unresolved. These include when public bodies are required to comply with their policies, whether they are under duties to adopt or publish policies, and how courts should review the interpretation and content of policies. More fundamentally, the law remains fragmented. Despite its practical importance, the law on policies has not been treated as a coherent subject of study.

This thesis argues that it should be. It offers an interpretive theory of the law on policies and advances three principal claims. First, it argues that administrative policies are practice-independent non-legal general guides to conduct created by public bodies. This explains why policies constitute a distinct category of government action and provides a principled basis for determining when the distinctive legal rules governing policies apply.

Second, the thesis develops an account of non-arbitrariness comprising two complementary aspects: exercise non-arbitrariness, concerned with how public power is exercised, and power non-arbitrariness, concerned with the nature of the power that public bodies possess.

Third, it argues that non-arbitrariness provides the best explanation of the law on policies. It explains the established doctrines more comprehensively and more concretely than competing values such as consistency, fairness, the rule of law, reasonableness, and

good administration. It also resolves the most important doctrinal questions left open by the authorities and provides principled guidance for the development of less-established and unestablished areas of the law.

By offering a unified interpretive theory of the law on policies, the thesis provides a new framework for understanding a practically significant but under-theorised area of administrative law.

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Chapter 1 Introduction

Administrative policies play an important role in governance. Policies have also been described as 'tertiary rules' or 'soft law'.[1] In initial terms, they are guides to conduct created by public bodies. For example, suppose that a public body has a statutory power to approve applications to rent public housing flats. The statute itself may not provide detailed guidelines for how this power should be exercised. But the public body may, in its own discretion, decide to adopt an administrative policy to help officers decide when to approve such applications. It could, for example, decide to approve applications based on a set of factors, including financial means or nationality, with financial means determined by reference to gross household income.

Policies feature prominently in disputes in English law. Indeed, scholars have observed that nearly 50% of judicial review decisions over a period of one year required consideration of policies.[2] There is now a large body of law on judicial review of policies. Four sets of legal rules have become well-established. First, public bodies must comply with policies unless there is good reason to the contrary.[3] Second, they must be flexible in

[1] Tom Hickman and Thomas Poole, 'Judicial review and guidance' (2024) 140(Jul) LQR 381; Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016).

[2] Elizabeth Fisher, 'Why Doctrinal Administrative Lawyers Need to Think More About Policy' (2023) 29(4) AJAL 254.

[3] For example, *R (Patel) v General Medical Council* [2013] 1 WLR 2801.

their use of policies.[4] Third, public bodies' interpretations of policies are subject to review by the courts.[5] Fourth, policies that authorise unlawful conduct are themselves unlawful.[6]

Nevertheless, these doctrines leave many questions open. Take the duty to comply as an example. While the duty is certainly well-established, the circumstances which give rise to it are less clear. Does the duty to comply arise in relation to a policy guiding a public body's internal administrative processes?[7] It is similarly unclear when exactly it is unlawful to depart from a policy. What are the factors that a court should take into account in assessing the lawfulness of a departure?[8]

These issues concern established areas in the law on policies. Yet, there are other areas in the law which are even less clear. Some rules on policies are much less well-established. These legal rules raise more fundamental questions: should they exist at all? For example, should there be a general duty to adopt or publish a policy? Should there be a duty to consult in the making of a policy? With respect to other issues, no law has been established; we can say that the law on such areas is 'unestablished'. In these areas, it is unclear what rules there are in the first place. For example, what rules should govern the use of policies which are directed solely at guiding the conduct of the public?

[4] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

[5] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

[6] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

[7] *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580.

[8] *R (Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548.

Despite the importance of the law on policies and the fact that it leaves many questions open, scholars have noted that little systematic attention has been paid to it.[9] Existing scholarship falls into two main categories. The first type of scholarship is directed at explaining discrete rules in the law on policies. Much attention has been focused on the duty to comply. Dotan, for example, argued that administrators are justified in being held to their policies on the basis of the values of equality and protecting reliance.[10] Many scholars have also contributed to this subject by studying the legitimate expectations doctrine and whether it should be the doctrinal basis for the duty to comply.[11] Ahmed and Perry argued that the legitimate expectations doctrine should not be engaged where a public body has changed its policy.[12] Elliott and Varuhas similarly argued that a principle of consistency is a more appropriate doctrinal foundation for a duty to comply.[13] There has also been scholarship directed at explaining other rules in the law on policies. Perry, for example, argued that the non-fettering rule is related to the fair hearing rule and can be explained on the same normative basis.[14] Mills focused on the rules governing the

[9] Fisher (n 2); Joanna Bell and Elizabeth Fisher, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] PL 505; Hickman and Poole (n 1).

[10] Yoav Dotan, 'Why Administrators should be Bound by their Policies' (1997) 17(1) OJLS 23.

[11] See also Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 JR 429, 433; Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) CLJ 93; Shona Wilson Stark, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2020); Rebecca Williams, 'The multiple doctrines of legitimate expectations' (2016) 132(Oct) LQR 639.

[12] Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61.

[13] Mark Elliott and Jason Varuhas, *Administrative Law: Texts and Materials* (5th edn, OUP 2017) 184-185; Mark Elliott, 'Legitimate Expectations: Procedure, Substance, Policy And Proportionality' (2006) 65(2) CLJ 254, 254-255; Jason NE Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 29-30.

[14] Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) CLJ 375.

interpretation of policies and argued in favour of a 'least expert reader' principle to govern how policies should be interpreted.[15]

The second type of scholarship on the law on policies takes a broader view of the law, instead of focusing on specific legal rules. For example, Hickman and Poole offered a taxonomy of policies that contributed to doctrinal clarity about how different legal rules should apply to different types of policies.[16] Bell and Fisher explored how lower court judges have actually engaged policies in judicial review applications, unearthing doctrinal questions in the law that are practically important and yet remain unanswered—for example, the duty to consult has not received much attention in academic commentary and yet is often raised in judicial review applications.[17] Weeks offered a broad survey of the law on policies, with a focus on the Australian context, and discussed important issues such as the value of policies in shaping discretion and the legal status of policies.[18] McHarg, in a similar vein, was focused on the phenomenon of administrative rule-making and how the law ought to engage with it. She studied a variety of legal rules on policies, such as the duty to comply, the non-fettering rule, and the rules on the interpretation of policies, and offered a commentary on each set of rules.[19]

[15] Alistair Mills, 'The interpretation of policies in administrative law: the significance of audience' (2024) 44(2) LS 295.

[16] Hickman and Poole (n 1).

[17] Bell and Fisher (n 9).

[18] Weeks (n 1).

[19] Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) CLP 267.

All of this scholarship is valuable and will be drawn upon in this thesis. Yet, a gap remains in the literature. There has not yet been an effort to offer a systematic and comprehensive explanation for the law on policies. The law on policies has been treated in a fragmented way. The first type of scholarship offers explanations of the law, but is limited to specific rules on policies. The second is broader in scope, especially Weeks' and McHarg's work. But neither Weeks nor McHarg study the possibility of a coherent explanation for the law on policies as a whole that can provide unity across the variety of legal rules. Existing scholarship has therefore explained aspects of the law on policies well. What it has not done is explain why those doctrines belong together as a coherent body of law.

An account which provides such an explanation, and which draws upon it to address the open questions in the law, will be a valuable contribution to the literature. Although the law has not traditionally recognised 'the law on policies' as a distinct doctrinal category, this thesis argues that it should. I suggest that there are three reasons in favour of seeking an account of the law on policies as a unified whole.

First, we miss something about the law on policies if our focus is narrowly trained on existing doctrinal categories. There are legal rules on policies which are not captured by existing doctrines. Some examples are the law on the duty to adopt policies, the interpretation of policies, and policies authorising unlawful conduct. These areas of law are unique to policies and do not belong to any other doctrinal category. They risk falling through the cracks if our focus is only on existing doctrinal categories that are broadly applicable to all decisions of public bodies.

Further, even if legal rules on policies are captured by existing legal doctrines, there are sometimes aspects of these rules which make them distinct. For example, the non-fettering rule does not apply merely to the use of policies. The same rule also applies where power has been delegated, and also in the context of contracts with public bodies. As such, focusing on the non-fettering rule as the relevant target of analysis risks missing the distinctive features of the rule as it applies to policies. Indeed, the non-fettering rule as applied to policies has been argued to be based on the fair hearing rule.[20] This doctrinal basis for the non-fettering rule would have little relevance to the other contexts in which the rule applies.

Second, studying the law on policies as a whole helps to reveal valuable insights about the relationships between the different legal doctrines applicable to policies. For example, in the context of the legal rules on the duty to comply with policies, a question has been raised about the circumstances in which the duty arises. This has led to judicial consideration of the question of what a policy is in the first place. What is interesting is that the answer to this question is clearly relevant beyond the duty to comply. It is relevant also to the non-fettering rule (what exactly has to be applied flexibly?) and the rules on the interpretation of policies (when do these principles of interpretation apply?). Studying the law on policies as a whole helps us to see these fundamental connections between the disparate legal doctrines.

In addition, such a study helps to reconcile internal tensions between the existing legal doctrines. A well-known example is the tension between the duty to comply and the

[20] Perry (n 14).

non-fettering rule. The doctrines *prima facie* point in different directions. The duty to comply requires adherence to policies, but the non-fettering rule says that it is unlawful to adhere too strictly to policies. A wider study of the law on policies helps to unearth this tension and provide an opportunity to reconcile the two doctrines.

Third, a study of the law on policies as a whole has the potential to offer a simple and elegant understanding of the law that makes sense of a presently confusing area. This has merit in itself. A unified theory of the law on policies can also bear fruit in terms of further implications for how the law regulates other similar devices. For example, if policies are understood to be a kind of non-legal guide to conduct, there are other devices which bear a close connection to them. Decision-making algorithms are one possible example. It is likely that a theory on the law on policies would at least have some things to say about how the law should regulate other similar devices.

As such, this thesis aims to explain the law on policies as a whole. This is not to say that the law on policies will necessarily be entirely distinct from existing doctrines in the law of judicial review. Some rules may indeed be distinct. The rules on the duty to comply with policies are a good example. At the same time, other rules on policies could function as an overlay on existing doctrinal categories, such as the rules on interpretation of policies.

1.1 Methodology

I have thus far described the objective of this thesis. I turn now to explain and defend the methodology adopted here.

The methodology I will adopt in this thesis can be broadly characterised as an interpretive method. An interpretive method is directed at producing an interpretive theory: a theory that offers an explanation of the law. At its most fundamental level, '[a]n interpretive theory of law aims to construct the best possible rationale for the law at issue. In other words, the theorist aims at a rational reconstruction of the law.'[21] It aims to 'enhance understanding of the law by highlighting its significance or meaning'[22] and serves to 'illuminate the law's fundamental and enduring structure.'[23]

An interpretive method can be contrasted with other methods which may be empirical—for example, to identify the different contextual factors influencing how judges have addressed different kinds of policies. It can also be contrasted with critical methods—for example, to propose a fundamentally different structure for the law on policies that courts should adopt, even if they have not thus far. The interpretive method is different from the first in that its focus is on explaining the internal structure of the law, rather than the external factors which shape the outcomes of decisions. It is different from the second in that it seeks to explain the existing legal materials. An interpretive theory should fit the law. A requirement of fit would not be a success condition for a critical method.

Legal scholars have offered various accounts of what exactly the interpretive method is. Dworkin's theory of fit and justification is a well-known account of an

[21] Farrah Ahmed and Adam Perry, 'Interpretive Theory in Public Law' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023) ch 3.

[22] Stephen A Smith, *Contract Theory* (OUP 2004) ch 1.

[23] Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68(2) MLR 320.

interpretive method. He argued that judges should decide hard cases by choosing the interpretation of the law that both fits the existing legal materials (statutes, precedents, practices) and shows them in their best light (justification).[24] Smith, in his discussion of how contract law can be explained, offered several criteria of success for an interpretive theory: fit, coherence, morality and transparency.[25] 'Fit' requires a theory to be consistent with and supported by the relevant facts; 'coherence' requires a theory to present an area of law as consistent or non-contradictory; 'transparency' means a theory matches the reasons that legal actors give for their decisions; while 'morality' requires that the area of law in question 'is or could be thought to be supported by recognisably moral principles'.

This thesis's methodology is broadly aligned with the interpretive method. Indeed, I will aim to make sense of the legal materials and 'construct the best possible rationale for the law at issue'.[26] I will aim to provide an interpretive theory that can fit and justify the law on policies in the manner that Dworkin described. To do so, I will first describe the law. This is a necessary task, since to explain the law I will first have to know what the law is. Given that the law on policies is a relatively new and developing area, I will identify the established legal rules which can be the object of explanation. I will take a rule to be established if it has been recognised by the highest courts and is regularly applied by lower courts, and if the main features of its content are also widely accepted by judges and lawyers. Beyond describing the legal rules in the law on policies, I will also aim to achieve a deeper understanding of the law by discussing how the law understands what policies are. What are the distinctive features of policies as compared to other types of government

[24] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

[25] Smith (n 22).

[26] Ahmed and Perry (n 21).

action? The answer to this question will tell us how policies are a distinctive legal concept, which in turn will establish the law on policies as a distinctive legal category meriting discussion. All of this will provide a strong foundational understanding of the law on policies. I will then seek to explain it. Is there a value that can explain why there is a legal duty to comply with policies, why policies have to be treated flexibly, why courts have authority over policy interpretation, and why courts are concerned with policies authorising unlawful conduct? If there is an explanation for these rules, I will apply it to resolve the open questions in the law.

I will make three further points about the interpretive method that will be adopted for this thesis. First, I will prioritise justification over fit.[27] In concrete terms, this means that I will be more willing to criticise cases as wrongly decided. I will still be concerned about a requirement of fit, but if there are aspects of the law that are not justifiable, I will critique it and offer an account of how it should develop such that it will become justifiable. This is an adaptation for the context of the law on policies. Since this area of law is relatively new, with many of its aspects still developing, it is less likely that there is already a justified settled understanding of its legal rules, as compared to an area of law which has been developed and concretised over a much longer duration. A more critical approach to the legal materials is therefore appropriate for the law on policies.

Second, I will be agnostic about Dworkin's claims about what law is. Dworkin argued that to discover what the law is, one has to interpret it. This involves value judgments about what the law ought to be. Yet, as I explained earlier, in this thesis I will

[27] See, for an account of variations in the interpretive method, Adam Perry and Angelo Ryu, 'Judicial Review: Substance and Procedure' (2026) 89(2) MLR 227, 228-229.

take the law as established as long as the courts have set out the law authoritatively. Also, unlike Dworkin, I will not claim that the best possible rationale for the law is itself a legal principle. I will return to this issue shortly in section 1.2. Returning to the point at hand, I will depart from Dworkin in these respects because it is not necessary for the purposes of this thesis to defend these claims. This thesis aims to shed light on a practically important area of law containing many open questions. Departing from Dworkin's claims will mean that it does not have to wade into a jurisprudential dispute which would distract from the thesis's focus on clarifying the law on policies. These departures from Dworkin will also make the interpretive theory offered here more acceptable to a wider audience. Since it is widely accepted by judges and lawyers that courts do set out the law authoritatively, this thesis will proceed on that understanding.

A final point about my methodology concerns the nature of the claims I intend to make. I will shortly be arguing that non-arbitrariness can explain the law on policies. The generality of the value of non-arbitrariness naturally raises questions about whether its relevance extends beyond the law on policies. Is the interpretive theory proposed in this thesis intended to be a special claim only applicable to the law on policies? Or is it actually an interpretive theory of the law on judicial review more generally, with the law on policies being a test case for this theory?

To clarify, my focus is on explaining the law on policies. I will claim that non-arbitrariness does explain the law on policies. But I will not make the further claim that non-arbitrariness only explains the law on policies. I accept that it is possible that non-arbitrariness can serve as an explanation for the law on judicial review more generally. It is natural that shedding light on a specific area of law can reveal broader insights beyond

the explained area. The arguments here can therefore possibly serve as a springboard for further work on whether they can also apply to the law on judicial review more broadly. But that is not my concern here. My objective will be achieved as long as I have explained the law on policies.

1.2 Objections to the methodology

Now that I have explained the methodology for this thesis, I turn to address two possible objections to it. The first concerns the object of the interpretive method in this thesis. This method aims to identify principles that show how cases fit together and which cast the law in the best light. If so, one may ask: why assume that the law on policies can be explained in this manner at all? Given the unsettled state of the law, it may be argued that a method seeking to explain the existing law is not appropriate for this area. For example, the law governing the duty to adopt or publish policies remains unsettled. And the law on well-established rules like the duty to comply with policies is also not fully settled—for example, questions remain about the circumstances under which this duty arises.

In response, I suggest that the interpretive method remains appropriate even though the law on policies is still developing. There are two ways to understand this objection. If the objection is that the unsettled state of the law means that there is no concrete legal material that can be explained, the answer is that there are already certain established doctrines which uncontroversially exist as features of the law on policies. For example, the duty to comply and non-fettering rule are well-established. Questions may remain about the scope of these doctrines or how they can be explained. But judges and scholars accept that they exist. This suffices for an interpretive method to be applied successfully. The

interpretive method can be used to explain these established doctrines, and then applied to shed light on how the law can be developed. If the objection is that the unsettled state of the law means that there cannot be an explanation for it, my response is that I do not make any assumption that there is a rational explanation for the law. This thesis will study the law on policies to see if there is an explanation. If not, it is open to arriving at the conclusion that there is none, and then making an argument about how the law can be better unified and justified. Accordingly, as a matter of methodology, I am neither assuming that there is a rational explanation for the law, nor that the law is certainly not unified.

The second objection concerns the value of the interpretive method. Why is it valuable to identify principles that can show how the cases on policies fit together? Such an objection can be framed in different ways. For example, one might think that context is everything in law and that a coherent and rational explanation for legal doctrine does not actually exist. Alternatively, one could argue that an effort to 'construct the best possible rationale for the law' entails a focus on legal doctrine. This would inevitably result in a focus on appellate decisions. But appellate decisions represent only a small percentage of legal disputes. It will thus be more fruitful to explain how judges actually decide cases, rather than focusing narrowly on legal doctrine set by appellate courts.

In response, I will first make a general defence of the value of the interpretive method. I will then respond to the two specific arguments raised against its value. The interpretive method is a widely accepted method of doctrinal research because it provides a useful practical resource for judges. There are two ways to understand the pay-off of the interpretive method. One way is to think that it contributes to a judge's work by telling us what the law is. On this view, the pay-off for judges is obvious. If a judge's task is to apply

the law to the facts, then an interpretive method contributes directly to that by telling judges what the law is that has to be applied. But this reflects a Dworkinian understanding of the interpretive method. And as I explained earlier, a drawback of this is that it makes an implicit contentious claim about what law is—that the value identified through an interpretive method is part of the law.

I prefer to frame the pay-off of the interpretive method through a second approach. It is less contentious but no less meaningful. Drawing from Ahmed's and Perry's work on the interpretive method, another way to understand how this method contributes to a judge's work is that it can make recommendations to judges as to how to develop the law.[28] On this view, an interpretive method tells judges how best to develop the law in a manner that is consistent with its fundamental structure. This second framing of the pay-off of the interpretive method avoids making contentious claims about what law is. But it does assume that it is valuable for judges to decide cases in a coherent manner. This assumption can be justified. As Ahmed and Perry have pointed out, judges are institutionally required to make decisions in a coherent manner.[29] The rules on precedent and stare decisis are a clear indication of this institutional requirement. This coherence contributes to certainty and clarity in legal doctrine.

I turn now to the specific arguments raised earlier against the interpretive method's value. The first emphasised the importance of context. In response, the interpretive method does not deny this in judicial decision-making. Searching for an explanation for the law is consistent with the idea that the law is sensitive to context. For instance, the law may

[28] Ahmed and Perry (n 21).

[29] *Ibid*.

distinguish between different types of policies, and there may be an overarching explanation for why the law does so. But an interpretive method would deny that context is all that we should be concerned with. Legal doctrines have to be applied in context, but to do so properly, it is surely important to first clearly understand the structure of these legal doctrines.

The second argument emphasised the importance of paying attention to the law beyond appellate decisions. In response, an interpretive method does not deny the importance of doing so. It is valuable to study how courts actually apply legal doctrines, including in first instance decisions. But there is surely still a place for an analysis of legal doctrine expressed by the highest courts, since this provides the set of rules that lower courts have to apply in the first place. If a concern for the law beyond appellate decisions is motivated by a desire to understand how the law actually works, then an interpretive method is complementary to this aim.

1.3 Overview of thesis

I move next to explain how the thesis is structured. It will first map the law on policies. In Chapter 2, I will describe the established legal doctrines on policies: the duty to comply, the non-fettering rule, the interpretation of policies, and the rule against policies authorising unlawful conduct. As I mentioned earlier, a doctrine is established when its existence is widely accepted. It has been recognised by the highest courts and is regularly applied by lower courts. The main features of its content are also widely accepted by judges and lawyers. The chapter will also identify open questions remaining in these doctrines. It will then describe the less-established doctrines and unestablished areas of law. Less-

established doctrines have the support of more limited authority than the established ones, typically in the form of *obiter dicta* of appellate courts or from the lower courts. Also, a body of case law has not yet sufficiently developed to confirm their existence and clarify their content. Unestablished areas of law have even less support in case law. In these areas, there is no legal doctrine at all or substantial uncertainty about the doctrines that exist.

As such, Chapter 2 describes how policies attract distinctive legal obligations. But what is distinctive about policies as compared to other types of government action? To answer this question, Chapter 3 will study how the law understands what policies are. It will argue that policies are distinctive because they are practice-independent non-legal general guides to conduct created by public bodies. This in turn explains why the law on policies is a distinct legal category that deserves to be studied. The chapter will also describe a taxonomy of policies—self-directing policies, coordinating policies, and public guidance—and discuss the differences in how the law treats each type of policy. The discussion in this chapter will contribute to a more comprehensive understanding of the law on policies and also raise additional open questions in the law that have to be resolved.

With the foundation thus laid, Chapter 4 will take the first step towards explaining the law. It begins the task of identifying the best account for the law. I will argue here that non-arbitrariness provides a *prima facie* plausible explanation. Drawing from literature in legal philosophy and civic republicanism, I will first distil two principles of non-arbitrariness: exercise non-arbitrariness provides that an exercise of power is non-arbitrary if a power-holder is attentive to the proper reasons for the use of power, while power non-arbitrariness provides that a power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable

justification. I will then argue that non-arbitrariness is a plausible explanation for the law on judicial review of policies. In brief, this is because non-arbitrariness is *prima facie* able to fit and justify the law on policies. Policies can further non-arbitrariness. But for them to do so, there must be a check on their use and content. The law provides this check.

Having established that non-arbitrariness provides a *prima facie* plausible account of the law, the rest of the thesis will turn towards proving that it is the best account of the law on policies. I will start in Chapter 5 by explaining how non-arbitrariness can explain two of the established doctrines: the duty to comply and the non-fettering rule. For example, applying a policy rigidly without regard to exceptional circumstances can make a decision-maker indifferent to reasons that should be taken into account, thereby leading to arbitrariness. By discouraging such rigidity, the non-fettering rule facilitates exercise non-arbitrariness. I will then apply non-arbitrariness to the open questions that remain in these doctrines and show that it provides useful answers to them. For example, it can clarify what exactly the requirement of flexibility in the non-fettering rule means—public bodies have to be willing to consider if there are good reasons for departing from their policies.

In Chapter 6, I move to consider the other two established doctrines: the law on the interpretation of policies and on policies authorising unlawful conduct. Both doctrines concern the content of policies. I will first argue that non-arbitrariness explains why the courts have the authority to interpret policies. I will then discuss whether courts should review policy interpretations for reasonableness or correctness. I will argue in favour of reasonableness review. As for the rule on policies authorising unlawful conduct, I will explain that having such a rule promotes non-arbitrariness by ensuring that public bodies

adopt policies which help them to be attentive to the requirements of the law. I will also discuss which doctrinal approach to the rule non-arbitrariness would favour.

Chapter 7 turns to discuss the less-established doctrines and unestablished areas in the law on policies. These doctrines and areas of law present an opportunity for the interpretive theory proposed in this thesis. I will explore whether less-established doctrines such as the duties to adopt policies, publish policies, or consult in the making of policies should exist. I will also study how open questions in these doctrines can be addressed. I will then turn to the unestablished areas of law: the law on public guidance and responses to unlawful policies. For these areas of law, I will consider what doctrines should exist in the first place.

Chapter 8 concludes by summarising the claims in this thesis and making clear what its contribution is. Finally, it will explain how non-arbitrariness is superior to a set of alternative explanations for the law on policies—such as consistency, the rule of law, and reasonableness.

Chapter 2 The law on administrative policies

Administrative policies are not legal rules. Yet, they resemble legal rules in an important sense: they too are general guides to conduct created by public bodies.[1] This similarity to law suggests that, just as public bodies are subject to legal duties in their use and creation of legal rules, they should be subject to legal duties in their use and adoption of policies. At the same time, the fact that policies are not legal rules means that these duties ought to be different from those that arise in relation to law. For example, while public bodies have to strictly comply with the law, it is less clear that a duty to comply with a policy should be equally strict.[2]

What then are the legal duties of public bodies in their use and adoption of policies? A body of law has developed to govern judicial review in the context of policies. This chapter will aim to describe this body of law, which will provide the background for the argument in this thesis.

I will start with the established doctrines in the law on policies. For the purposes of this chapter, the degree to which a doctrine is established is a function of two factors: type of precedential support and certainty of support from the cases. The former concerns the court level of supporting authorities and whether this support is part of the *ratio* of the relevant cases or stated merely in *obiter*. The latter is about whether the cases form a clear and consistent line of authority for the content of the doctrine. Accordingly, a doctrine is

[1] Chapter 3 will discuss the features of policies in greater detail.

[2] It will become clear in this chapter that the duty of public bodies to comply with policies is more qualified in nature – see section 2.1.1.

'established' when its existence as a feature of the law on policies is not in doubt. It has been recognised by the highest courts and is regularly applied by lower courts. The main features of its content are also widely accepted by judges and lawyers. There is no longer a live question about whether the doctrine exists. In this chapter, I will first identify and describe four established doctrines in the law on policies: the duty to comply with policies, the non-fettering rule, the review of policy interpretation and the rule against policies which authorise unlawful conduct.

The fact that a doctrine is established does not mean that all of its details are clear. Several kinds of questions can remain open even for established doctrines. These questions have not yet been resolved by authority or have continued to raise concerns in the literature. The first kind are doctrinal questions. These concern what exactly is legally prohibited or permitted under the doctrine. In other words, the legal content of the doctrine may not be entirely settled as a matter of authority. For example, even though there is certainly a duty to comply with policies, it is less clear precisely which policies give rise to this duty. The second kind of questions are normative. Normative questions can arise even when the legal content of a doctrine has been authoritatively settled. They concern issues such as a doctrine's normative basis or what its content should be. For example, whether a duty to comply should extend to situations involving a change of policy raises a normative question. Also, while public bodies cannot fetter their discretion in their use of policies, it is less clear what the explanation for this rule is. The third kind of questions are taxonomical. These concern how a doctrine ought to be classified. Sometimes, even though it is clear what a doctrine legally prohibits or permits, there can be uncertainty about where it stands in the law. For example, it is debatable whether the duty to comply with policies falls under the legitimate expectations doctrine or a free-standing principle of consistency.

Taxonomical questions do have practical consequences and have been raised in the literature. Although courts can suggest how such questions can be resolved, they cannot be definitively settled by authority, unlike doctrinal and normative questions. As such, after describing the four established doctrines in the law on policies, I will identify the doctrinal, taxonomical or normative questions that remain in these areas.

I will then move to describe the less-established doctrines and unestablished areas of the law. Less-established doctrines have the support of more limited authority than the established ones, typically in the form of *obiter dicta* of appellate courts or from the lower courts. Also, a body of case law has not yet sufficiently developed to confirm their existence and clarify their content. Such less-established doctrines naturally give rise to doctrinal, taxonomical and normative questions. But they also raise existential questions—does and should the doctrine exist? Unestablished areas of law have even less support in case law. In these areas, there is no legal doctrine at all or substantial uncertainty about the doctrines that exist.

The distinction between established doctrines on one hand, and the less-established doctrines and unestablished areas on the other, is central to this chapter. The reason for this distinction is that this thesis intends to offer an interpretive theory of the law on policies. Given that there are less-established doctrines and unestablished areas in the law on policies, it would seem presumptuous to assume that all parts of the law on policies can be explained. Yet, there are established doctrines which can validly be the subject of the interpretive method. An interpretive theory of these established doctrines can then shed light on how other parts of the law can be developed. It can also help to address questions remaining in the established doctrines. As such, identifying established doctrines of the law

on policies and distinguishing them from the less established areas enables the application of the interpretive method to the law on policies.

This chapter will also focus only on areas of law which are distinctive to policies. While grounds of review such as improper purposes are also relevant to judicial review of policies, they fall outside the scope of the present discussion. This is intended to further another purpose of this chapter: to highlight why policies deserve specific attention as a topic of study within the law of judicial review.[3] This chapter will highlight that policies bear distinctive consequences for how courts perform judicial review. This contributes to making a specific study of policies in judicial review a task worth undertaking.

2.1 Established doctrines

I will begin by describing four well-established doctrines in the law on policies: the duty to comply with policies, the non-fettering rule, the courts' authority to interpret policies, and the rule against policies authorising unlawful conduct.

2.1.1 Duty to comply

One of the well-established doctrines in the law on policies is that public bodies are required to comply with their policies unless there is good reason to the contrary. The doctrine is at issue when there is a decision of a public body to depart from its policy. In these situations, a public body has adopted a policy. But it has departed from it in a specific

[3] See Elizabeth Fisher, 'Why Doctrinal Administrative Lawyers Need to Think More About Policy' (2023) 29(4) AJAL 254 for more discussion on this point.

case. The public body remains committed to the policy for other cases. The question that arises is whether such departure is lawful.

The courts historically applied the legitimate expectations doctrine to address such situations. A landmark early example is *R v Secretary of State for the Home Department, ex p Asif Khan*.[4] The Home Office issued a published policy outlining the criteria under which it would grant entry clearance for overseas adoptions. Khan met those criteria, yet the Home Secretary departed from the policy and refused his application. The court held that Khan had a legitimate expectation that the policy would be applied to him. This was a significant development of the law on legitimate expectations. It showed that policies, not just individualised promises, could create legitimate expectations. The court ultimately held that the Home Secretary's departure from the policy without good reason was unlawful.

The extension of the legitimate expectations doctrine to policies raised an important question. Ordinarily, legitimate expectations arose from promises given by public bodies to specific individuals.[5] In such circumstances, an affected individual would invariably know about the promise. Now that the legitimate expectations doctrine applied also to policies, would there be a duty to comply with a policy under the doctrine if an affected person did not know about the policy? After all, an individual may not necessarily know about a policy that was applied to decide a matter.

[4] *R v Secretary of State for the Home Department, ex p Asif Khan* [1984] 1 WLR 1337.

[5] See, for example, *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

The Court of Appeal in *R (Rashid) v Secretary of State for the Home Department* addressed this issue.[6] This was another milestone in the development of the duty to comply. The Secretary of State had refused the claimant's application for asylum, and the claimant applied for judicial review of this refusal. The lower court had quashed the decision on the basis that the Secretary failed to apply a policy that ought to have applied. Applying this policy would have resulted in the applicant being granted asylum. This resulted in unfairness which rendered the Secretary's decision unlawful.

One of the key issues on appeal was the relevance of the applicant's knowledge of the policy. It was clear that at the time that the decision was made, the applicant did not know about the policy. In such a situation, could the applicant rely on a legitimate expectation that the Secretary would comply with his own policy? The Court of Appeal thought so. It held that the applicant's knowledge of the policy was irrelevant to whether there was such a legitimate expectation. The court reasoned that '[i]t would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy'.[7] The applicant had a legitimate expectation that 'a general policy for dealing with asylum applications will be applied and will be applied uniformly', whether or not he actually knew about the policy.[8] The Secretary's failure to give effect to this legitimate expectation resulted in unfairness amounting to an abuse of power.[9] This rendered his decision unlawful.

[6] *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.

[7] *Ibid* [25].

[8] *Ibid* [34].

[9] *Ibid* [36].

Rashid made clear that reliance on a policy was not necessary for a duty to comply to arise. But crucially, *Rashid* clarified that knowledge of a policy was similarly unnecessary. This threw into doubt the closeness of the connection between the duty to comply and the legitimate expectations doctrine. Indeed, it is somewhat unnatural to hold that an applicant can have a legitimate expectation that a policy would apply to him even if he did not know about it. The courts started to rethink the basis for the duty to comply with policies.[10]

A landmark case in this regard was *R (Nadarajah and Abdi) v Secretary of State for the Home Department*.[11] The applicants were being deported to other jurisdictions for the determination of their asylum claims. They argued that this was unlawful on the basis that these decisions were contrary to the Secretary of State's own policy of determining asylum claims domestically where an applicant had family links in the UK. In dealing with this appeal, Laws LJ at the Court of Appeal made several important comments about the duty to comply and its relationship with the legitimate expectations doctrine. In an often-quoted passage, his Lordship held that the principle underlying the legitimate expectations cases was 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'[12] A departure from this standard was justifiable only if it was a proportionate response, 'having regard to a legitimate aim pursued by the public body in the public interest.'[13]

[10] See, for example, *DM v Secretary of State for the Home Department* [2014] CSIH 29.

[11] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[12] *Ibid* [68].

[13] *Ibid.*

Nadarajah thus clarified that the duty to comply was based on a requirement of good administration. In Laws LJ's reasoning, this requirement was what justified the legitimate expectations doctrine. Accordingly, at this juncture, the duty to comply remained closely linked to the legitimate expectations doctrine. But *Nadarajah* opened the door to the possibility of basing the duty to comply directly on the requirement of good administration, independent of any connection with the legitimate expectations doctrine.

The Court of Appeal decision in *R (WL) (Congo) v Secretary of State for the Home Department* was a sign of the direction in which the law was developing.[14] The court noted the obvious fact that 'policy is not the same as law'.[15] Yet, policies can give rise to obligations. For example, 'a failure by the Secretary of State to apply his own published policy without good reason may be reviewable as a breach of legitimate expectation'.[16] The court added that 'we may have arrived at the point where it is possible to extract from the cases a substantive legal rule that a public body must adhere to its published policy unless there is some good reason not to do so.'[17] Here, the duty to comply was still based on legitimate expectations, as it was in *Nadarajah.* At the same time, the court recognised that the duty to comply was a substantive legal rule of its own. This suggested that the duty could have a basis independent of the legitimate expectations doctrine.

In *Lumba v Secretary of State for the Home Department*, the Supreme Court provided an important signal that a change in the doctrinal basis of the duty to comply was

[14] *R (WL) (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111.

[15] *Ibid* [57].

[16] *Ibid* [58].

[17] *Ibid*.

on the horizon.[18] The claimant alleged that the Secretary of State had applied an unpublished policy of blanket detention for all foreign national prisoners once they completed their prison sentences. This was inconsistent with the Secretary of State's published policy, which provided that prisoners should only be detained when their continued detention was justified. The Supreme Court held that 'a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so.'[19] Notably, this formulation of the duty to comply made no reference to the legitimate expectations doctrine.

These early indications of change culminated in the Supreme Court decision in *Mandalia v Secretary of State for the Home Department.*[20] The policy at issue in *Mandalia* was issued by the Border Agency to caseworkers to guide them in their processing of visa applications. One of the issues that the Supreme Court had to address was whether and how the Border Agency should be held to its policy. It noted that there was a legal rule that public bodies had to comply with their policies, and observed that there was a movement away from ascribing this duty to the legitimate expectations doctrine.[21] The court added that the application of the legitimate expectations doctrine was strained in such circumstances, given that the duty to comply arises even if an applicant is unaware of the policy. As a result, affirming the reasoning of Laws LJ in *Nadarajah*,[22] the Supreme Court held that the preferred doctrinal basis for holding a public body to its policy was a 'free-

[18] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

[19] *Ibid* [26].

[20] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

[21] *Ibid* [29].

[22] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

standing' principle of good administration, 'by which public bodies ought to deal straightforwardly and consistently with the public.'[23] This principle of good administration required public bodies to comply with their policies unless there was good reason not to do so.[24] In line with the authorities on the duty to comply, the court held that this duty applied even where an applicant was unaware of the policy.[25] Indeed, the applicant in *Mandalia* was unaware of the Border Agency's policy. The principle of good administration identified in *Mandalia* applied nevertheless to require the Border Agency to comply with its policy. There was no longer any need to refer to the legitimate expectations doctrine.

Mandalia thus confirmed the existence of a duty on public bodies to comply with their policies unless there was good reason to the contrary, and also suggested that this duty existed independently of the legitimate expectations doctrine. The Supreme Court in *Lee-Hirons v Secretary of State for Justice*, citing *Mandalia*, affirmed the status of the duty to comply as an independent legal rule: '[w]here a public authority issues a statement of policy in relation to the exercise of one of its functions, a member of the public to whom it ostensibly applies… has a right at common law to require the authority to apply the policy, so long as it is lawful, to himself unless there are good reasons for the authority not to do so.'[26]

Accordingly, the courts have been moving towards a free-standing doctrinal basis for the duty to comply with policies independent of the legitimate expectations doctrine.

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[23] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 [29].

[24] *Ibid*.

[25] See also *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[26] *Lee-Hirons v Secretary of State for Justice* [2016] UKSC 46 [17].

But the important point for present purposes is that the substance of the duty to comply remained consistent. This means that the duty to comply is a well-established feature of the law on policies. As the court in *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* recognised, '[t]he *Lumba* public law duty of adherence to a policy, absent a good reason justifying departure, is well established.'[27] The issue of the doctrinal basis for this doctrine remains debatable and will be revisited later.

Thus far, I have been discussing the situation where a public body has departed from its policy in a specific case. This raises the question of whether the departure is lawful. But for completeness, it is worth noting that there is another kind of situation where the courts intervene with a public body's decision not to apply a policy. This occurs when a public body seeks to change its policy and apply a new one to an applicant. In such situations, the duty to comply I discussed previously does not apply. There is no legal duty on a public body to apply its previous policy. A question arises then as to whether the public body owes any kind of legal duty to an applicant who is now subject to a new policy.

A useful starting point to understand how the law addresses such situations is the decision in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd*.[28] This case concerned a change of policy in how fishing licences were issued. The applicant argued that they had a legitimate expectation that the old policy would apply. The court noted the importance of preserving the discretion of public bodies to change their

[27] *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2937 (Admin) [76].

[28] *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 1 CMLR 533.

policies.[29] But at the same time, it held that the court had a duty in fairness to protect the legitimate expectations of individuals affected by changes in policy. This could outweigh the interest in preserving the discretion to change policies.[30] On the facts, the court held that there was no unfairness to justify the court's intervention. Nevertheless, the court's reasoning suggested that the legitimate expectations doctrine could require a public body to apply its old policy to an affected applicant.

The reasoning in *Hamble (Offshore) Fisheries Ltd* was very controversial. Courts have repeatedly held that intervening in situations involving a change of policy would amount to a serious intrusion into the discretion of authorities to formulate new policies.[31] As Lord Diplock held, '[a]dministrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.'[32] In line with this principle, the House of Lords in *In re Findlay* held that prisoners could not prevent the Home Secretary from toughening the parole policy.[33] Their expectation was limited to being considered under whatever policy was in force. Perhaps most forcefully, in *R v Secretary of State for the Home Department, ex p Hargreaves*, the Court of Appeal characterised the reasoning in *Hamble (Offshore) Fisheries Ltd* as 'heresy'.[34] The authorities that the court in *Hamble (Offshore) Fisheries Ltd* had relied on concerned

[29] *Ibid* [45].

[30] *Ibid* [47].

[31] Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) CLP 267.

[32] *Hughes v Department of Health and Social Security* [1985] AC 776, 788.

[33] *In re Findlay* [1985] AC 318 (HL).

[34] *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906, 921.

fairness as to the procedure by which decisions were made. But there was no authority supporting an extension of this principle to cover decisions on matters of substance. This would run counter to established authorities, such as those described earlier in this paragraph, which held that public bodies had the discretion to change their policies. On matters of substance, the proper approach to review was only on the basis of *Wednesbury* unreasonableness.

The courts have nevertheless continued to apply the legitimate expectations doctrine in situations concerning a change of policy. One example is the decision in *R (Patel) v General Medical Council*.[35] The applicant had pursued a foreign medical qualification with a view to practising medicine in the UK. He had done so on the basis that the General Medical Council's policy on foreign medical qualifications included the one he was pursuing. But upon graduation, he was informed that the Council's policy had changed. His qualification no longer allowed him to practise medicine in the UK.

The Court of Appeal ultimately found that the applicant had a legitimate expectation that he would have the benefit of transitional arrangements with the Council's change of policy, and ordered that this legitimate expectation should be upheld.[36] This was because the Council had behaved in such an unfair way as to amount to an abuse of power—the applicant had decided to pursue his training as a result of a clear, unambiguous and unqualified representation from the Council, and the change in policy had been immediate with no transitional arrangements.

[35] *R (Patel) v General Medical Council* [2013] 1 WLR 2801, 2815–2829.

[36] *Ibid*.

Accordingly, public bodies are sometimes subject to legal duties in contexts involving a change of policy. But it is questionable whether such duties should exist at all. This will be discussed later in section 2.2.1.4.

2.1.2 Non-fettering rule

Another well-established doctrine in the law on policies is that public bodies have to treat their policies flexibly and keep an open mind about exceptional situations which may justify a departure.[37] This is the non-fettering rule. Its origin can be traced to the decision in *R v Port of London Authority, ex p Kynoch Ltd*.[38] The Port Authority had adopted a policy not to license others to do things that it could do for itself, such as the building of wharves in London. The applicant applied for a licence to build wharves in London and was unsurprisingly rejected. When the applicant applied for judicial review of this refusal, the court held that the authority would have acted unlawfully if it had refused to 'hear any application of a particular character by whomsoever made'—in other words, if it had maintained a closed mind and applied its policy rigidly.[39] In this case, the authority had given the application due consideration and therefore had acted lawfully.

The leading modern authority for the non-fettering rule is *British Oxygen Co Ltd v Minister of Technology*.[40] The Board of Trade had placed a minimum value condition for grants to be given for equipment purchases—grants would only be given for items costing

[37] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL); McHarg (n 31).

[38] *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176.

[39] *Ibid* 184.

[40] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

£25 or more. The Board of Trade applied this policy to reject the applicant's application for a grant, and the applicant challenged this decision through judicial review. In line with *Kynoch*, Lord Reid held that this policy could not be applied strictly, and that a public body which had adopted a policy must be 'always willing to listen to anyone with something new to say'.[41] Since the Board had carefully considered the application for a grant, it had acted lawfully.

Since *British Oxygen*, the principle that policies have to be applied flexibly has been consistently affirmed. Returning to *Lumba*, the Supreme Court also took issue with the fact that the Home Secretary's unpublished policy was that of blanket detention. On this point, the court held that 'it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers'.[42] Since the Home Secretary's policy of blanket detention was a rigid one, this was another reason to find the Home Secretary's actions unlawful.

The non-fettering rule was also discussed in the Supreme Court decision of *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs*.[43] This case concerned a claimant who was on death row in Indonesia. She challenged the UK government's decision to adhere to its policy of not paying for the legal fees incurred by overseas British nationals facing criminal charges abroad. One basis for this challenge was the non-fettering rule. The court thought that the non-fettering rule was applicable only to the context of statutory powers and therefore could not be invoked. This was because in

[41] *Ibid* 625.

[42] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [21].

[43] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

the court's view, the rule was based on Parliament's intent—it was contrary to Parliament's intent to limit the discretion which Parliament had conferred on a public body through the rigid application of a policy. But it went on to consider whether the rule was violated in any event. The Supreme Court noted that the rule required policies to be applied flexibly. But the government had not applied its policy rigidly, since it had considered the applicant's request carefully and had good reasons for adhering to the policy. This indicated a willingness to be flexible. Accordingly, the rule would not have been violated in any event.[44]

More recently, the Court of Appeal applied this rule in *R (HM, MA and KH) v Secretary of State for the Home Department*.[45] The defendant public authorities had operated a policy to seize mobile phones from migrants and extract data from them. The court took issue with the blanket nature of this policy, since it led to authorities applying the policy rigidly and not considering whether the statutory conditions for the power of seizure were met in each individual case.[46] This formed one of the reasons for the policy's unlawfulness.

Accordingly, the non-fettering rule is an established doctrine of the law on policies. Stark and Sedley have suggested that this doctrine can be justified on the basis that requiring policies to be treated flexibly furthers the public interest and promotes good

[44] *Ibid* [69].

[45] *R (HM, MA and KH) v Secretary of State for the Home Department* [2022] EWHC 695 (Admin).

[46] *Ibid* [33].

governance.[47] But the normative justification for the non-fettering rule remains an open question. I will revisit this issue later.

2.1.3 Court as authoritative interpreter

A third well-established doctrine in the law on policies is that courts have the authority to determine whether a public body's interpretation of its policy is correct. The key authority is *Tesco Stores Ltd v Dundee City Council*.[48] The local council adopted a policy regarding 'suitable' retail developments. What did 'suitable' mean? Tesco argued that it referred to suitability of a development for meeting deficiencies in retail provision in the area. The local council argued that 'suitable' referred to the suitability of a site for a proposed development. It also argued that the meaning of policies was for public bodies to decide upon, subject only to review for reasonableness.

The Supreme Court held in favour of the local council's interpretation of the policy. But it established two important points in doing so. First, the court clarified that there is a distinction between the application and interpretation of a policy. The application of a policy is an exercise of planning judgment. This lay within the discretion of authorities, subject only to reasonableness review. Second, the interpretation of a policy is for the courts to decide on the basis of correctness.[49] If public bodies could decide the meaning of policies for themselves, this would render irrelevant statutory obligations of public bodies to

[47] Shona Wilson Stark, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2020); Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 262.

[48] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

[49] *Ibid*.

comply with specific policies such as development plans.[50] It would also make little practical sense, since policies were intended to guide the behaviour of different parties and secure consistency in how decisions were made.

The Supreme Court decision of *Suffolk Coastal District Council v Hopkins Homes Ltd* also discussed policy interpretation.[51] A key issue was the meaning of the phrase 'relevant policies for the supply of housing' in the National Planning Policy Framework.[52] The court confirmed that it did have the authority to interpret policies, in line with its previous decision in *Tesco Stores Ltd*. But in view of concerns about the over-legalisation of the planning process, Lord Carnwath sounded a note of caution about the scope of the court's authority to interpret policies. He observed that 'it is important that the role of the court is not overstated.'[53] He then distinguished policies which are 'relatively specific' from those which are 'expressed in much broader terms'.[54] The first category included the policy in *Tesco Stores Ltd*. Such a policy was specific enough to lend itself to legal analysis. Broader policies may not be amenable to the same type of legal analysis. The implication is that such policies create more room for exercises of planning judgment, and that courts should be wary of intervening too robustly where such policies are concerned. This would accord due respect to the expertise of public bodies such as planning authorities.

[50] *Ibid* [18].

[51] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37.

[52] The case was decided on the basis that the issue at hand was a matter of the weight that had been given to a policy—see [66].

[53] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 [24].

[54] *Ibid* [24].

The distinction between broad and specific policies was applied in the Supreme Court decision in *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council*.[55] The key issue was whether the local planning authority had correctly understood the requirement of 'openness' in relation to Green Belt policy and preventing urban sprawl in the National Planning Policy Framework. Did this requirement mean that the planning authority had a legal obligation to take into account the visual impact of a development? Lord Carnwath, drawing upon the distinction between broad and specific policies which he had proposed in *Hopkins Homes*, thought that the requirement of 'openness' at issue in the case at hand was a good example of a 'broad policy concept'.[56] Accordingly, all that the law required was that the relevant authority take 'openness' into account. The assessment of what exactly was relevant to 'openness' was a matter of planning judgment rather than law.[57] On the facts, the planning authority had indeed taken openness into account and had given weight to some visual effects. There was no failure to take into account any obviously material consideration. This meant that the planning authority had not erred in law.

As such, the cases establish the following three propositions on the interpretation of policies. First, courts can review policy interpretations for correctness. Second, there is a distinction between interpreting and applying a policy. The former is a matter of law falling within the court's domain, while the latter is a matter of judgment for the authority.[58]

[55] *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 [22].

[56] *Ibid* [22].

[57] *Ibid* [39]-[41].

[58] For a critical analysis of this distinction, see Alistair Mills, 'The Interpretation of Planning Policy: The Role of the Court' (2022) 34 JEL 419.

The former can be reviewed for correctness, while the latter can only be reviewed for reasonableness. Third, the courts recognise that 'broad' policies leave more room for an authority's judgment.

2.1.4 Authorising unlawful decisions

The final well-established doctrine of the law on policies is that a policy is unlawful if it authorises unlawful decisions.

An important case that marked the establishment of this doctrine was the House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority*.[59] This case established the court's jurisdiction to review the content of policies for errors of law. The Department of Health and Social Security had issued guidance to area health authorities. This guidance suggested that in exceptional cases, doctors could exercise their clinical judgment to prescribe contraception to children under 16 years even without parental consent. The applicant sought to challenge this guidance on the basis that it contained advice that was unlawful.

This raised the issue of whether and how the court could review the content of such guidance. Lord Bridge observed that the guidance did not have any statutory force. It was not issued as an exercise of any statutory power and it was purely advisory in character. This meant that as a general rule, such guidance would not be subject to any form of judicial review. But Lord Bridge held that there was an exception to this rule. If a public body

[59] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

published guidance which was erroneous in law, the court did have the jurisdiction to correct this by issuing an appropriate declaration. His Lordship thought that 'the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare.'[60] Nevertheless, this case established that the courts could permissibly review the content of administrative policies.

In the wake of *Gillick*, two approaches to review of the content of policies emerged in the case law. Briefly, the first approach would require the court to evaluate whether a policy results in a real risk of authorising unlawful conduct, while the second would ask whether a policy contains a normative statement that authorises unlawful conduct. Nevertheless, both approaches are united in affirming the rule that a policy which authorises unlawful decisions is unlawful.

I will explain both approaches in turn. The first was applied by the Supreme Court in *R (UNISON) v Lord Chancellor*.[61] The Lord Chancellor had introduced an order that fees must be paid before claims and appeals in the employment tribunals could commence. This order to introduce fees was challenged on various grounds, one of which was that it interfered with the common law right of access to justice.

The court observed that in assessing such rules, the fundamental question was whether rules infringing fundamental rights had been expressly authorised by primary legislation. But even if there was such authorisation, the court could still review the

[60] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 193-194.

[61] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

infringement on two possible grounds. One was whether the rule authorised a degree of intrusion that was reasonably necessary to fulfil the statutory purpose.[62] The second ground is more relevant for present purposes: courts could also consider whether there was a real risk that the order in question would lead to unlawful outcomes.[63]

Accordingly, the question in this case was whether the fees order resulted in a real risk of preventing access to justice. The court concluded that it did. This was due to statistical evidence on the impact of the fees order on the bringing of claims. The court thought that the impact of the fees order should not be assessed as a theoretical matter, but that it should consider the likely effect of the imposition of fees in the real world.[64] There was no need for conclusive evidence that the fees order prevented people from bringing claims. But the fall in the number of claims was so substantial that the court concluded that the fees order led to a real risk of preventing access to justice.[65]

The second approach was set out in the Supreme Court decision in *R (A) v Secretary of State for the Home Department*.[66] The court cast considerable doubt on *UNISON* as an approach for the review of policies and clarified what it understood to be the proper approach. The Secretary of State had issued a policy to police authorities to govern the disclosure of child sex offender convictions.[67] The policy informed decision-makers that

[62] *Ibid* [80].

[63] *Ibid* [85].

[64] *Ibid* [93].

[65] *Ibid* [91].

[66] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

[67] *Ibid*.

before making disclosures, they should consider whether to seek representations from the subject. This policy was challenged on the basis that it did not sufficiently provide for the police to consult an offender before disclosing his offences to members of the public. The applicant argued that this failed to give effect to the applicant's Article 8(1) right to privacy under the ECHR, rendering the policy unlawful.

The Supreme Court held that the central inquiry for policies which authorise unlawful conduct is as follows: 'does the policy in question authorise or approve unlawful conduct by those to whom it is directed?'[68] In formulating this test, the court referred to the House of Lords decision in *Gillick*.[69] The court in *A* thought that its task was to compare 'normative statements in the law and in the policy, as objectively construed', and that the test does not call for 'a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations'.[70] This meant that the test of unlawfulness could be applied at the point when a policy is promulgated. The court observed that this was an appropriate standard, since a more demanding test may discourage public authorities from adopting guidance. This would be contrary to the public interest, since policies do play an important role in furthering good administration.[71] Applying this test to the guidance at hand, the Supreme Court concluded that it was clearly lawful.[72] Guidance did not have to eliminate every legal uncertainty or guarantee that all

[68] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 [38].

[69] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[70] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 [41].

[71] *Ibid* [40].

[72] *Ibid* [42].

decisions made under it will be lawful. On its terms, this guidance did not give a misleading direction. That was sufficient for it to be lawful.

The Supreme Court also cast doubt on the risk approach adopted in *UNISON* to review policies authorising unlawful conduct.[73] The reasons can be summarised as follows. First, it thought that the risk approach was wider than and inconsistent with *Gillick*. As an additional test for the lawfulness of a policy, it would create conceptual confusion in the law. Second, the risk test provides no criteria to determine what level of risk is unacceptable. Third, applying the risk test to administrative functions would result in the courts intruding into the work of government. Finally, the risk test would require the court to perform a statistical analysis to determine whether a policy would lead to an unacceptable risk of leading to unlawful outcomes. This was not something that a court was well equipped to do. The test for lawfulness should not depend on practical experience of how a policy works, but should be capable of applying at the time that a policy was promulgated.

For these reasons, the Supreme Court in *A* held that its approach should be preferred to the risk approach adopted in *UNISON*. It thought that *UNISON* ought not to be understood as setting out a general approach to govern the lawfulness of policies.[74] Rather, *UNISON* was about the constitutional principle of access to justice. The risk approach adopted in *UNISON* was applicable to situations where this principle was at stake. The appropriate test for the lawfulness of policies was the one articulated in *A*.

[73] *Ibid* [65].

[74] *Ibid* [80].

Questions remain about the proper approach that courts should take to establish a policy's unlawfulness. I will turn to these questions later. Nevertheless, the important point here is that it is well-established that policies authorising unlawful conduct are unlawful.

2.2 Questions in established doctrines

Thus far, I have identified four established doctrines in the law on policies: the duty to comply, the non-fettering rule, the court's authority to interpret policies and the rule against policies authorising unlawful conduct. While the existence of these doctrines is well-established, this does not mean that all of their aspects are entirely clear. There are still questions that remain in relation to each doctrine.

In this section, I will raise the various doctrinal, taxonomical and normative questions that remain in these established doctrines. As I explained at the beginning of this chapter, these questions have not yet been resolved by authority or have continued to raise concerns in the literature. To be clear, my aim here is simply to identify what these questions are. An attempt to resolve these questions will come later in the thesis.[75]

2.2.1 Questions about the duty to comply

The well-established duty to comply with policies raises all three types of questions. In this section, I will discuss the various open questions in this area of law.

[75] Chapters 5, 6 and 7 will be devoted to resolving these questions.

2.2.1.1 In what circumstances does the duty to comply arise?

A fundamental doctrinal question remains unsettled concerning the duty to comply: in what circumstances does the duty arise in the first place?

This question was raised by the Court of Appeal decision in *R (Good Law Project) v Prime Minister*.[76] The court had to address the question of whether public bodies could be made to comply with internal policies on the use and preservation of electronic communications. The applicant argued that there was ample authority holding that public bodies had a duty to comply with their policies unless there was good reason not to do so. The court, however, rejected this argument and found that the duty did not arise here. This was because the policies were 'directed to ministers and civil servants, and not to the public'.[77] It was not the court's role to 'attempt to micro-manage how the executive conducts its affairs in the selection and preservation of documents, or in the use of communications technology by ministers and officials.'[78] The court further held that 'if policies such as those at issue in this appeal were regarded as legally enforceable, public authorities would be deterred from adopting them.'[79]

In what circumstances does a duty to comply arise, then? The court suggested that 'the types of policy that are likely to attract a duty to comply are those that are the epitome of Government policy', referring to the Supreme Court decision in *R (Friends of the Earth)*

[76] *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580.

[77] *Ibid* [59].

[78] *Ibid* [60].

[79] *Ibid* [64].

v Heathrow Airport Ltd for the definition of such policies.[80] While *Friends of the Earth* did not concern the duty to comply, the court in that case described 'the epitome of "Government policy"' as 'a formal written statement of established policy', such as the National Planning Policy Framework or the Aviation Policy Framework.[81] A policy also had to be 'clear, unambiguous and devoid of relevant qualification.'[82]

The court in *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* addressed the same issue.[83] The Secretary of State sought to claw back funds that had been awarded to a developer for a project to build offices. The developer eventually sought to convert its project to a housing development instead. The Secretary of State exercised their discretionary power under the grant funding agreements to claw back the funds. The developer argued that the clawback was unlawful. One of its arguments was that the clawback amounted to a departure from the department's own policy.[84] Among other things, the clawback decision focused on ineligibility under the grant programme eligibility rules, even though the policy documents did not refer to this factor. Also, the clawback decision did not follow the policy documents' recommendation that assets could be disposed of after five years without a clawback of funds. The developer argued accordingly that there had been a departure from the department's own policies without good reason, and that this made the clawback unlawful.

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[80] *Ibid* [65].

[81] *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52 [105]-[106].

[82] *Ibid* [106].

[83] *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2937 (Admin).

[84] *Ibid* [73].

The court rejected this argument. It understood the key issue to be whether the duty to comply had arisen. Drawing from *Good Law Project*, the court thought that this duty would arise only for policies with two features: '(i) an identifiable external decision-making function; (ii) a document which, viewed objectively, serves as a prescriptive instrument for that function.'[85] The first feature referred to 'an identifiable outward-looking function of making decisions about affected persons.' The second feature referred to 'a set of criteria or considerations whose purpose is to promote consistency and foreseeability in the discharge of the decision-making function.'[86] Considering the policy in this case, the court concluded that there was an identifiable external decision-making function, but that it was not prescriptive in nature. This was because the relevant documents captured a policy decision, rather than the adoption of a prescriptive instrument.[87] This decision was an important one that would be relevant to a decision taken subsequently. It was a relevant consideration that the department would have to take into account. But it did not attract the duty to comply since it was not a prescriptive instrument.

These recent cases illustrate that it remains unclear what the circumstances are for the duty to comply to arise. They show that courts have used two kinds of explanations for why a duty to comply did not arise. The first is that there was no policy. The second is that there was a policy, but it was not one to which the duty to comply attached. The conditions set out in *Riverside Park Ltd* point towards the first kind of explanation. If a purported policy is not a prescriptive instrument, it is not a policy at all—it could be better characterised as a decision, for example, as the court concluded regarding the document in

[85] *Ibid* [76].

[86] *Ibid* [76].

[87] *Ibid* [77]-[79].

Riverside Park Ltd. *Good Law Project*, on the other hand, points towards the second kind of explanation: even if something can be characterised as a policy, certain conditions need to be met for a duty to comply to arise. As the Court of Appeal held, the duty to comply would apply only for policies which are 'a formal written statement of established policy'.

Accordingly, the criteria for the duty to comply to attach raises several open questions. If the duty to comply does not arise because there is no policy, what are the conditions that make something a policy? And if additional conditions need to be met for policies to give rise to a duty to comply, what are they? For example, *Good Law Project* suggests that internal policies do not give rise to a duty to comply. But is this correct?

These questions have not yet been addressed in detail by the Supreme Court. Academic attention to them has also been limited. Mills has observed that the law on when the duty to comply arises is ambiguous, and that the meaning of a 'policy' and how a policy should be distinguished from mere guidance remains an open question.[88] Bell and Fisher have noted that the definition of policy in *Friends of the Earth*, which formed the basis of the decision in *Good Law Project*, is problematically narrow.[89] It means that the policies which a public body has to take into account will be limited to 'a subset of documents and statements, even if major plans for reform are well underfoot elsewhere in government.'[90] This reduces the degree to which government policies have to be integrated across different ministries and levels of government.

[88] Alistair Mills, 'The interpretation of policies in administrative law: the significance of audience' (2024) 44(2) LS 295.

[89] Joanna Bell and Elizabeth Fisher, 'The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication' (2023) 86(1) MLR 226.

[90] *Ibid* 233.

2.2.1.2 When is it unlawful to depart from a policy?

It is well-established that public bodies have a duty to comply with their policies. But it is less clear how the court should assess whether a failure to comply is unlawful.

The key question that has to be addressed is what the test for unlawfulness is. One obvious possibility is to use the classic standard of unreasonableness. On this approach, the reasons for departure would be evaluated on the basis of unreasonableness. This proposal finds some support in the Court of Appeal decision of *R (Campaign Against Arms Trade) v Secretary of State for International Trade.*[91] In this case, the court found that the Secretary's departure from policy was a reason to hold that the Secretary had acted in an unreasonable manner.[92]

If this approach is adopted, this would mean that the law on complying with a policy is no different from the ordinary standard of unreasonableness that applies to any other decision of a public body. The context of a failure to comply with a policy would not affect the legal analysis. The court would ultimately have to determine if the public body's decision is unreasonable.

Yet, the courts have suggested other formulations of the test for unlawfulness. Most notably, in *Mandalia*, the Supreme Court adopted a 'good reason' test: a public body has a duty to comply with its policy unless there is good reason to the contrary. It is not clear,

[91] *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] EWCA Civ 1020.

[92] *Ibid* [138]-[139].

however, what exactly this 'good reason' test entails. One possibility is that 'good reasons' have to be assessed on the basis of proportionality. This was suggested by Laws LJ's decision in *Nadarajah*, described earlier. This would require the court to consider whether a departure from a policy is a proportionate response, having in mind the aim the public body is seeking to pursue.[93]

But there has not yet been an authoritative pronouncement on what exactly the test requires. The Court of Appeal in the recent decision of *R (Duke of Sussex) v Secretary of State for the Home Department* attempted to address the question of what the 'good reason' test means.[94] This case concerned a decision of the Executive Committee for the Protection of Royalty and Public Figures (RAVEC). RAVEC was responsible for making decisions about which individuals should receive vulnerability mitigation and protection measures at public expense. The individuals concerned were generally members of the Royal Family or public figures. In this case, RAVEC had made a decision to withdraw protection from the applicant, the Duke of Sussex. The question was whether it had unlawfully departed from its policy in doing so. This question arose because the policy required RAVEC to conduct and evaluate a risk analysis in making such decisions. RAVEC did not do so.

The Court of Appeal observed that the key legal question was whether RAVEC had a good reason to depart from its policy.[95] It held that there were two factors that had to be considered in answering this question. The first was the nature of the policy. The court

[93] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68].

[94] *R (Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548; [2025] 4 WLR 66.

[95] *Ibid* [51].

noted that 'there is a spectrum of different kinds of policy', ranging from formal policies made after public consultation to internal-facing guidance. Raising the policy at hand as an example, the court observed that RAVEC's policy was not an informal guidance, nor was it a formal policy published after public consultation. Yet, it concerned 'an area of national importance that was peculiarly within the expertise of law enforcement agencies, RAVEC and the Royal Household itself.'[96] Accordingly, while it was not a public-facing formal policy, the subject matter did raise an issue of 'Government and democratic accountability.'[97]

The second factor was 'the deference that the court ought to pay to the decision maker in deciding whether it had a good reason to depart from its policy.'[98] Where a decision was made by 'a specialist experienced decision-maker' like RAVEC, the court should attach more weight to it.[99] The Court of Appeal clarified that the deference it should give to decision-makers existed on a spectrum, depending on the subject matter and the expertise of the government agencies at hand.[100] This meant that it would be incorrect to adopt a blanket standard of *Wednesbury* unreasonableness for the purposes of this 'good reason' standard.[101]

[96] *Ibid* [65].

[97] *Ibid* [65].

[98] *Ibid* [66].

[99] *Ibid*.

[100] *Ibid*.

[101] *Ibid* [67].

Applying these factors to the case at hand, the court concluded that the nature of the policy was 'politically highly sensitive'—'[w]here questions of national or Royal security are concerned, the court must inevitably be astute to respect the experts in these fields.'[102] Turning to the second factor, this meant that the court had to 'respect the expertise of decision makers in this space, and must be careful not to usurp their functions.'[103] With the standard of review framed in this deferential manner, the Court of Appeal concluded that RAVEC did have good reason to depart from its policy. Since the claimant resided outside of the UK and returned for occasional visits, it was reasonable for RAVEC to conclude that it should establish bespoke arrangements each time the applicant returned to the UK. Performing a risk analysis would not have changed the key features of this reasoning.[104]

What does the court's reasoning in *Duke of Sussex* tell us about the 'good reason' test? One possible takeaway is that it suggests that the test is similar in content to the unreasonableness ground of review. Indeed, it might be observed that the court's reasoning about the appropriate standard of review is analogous to how courts reason on the basis of the unreasonableness test. In applying unreasonableness as a ground of review, courts consider questions such as the nature of the subject matter to determine the level of scrutiny that they should adopt.

If this is correct, this raises further open questions. Did *Duke of Sussex* provide an exhaustive list of the factors that courts have to take into account in deciding whether a

[102] *Ibid* [68].

[103] *Ibid* [68].

[104] *Ibid* [69]-[75].

public body has good reasons for departing from its policy? If not, what are they? Also, is there a difference then between the 'good reason' test and the test of unreasonableness? I think that even if *Duke of Sussex* stands for the claim that the relevant standard for the 'good reason' test is unreasonableness, there would still be a difference between the two. The difference could lie in the burden of proof. Under the 'good reason' test, once an applicant proves that a public body has departed from its policy, the public body would bear the burden of proving that it had good reasons for doing so. Under unreasonableness, the applicant would bear the burden of proving that the decision to depart was unreasonable. In any case, the key point for present purposes is that while the existence of the duty to comply is well-established, it remains uncertain what exactly this duty requires in law.

2.2.1.3 Classifying the duty to comply

I turn now to a taxonomical question raised by the duty to comply. While it is clear that the law imposes a duty on public bodies to comply with their policies, there remains uncertainty over how it should be classified in law. As is clear from the discussion earlier, there are two main candidates. The first is to place the duty under the legitimate expectations doctrine. The second is to see it as based on an independent principle of consistency. As was noted earlier, the Supreme Court in *Mandalia* thought that this was the more appropriate basis for the duty to comply with policies.[105]

The candidate classifications are quite different. They rest on different rationales. The legitimate expectations doctrine, with its origins in upholding promises, places an

[105] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

emphasis on protecting the interests of individuals. The elements of the doctrine reflect this rationale. For an expectation to be legitimate, the courts have taken into account whether an individual has relied on a promise. The representation to the individual also must be clear and unequivocal. These elements suggest that the legitimate expectations doctrine is about preventing individuals from being treated unfairly. In contrast, the principle of consistency is about good administration. On this basis, a public body's duty to comply with its policy would not depend on whether the policy had led to an individual having a legitimate expectation. The duty to comply rests in a public body's duty to act consistently. This arises whether or not an individual even knew about the policy.

The issue of the proper basis of the duty to comply has been the subject of considerable academic discussion.[106] Many have argued that legitimate expectations should not be the doctrinal basis for a duty to comply. Clayton, for example, argued that the duty to comply with policies squares uneasily with the legitimate expectations doctrine for various reasons.[107] For one, it is not clear why reliance on a policy should be a condition for a duty to comply. After all, one might think that public bodies should adhere to their own policies, regardless of an individual's state of mind. It would also be odd to treat people differently depending on their knowledge of a public body's policies. Clayton thought that removing policies from the scope of the legitimate expectations doctrine would contribute to coherence within administrative law, since this would mark a return to the orthodox principle that policy decisions should only be reviewable on *Wednesbury* grounds.[108]

[106] See, for example, Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) CLJ 93; Mark Elliott, 'Legitimate Expectations: Procedure, Substance, Policy And Proportionality' (2006) 65(2) CLJ 254; Stark (n 47).

[107] Clayton (n 106) 102-103.

[108] *Ibid* 103.

Accordingly, his proposal was that the duty to comply is better grounded on the principle of consistency, with inconsistency being treated as a facet of *Wednesbury* unreasonableness.[109]

Similarly, Elliott argued that the duty to comply ought not to be assessed under the legitimate expectations doctrine.[110] He acknowledged that there are similarities in normative basis between the legitimate expectations doctrine and the duty to comply, such as transparency and certainty. Nevertheless, he, like Clayton, thought that a defect of the legitimate expectations doctrine as a foundation for the duty to comply was that it would mean that the duty would not apply to individuals ignorant of the relevant policy. Accordingly, Elliott argued that the duty to comply ought to have a different doctrinal foundation. He suggested that the basis for this duty should be the principle of ensuring 'consistent and equal treatment of like cases', rather than protecting expectations.[111]

Stark argued, for the same reasons as Clayton and Elliott, that legitimate expectations ought not to be the basis of the duty to comply with policies. She agreed with the Supreme Court decision in *Mandalia*. Contrary to Clayton, however, she argued that *Wednesbury* unreasonableness was insufficiently specific to get at the true norms underlying the duty to comply. She thought that the crux of the duty was that 'where a policy has been adopted, applications of it must not be arbitrary.'[112] Public bodies should be required to apply their policies unless there was good reason to depart from them. In her

[109] *Ibid* 104.

[110] Elliott (n 106).

[111] *Ibid* 254-255.

[112] Stark (n 47).

view, this norm is better conveyed through a specific doctrine of consistency, as compared to a general requirement to act rationally under *Wednesbury* unreasonableness.

2.2.1.4 Should change of policies give rise to legal duties?

The next question I will discuss is a normative one. As I described earlier, where a public body has changed its policy, the courts have recognised that it can be compelled to apply its old policy to an applicant where applying its new policy would result in conspicuous unfairness. But should such a duty arise at all?

Scholars have suggested that the legitimate expectations doctrine should not apply to cases involving a change of policy. Clayton, for example, drew a distinction between departure from policy and change of policy cases. He noted that in change of policy cases, it is possible to argue that the application of the legitimate expectations doctrine is constitutionally illegitimate.[113] This is because it would cause judges to overstep their limits and contravene the principle of separation of powers. When applied in this context, the legitimate expectations doctrine would go beyond *Wednesbury* unreasonableness and would unduly restrict the ability of public bodies to change their policies. Departure from policy cases would not raise this concern.

Ahmed and Perry have also suggested that there are serious issues with applying the legitimate expectations doctrine to change of policy cases.[114] They pointed out that

[113] Clayton (n 106) 104.

[114] Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61.

commentators such as Wade and Forsyth, as well as judges in cases like *Hughes v Department of Health and Social Security* and *In re Findlay*, were united in taking the position that the only legitimate expectation that an individual can have is that the policies in force at the relevant time would be applied to him.[115] Any expectation generated by a previous policy would be destroyed once a new policy is in force. This supported their argument for a rule-based account of the legitimate expectations doctrine, since their account would exclude the change of policy cases from the doctrine's scope.

Accordingly, it remains questionable whether public bodies should be subject to legal duties in situations where they have changed their policies.

2.2.1.5 Why must policies be complied with?

The final question on the duty to comply is another normative one. It concerns why policies are capable of generating a legal duty to comply in the first place. The duty to comply demands that public bodies have to act consistently with their policies. There is a parallel then between the duty of a public body to follow the law and the duty to comply with policies. Just as an applicant for judicial review is able to challenge a public body's decision for failure to follow the law, an applicant can also challenge a decision for failure to comply with a policy.

This parallel is not a complete one. After all, the duty to comply with policies is subject to a 'good reason' test, while the duty to follow the law is not. But the reason for a

[115] *Hughes v Department of Health and Social Security* [1985] AC 776; *In re Findlay* [1985] AC 318 (HL); Ahmed and Perry (n 114) 82-83.

duty to comply with policies to arise at all is not obvious. Policies are not legal rules. Yet, the duty to comply means that a policy has an effect approaching what we would ordinarily ascribe to legal rules. Why then do public bodies have to comply with their policies? As McHarg asked, '[w]hat 'principle of good administration' requires that administrators follow their own rules'?[116] This is an important issue to address. Resolving this normative question will put us in a better position to give guidance on the areas of doctrinal uncertainty in the law.

Sedley, writing extra-judicially, has engaged with this issue. He observed that one possible rationale for the duty to comply is that it is related to a public body's duty not to act irrationally. One might think that 'it is irrational to adopt a policy and then act as if it did not exist'.[117] He thought, however, that a more accurate explanation of the duty is that it is unfair for people to be differentially treated for no good reason.[118] Applying a policy to some people and not to others for no good reason is unjust. It is also bad administration for officials to treat identical cases differently. Sedley thought that this explained the courts' imposition of a duty to comply on public bodies. He observed that executive discretion 'should be accompanied not only by the use of policy to achieve consistency in its exercise but by appropriate forms of judicial oversight.'[119]

[116] McHarg (n 31).

[117] Sedley (n 47) 258-259.

[118] *Ibid*.

[119] *Ibid* 259.

Dotan offered two rationales for the duty to comply.[120] The first is to protect the interests of persons who have relied on policies. People often rely on policies to make decisions and form plans. When public bodies depart from their policies, the expectations of these people are frustrated and they may suffer losses as a result. The second rationale is equality. Similar to Sedley, Dotan thought that policies help to ensure consistency of treatment and that like cases are treated alike. For policies to be effective in furthering the value of equality, it is necessary for the law to hold public bodies to their policies. Dotan argued that the rationales of reliance and equality both fit and justify the law and therefore serve as a successful interpretive theory.

In a similar vein, Varuhas and Elliott have argued that the duty to comply is justified by the rule of law values of certainty and consistency.[121] They thought that such values are best expressed through a principle of consistency, rather than the legitimate expectations doctrine. Forsyth shared a similar view.[122] As described above, the idea that consistency is the basis of the duty to comply has had some purchase in the courts. The Supreme Court in *Mandalia* relied on this idea in its reasoning about the duty. This appears presently to be the leading answer to the question of why public bodies have to comply with their policies.

2.2.2 Questions about the non-fettering rule

[120] Yoav Dotan, 'Why Administrators should be Bound by their Policies' (1997) 17(1) OJLS 23.

[121] Mark Elliott and Jason Varuhas, *Administrative Law: Texts and Materials* (5th edn, OUP 2017) 184-185; Elliott (n 106) 254-255; Jason NE Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 29-30.

[122] Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 JR 429, 433.

The non-fettering rule, like the duty to comply, also raises important doctrinal and normative questions.

2.2.2.1 The requirements of the rule

A fundamental doctrinal ambiguity in the non-fettering rule is about what exactly it requires.[123] If the rule requires public bodies to treat policies flexibly, what exactly does flexibility mean? For example, as Perry argued, the rule could be understood as requiring a public body to accord a fair hearing to an affected person.[124] Another issue is whether there are exceptions to the rule, and if so, when such exceptions arise. In other words, can public bodies be allowed under certain circumstances to apply their policies rigidly? Despite their practical importance, the answers to these questions remain unclear.[125]

Closely related to the ambiguity about the non-fettering rule's content is a further ambiguity about the relationship between this rule and the duty to comply. The non-fettering rule requires policies to be treated flexibly. At the same time, there are limits to this flexibility. Too much flexibility can also be unlawful. After all, the duty to comply requires public bodies to comply with their policies. This means that both legal rules point in opposite directions. What then is the relationship between them? Are the requirements of both rules contradictory, or is there a way to reconcile them? This issue has been the subject of academic attention but still remains unresolved.[126]

[123] Chris Hilson, 'Judicial review, policies and the fettering of discretion' [2002] PL 111.

[124] Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) CLJ 375.

[125] *Ibid* 398.

[126] See, for example, Clayton (n 106); Perry (n 124).

2.2.2.2 Why must policies be applied flexibly?

I turn next to the normative questions raised by the non-fettering rule. The first is about its scope. The Supreme Court decision in *Sandiford* has addressed this issue.[127] As described earlier, the court decided that the non-fettering rule was not applicable to the government's policy at hand. This was because the rule was justified on the ground of Parliament's intent. Accordingly, it did not apply to a policy which did not govern statutory power, such as the policy at hand. Yet, it is questionable whether the rule's scope should be limited in such a manner. One may observe that it is odd to treat a distinction between statutory and non-statutory powers as salient to the scope of the rule. Indeed, whether a policy governs statutory or non-statutory power, it has the same practical effect in guiding decisions. This will be discussed in Chapter 3.

In any case, the important point for now is that the court's reasoning in *Sandiford* about the scope of the rule was closely related to what it understood to be the normative justification of the rule. If one takes a different view of how the rule is justified, one will have a correspondingly different view of the rule's scope. Accordingly, the normative question about the proper scope of the rule is linked to an even deeper one that remains unsettled: why must policies be applied flexibly?

Perry and McHarg have both noted that the basis for this rule remains obscure.[128] There are a few possible candidates. The first is the intention of Parliament. The basic idea

[127] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

[128] Perry (n 124); McHarg (n 31).

is that if Parliament has conferred a discretionary power on a public body, it must have contemplated that it should be exercised in different ways in different circumstances. Adopting a rigid policy or applying a policy rigidly would therefore not be in line with Parliament's intention.

The Supreme Court in *Sandiford* lent support to Parliament's intention as the basis of the non-fettering rule.[129] It considered that the non-fettering rule rested on the necessary implication that 'the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances.'[130] Given then that such an implication does not extend to prerogative powers, the court held that policies adopted under prerogative powers have to be treated differently from those adopted under statutory powers—'[t]here is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power.'[131]

But this explanation for the non-fettering rule has been challenged. Perry argued that it relies on presumed legislative intent. If so, then the reasons for presuming this intent would apply equally to the non-statutory context.[132] This means that it would be odd to limit the rule only to the statutory context. McHarg argued that this basis for the non-

[129] See also *R (BSC) v Secretary of State for the Home Department* [2026] EWHC 705 (Admin), where the court developed a test of whether Parliament made it impermissible for a public body to surrender a power. This is a doctrinal expression of the justification from Parliament's intent.

[130] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 [61].

[131] *Ibid* [62].

[132] Perry (n 124) 386-387.

fettering rule makes an unjustified assumption about Parliament's intent.[133] Parliament may not necessarily have intended that a discretionary power has to be exercised differently in different circumstances. It is at least equally possible that Parliament intended to grant a public body the discretion to make rules to guide its decision-making. Both Perry's and McHarg's arguments illustrate that a key problem with the explanation from legislative intent is that it involves an element of artificiality.

Another candidate for the rule's basis is error-avoidance. This is based on the idea that the adoption of rigid rules leads to errors in decision-making, since a decision-maker would be unable to take into account relevant information in deciding specific cases. But Perry has convincingly argued that there are problems with this idea. In brief, he argued that there are four problems with this rationale.[134] First, a rigid policy can reduce errors more effectively than a flexible one. Second, there are important advantages to having rigid policies, such as efficiency or predictability, which means that they are not necessarily always worse than flexible ones. Third, flexible policies are not necessarily always superior to rigid policies. Fourth, even if they are, this does not mean that rigid policies should be banned. Decision-makers can be allowed to decide when rigidity is justifiable.

A third possible explanation is the fair hearing rule. Perry argued that the reason why policies must be flexible is that a rigid policy would prevent an applicant from having a fair hearing.[135] He pointed out that authoritative cases on the non-fettering rule framed the rule in terms that are related to an applicant's ability to have a fair hearing. For example,

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[133] McHarg (n 31) 293.

[134] Perry (n 124) 388-391.

[135] *Ibid* 393.

in *British Oxygen*, Lord Reid framed the rule in terms of the willingness of a public body to listen to an affected person.[136] A consequence of accepting this as the rationale for the non-fettering rule is that it would apply to any policy where the fair hearing rule is relevant, whether or not the policy governs statutory powers.

However, McHarg argued that a connection between the fair hearing and non-fettering rules is not supported by authority.[137] She also argued that understanding the non-fettering rule as Perry did would restrict the rule's application to contexts where fair hearings are required. She thought that the most fundamental problem with Perry's argument was that having a fair hearing does not entail the ability to also challenge the rules leading to a decision. The fair hearing rule extends only to how the rules have applied. Ultimately, McHarg argued that the non-fettering rule should be abolished. She thought that there was no reason to have a presumption in favour of discretion.[138] Accordingly, the explanation for the non-fettering rule remains debatable.

2.2.3 Questions about authorising unlawful conduct

The law on policies which authorise unlawful conduct is relatively clear, as a matter of doctrine. Yet, normative questions still remain in this area of law.

2.2.3.1 Which approach should govern?

[136] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL), 625.

[137] McHarg (n 31).

[138] *Ibid* 295-296.

The Supreme Court in *A* has laid down the governing approach to evaluate whether a policy is unlawful for authorising unlawful conduct. But should *A* be the governing approach? I described earlier two possible tests in the law: the *UNISON* and *A* approaches. While authority weighs in favour of *A*, whether *A* should be the governing approach is a question still worth discussing.

Both *UNISON* and *A* prescribe very different approaches to evaluating the lawfulness of policies. The *UNISON* approach would require close attention to how a policy would actually function, since the relevant inquiry is whether it leads to a real risk of unlawful decisions. This means that courts would have to pay attention to evidence about the likely effects of a policy. In contrast, the *A* approach would not require such analysis. The *A* approach merely requires a court to determine if a policy contains a 'normative statement' that is contrary to what the law requires. This test can be applied by reference to the terms of a policy alone.

The Supreme Court in *A* suggested that its approach was to be preferred over the one in *UNISON*. Its reasons for thinking so were already described earlier. But these reasons are open to criticism. For example, it is not entirely clear that the approach in *UNISON* was intended to apply only where the constitutional principle of access to justice is engaged. The *UNISON* approach seems generally applicable to any policy, not merely those which affect access to justice.

In addition, the *UNISON* approach could be said to be more grounded in the reality of administration. It is arguably unrealistic to be unconcerned about a policy which may not contain a normative statement contrary to the law but which will frequently result in

unlawful outcomes when applied. Suppose that the law empowers an agency to grant visas for the purpose of facilitating skilled labour to enter the UK. The agency adopts a policy of allowing visa applicants to score their own expertise using a defined set of criteria. Applicants who self-declare a score of a minimum number of points will be granted visas. This policy does not contain a normative statement contrary to the law, since it does direct officers to grant visas to those who are considered to be skilled labour. But the policy, when applied, is very likely to result in the grant of visas to those who do not actually count as skilled labour. The *UNISON* approach is better able to address such policies, as compared to the *A* approach.

Indeed, it might be observed that the *A* approach is very deferential. The restrictive framing of the test was justified on a variety of grounds in *A*: the test was necessarily narrow because there was often no public law obligation to promulgate policies; a more demanding test would dissuade executive authorities from promulgating policies, to the detriment of good administration; and an overly-strict test would entangle the courts too deeply in the work of policy-drafting.[139] But at the same time, as described earlier, the courts have affirmed that they can review interpretations of policies for correctness. There seems to be a tension between the approach in *A* and the courts' willingness to intervene in other parts of the law on policies. It is therefore arguable that revisiting the approach in *A* may help to achieve greater coherence in the law on policies.

2.2.3.2 Why should courts review the content of a policy for unlawfulness?

[139] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 [39]-[40].

A second normative question in this area of law goes to the foundations of the doctrine. It is well-established that policies are unlawful if they authorise unlawful conduct. This ground of review is directed at a policy's content. Yet, why should courts be concerned about the content of policies? If policies are not law, they do not directly affect any legal rights and obligations. Such rights and obligations are affected only when a decision is made under a policy. If so, why should courts be concerned about policies, instead of simply reviewing unlawful decisions?

In *Gillick*, one of the key authorities for this ground of review, the House of Lords agreed that the courts could review the content of policies. But at the same time, the court was careful to note that such review should be exercised very carefully and limited only to clear errors.[140] It is clear that the House of Lords was aware that allowing review of the content of policies was an extension of its jurisdiction. Yet, it remains uncertain what the basis of this extension was. This uncertainty has resulted in inconsistent judicial practice. As McHarg observed, there have been 'occasions on which courts have declined to review non-legally binding rules or policies'.[141]

2.2.4 Questions about reviewing the interpretation of policies

To recall, it is well-established that courts have the authority to interpret policies. The courts have drawn a distinction between interpretation and application. Interpretation is reviewed on the basis of correctness, while application rests within the judgment of public bodies and is reviewable only on the basis of reasonableness. Broad policies leave more

[140] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 192-194.

[141] McHarg (n 31) 284.

room for judgment by public bodies. These rules are widely accepted as the foundation for the law on interpretation of policies. Nevertheless, both doctrinal and normative questions remain in this area of law.

2.2.4.1 When is correctness review of interpretations available?

The first doctrinal question is when exactly correctness review is available. The law on this point is unclear. While the courts have relied on the distinction between interpretation and application, it is not straightforward to apply. Suppose that a policy allows a public body to approve planning applications if they meet the requirement of 'projected commercial viability.' The public body subsequently rejects an application on the basis that it is not commercially viable. The applicant applies for judicial review of this decision on the basis that the project is commercially viable and that the public body had therefore erred in law. Is this issue about how 'projected commercial viability' should be interpreted, or is it about the public body's application of the policy? Either characterisation seems plausible. Yet, the legal consequences of either characterisation are very different.

Mills has argued that relying on a distinction between interpretation and application to decide when correctness review applies is unsatisfactory. In his view, the distinction is 'not illuminating'.[142] This is because a reference to the distinction often reflects 'a conclusion that the court has reached as to whether a question is one which it should answer.'[143] But it does little work to explain how that conclusion is reached. Mills preferred

[142] Mills (n 58) 433.

[143] *Ibid* 433.

an approach that would more directly engage with the kinds of questions which courts should be answering.[144]

Another distinction that courts have relied on to determine whether they should engage in correctness review is between broad and specific policies. The interpretation of 'specific' policy provisions would be susceptible to correctness review, while the interpretation of 'broad' policy provisions remains within the judgment of the authority and can only be reviewed on the ground of unreasonableness.[145] As described earlier, Lord Carnwath in *Hopkins Homes* thought that the policy in *Tesco Stores Ltd* was a specific one that was suitable for correctness analysis.[146] In contrast, the policy in *Samuel Smith* was a good example of a broad policy.[147] Accordingly, the interpretation of the policy in *Tesco Stores Ltd* was subject to correctness review by the courts, while the policy in *Samuel Smith* was subject only to reasonableness review in view of its broader nature.[148]

But relying on this distinction as a way of determining the proper approach to interpreting policies is also questionable. As Ruiz-Tagle pointed out, the courts have not yet specified how exactly one ought to distinguish between broad and specific policies.[149] Mills noted that such a distinction is a 'doubtful' one, pointing out that the specificity of a

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[144] *Ibid*.

[145] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37; *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; see also Samuel Ruiz-Tagle, 'Samuel Smith and Judicial Review of Policy Interpretation: A Middle Way in the Law and Policy Divide' (2020) 32 JEL 577; McHarg (n 31).

[146] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 [24].

[147] *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 [22].

[148] Ruiz-Tagle (n 145) 582-583.

[149] *Ibid*.

policy and its susceptibility to legal interpretation is likely instead to be a matter of degree.[150] Accordingly, while the precision of a policy has been considered to be a means by which policies can be distinguished, whether such a distinction ought to perform a significant role in legal analysis remains questionable.

2.2.4.2 What makes an interpretation correct?

A second doctrinal question in this area of law is as follows: if the courts can perform correctness review of policy interpretations, what makes an interpretation correct? The law on this issue is also unclear. The courts have affirmed two general principles. First, policies should not be interpreted like contracts or statutes—Mills describes this as the 'negative instruction'.[151] Second, policies should not be interpreted in an over-legalistic manner.[152]

As Mills has observed, these two principles do not offer much guidance.[153] They tell us little about how courts should determine whether an interpretation is correct. For instance, is correctness to be determined by reference to the meaning of a policy at the time of its drafting, or is meaning capable of evolving over time? In the context of statutory interpretation, courts have accepted that the meaning of statutes can evolve over time. This is because the durability of legislation means that the situations to which it applies can

[150] Mills (n 88).

[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid*.

change over time.[154] It is unclear whether this principle should apply generally to all policies, however.[155] After all, some policies are more enduring than others.

Also, does the correctness of an interpretation depend on the intention of the policy drafter? The courts have at times referred to the policy drafter's intention at the time of drafting to determine whether an interpretation is correct.[156] In other cases, courts have suggested that intention is relevant but has to be determined objectively by looking at the language of a policy.[157] If a policy is understood to be the expressed intention of how a decision-maker will make decisions in the future, a recourse to what the policy drafter actually intended would make sense. On the other hand, if a policy plays a guiding function and is applied by people who may not have drafted the policy, an objective understanding of intention would be more justifiable. As Mills has noted, 'if the true legal meaning of a policy is dependent on information known only to the author of it, then it would be impossible for the policy to guide other readers of it.'[158]

Despite the practical importance of understanding how exactly the correctness of a policy interpretation will be determined, this issue has received little attention. Accordingly, Mills' contribution on the matter was a valuable one. He argued that the best way to interpret a policy is through the 'least expert reader' principle. This means that the meaning of a policy is that which the least expert reader falling within the audience of the policy

[154] *R (ZYN) v Walsall MBC* [2014] EWHC 1918 (Admin).

[155] Mills (n 88) 308.

[156] See, for example, *Re McFarland* [2004] UKHL 17.

[157] See, for example, *Wiltshire Council v Secretary of State for Communities and Local Government* [2020] EWHC 954 (Admin).

[158] Mills (n 88) 297.

would ascribe to it.[159] This principle would require the court to first understand what the 'apparent audience' of a policy is, and then to interpret the policy in a manner by which the 'least expert' member of that audience would understand.[160] Mills argued that such an approach to interpretation gives best effect to the guiding function of policies.[161]

While Mills' proposal is interesting, it may be difficult to apply it as an interpretive principle in practice. His approach depends on being able to identify the specific audience of a policy. Yet, many policies have multiple audiences. Consider, for example, planning policies such as those in the National Planning Policy Framework.[162] On one hand, they are directed at public bodies, given that they shape how government actors make decisions about grants of planning permission. On the other hand, they also surely play a role in guiding the decisions of stakeholders involved in planning and development. How then should one determine the proper audience of these policies? Problems may arise if the audience of a policy is made to perform too much work in legal analysis. Regardless, the important point here is that it remains unclear how exactly the correctness of a policy interpretation should be determined.

2.2.4.3 Why should courts review whether a policy has been correctly interpreted?

[159] *Ibid*.

[160] *Ibid*.

[161] *Ibid*.

[162] See *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 for an example of how planning policy can feature in judicial review.

Thus far, I have raised a set of doctrinal questions that remain in the law on policy interpretation. But there is a deeper normative question that underlies this area of law. Why should courts review interpretations of policies for correctness in the first place?

An example can help to illustrate this issue. In *R v Criminal Injuries Compensation Board, ex p Schofield*,[163] the applicant sought compensation under a scheme administered by the Criminal Injuries Compensation Board. She had suffered personal injuries when she was knocked down during the pursuit of a suspected thief, who was subsequently convicted of shoplifting. She was denied compensation on the ground that she had not been attempting to make an arrest when she suffered her injuries, as was thought to be required by the terms of the scheme. She challenged this decision by way of judicial review.

The court held that the decision had been made pursuant to an error of law and quashed it. This was because the decision to deny compensation was based upon a misinterpretation of the policy document governing the scheme for compensation. While Lord Parker CJ thought that 'it is wrong to approach paragraph 5 as if it was contained in a statute', a plain reading of the policy led to the inevitable conclusion that the applicant was entitled to receive compensation since she had suffered injury directly attributable to an arrest.[164] Accordingly, the decision to deny compensation suffered from an error of law.

But why was an incorrect interpretation of a policy capable of giving rise to an error of law? Bridge J (as he then was), writing in dissent in *Schofield*, thought that it was wrong to treat the policy document as a piece of legislation. He preferred to see the policy

[163] *R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 1 WLR 926.

[164] *Ibid* 929.

document merely as a document setting out 'the broad guidelines of policy', and accordingly was hesitant to conclude that the decision to deny compensation had been based on a misdirection in law.[165]

This case helps to highlight an ambiguity in this area of law. Just as public bodies make errors of law when they incorrectly interpret statutes, the same applies when they incorrectly interpret policies. But why is that? If policies are not law and are adopted in the exercise of a public body's discretion to guide its decision-making, then one might think that an interpretation of its policy should at most give rise to challenge on the ground of unreasonableness. As McHarg observed, if courts are able to review the correctness of policy interpretations, this collapses the distinction between law and policies.[166]

This issue has been debated. For example, Bedford argued that it is odd to review policy interpretations for correctness because policies may not be drafted in a way that lends them well to rigorous legal analysis.[167] He thought that the better view is to review policy interpretations for reasonableness. Lord Carnwath, writing extra-judicially, took a similar position.[168] He argued that it is true that policies should be interpreted objectively and consistently. But in his view, it was not so clear that the courts should assume the responsibility of this task. He characterised *Hopkins Homes* as a good decision because it reduced the courts' role in providing authoritative interpretations of policies. He thought that the speed of policy-making and decision-making suggests that courts may not be best-

[165] *R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 1 WLR 926, 931.

[166] McHarg (n 31) 285.

[167] Michael Bedford, 'Tesco Stores Ltd v Dundee CC: a form of non-statutory fiction' [2017] JPL 914.

[168] Lord Carnwath, 'Planning Policy and the Law' (2023) 35 JEL 133.

placed to perform this role, and that a dedicated tribunal with a mix of legal and policy expertise may be better-placed to perform this role. This suggests that judges should be slow to impose 'correct' authoritative interpretations of policies.

Others have spoken up in favour of courts reviewing policy interpretations for correctness. Mills argued, in response to Bedford, that many policies are drafted carefully and precisely.[169] Also, legislation can be badly drafted too. Yet, such legislation will also be subject to legal analysis. Further, if courts were to review policy interpretations only for reasonableness, this would mean that there would be multiple acceptable interpretations of a policy. Mills argued that this would cause a policy's ability to guide decisions to be weakened, especially in situations where a policy is applied by multiple public bodies.[170] This would have a detrimental effect on consistency and accountability.

Accordingly, while the courts have accepted that they can review policy interpretations for correctness, it remains an open question whether they should do so.

2.3 Less-established doctrines

It is useful to take stock of the discussion thus far. I have described four established rules in the law on policies and raised the doctrinal, taxonomical and normative questions that remain in them. The interpretive theory that this thesis will aim to offer will be based on these established rules and will provide answers to these open questions.

[169] Mills (n 58) 439.

[170] *Ibid* 431.

But for completeness, it is worth noting that the law on policies has also touched upon a range of other issues. While the law on these issues is not established enough to serve as material for the interpretive method, these issues nevertheless are worth discussing. An interpretive theory could have useful contributions to how these areas of law should be developed.

In this section, I will discuss doctrines of the law on policies that can be characterised as less-established. There is usually some authority in favour of them. But they are not yet well-established, in the sense that whether they are features of the law on policies still remains unclear. There is an insufficient body of case law to confirm their existence and clarify their features. There are three doctrines which fall into this category: the duty to adopt a policy, publish a policy, and consult in making a policy.

2.3.1 Duty to adopt a policy

Whether public bodies have a duty to adopt a policy is the first less-established doctrine. There is no general common law duty to adopt a policy. But there is authority from the highest courts suggesting that public bodies can be required to do so in exceptional situations.

The authority in question is the House of Lords decision in *R (Purdy) v Director of Public Prosecutions*.[171] In *Purdy*, the applicant was considering travelling to another country to undergo an assisted suicide. But she was concerned that if her husband helped

[171] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

her with this journey, he might be prosecuted, since the UK criminalised aiding or abetting the suicide of a person. The House of Lords noted that the applicant's right to a private life under Article 8(1) of the ECHR was engaged in this context. A restriction on this right would only be lawful if it was 'in accordance with law'.[172] The word 'law' in this context included the requirements of accessibility and foreseeability. Accessibility meant that an individual must know what acts and omissions would make him criminally liable, and foreseeability meant that a person must be able to foresee the consequences which a given action may entail.[173]

The central question was whether the Code for Crown Prosecutors, which guided prosecutorial decisions, complied with the requirements of accessibility and foreseeability in relation to the offence being contemplated. The House of Lords held that it did not: '… for anyone seeking to identify the factors that are likely to be taken into account in the case of a person with a severe and incurable disability who is likely to need assistance in travelling to a country where assisted suicide is lawful, these developments fall short of what is needed to satisfy the Convention tests of accessibility and foreseeability.'[174] Accordingly, for this special class of cases, the court held that the Director of Public Prosecutions was required to 'promulgate an offence-specific policy identifying the facts and circumstances which he will take into account' in deciding whether to prosecute for an assisted suicide offence.[175]

[172] *Ibid* [40].

[173] *Ibid* [41].

[174] *Ibid* [53].

[175] *Ibid* [54]-[56].

Purdy was a very controversial decision. The House of Lords had previously held that the prosecution had the discretion to provide a statement on prosecutorial policy but did not have a legal duty to do so.[176] Commentators have argued that *Purdy* in substance allows the prosecution to decriminalise an offence that Parliament had instituted.[177] This squares uneasily with the principle of parliamentary sovereignty.[178]

Perhaps as a result of how controversial *Purdy* is, the principle has not yet been developed further.[179] One way to limit the development of *Purdy* would be to confine it to the specific context of Article 8(1) of the ECHR. Indeed, the requirement to promulgate a policy arose specifically from the court's interpretation of 'in accordance with law' in Article 8(2). If so, then *Purdy* would be limited to the ECHR context and would have no further implications for common law administrative law. Yet, as McHarg has observed, the reasoning in *Purdy* is applicable in principle beyond the context of assisted suicide.[180] Accordingly, *Purdy* raises the question of whether English law will develop to impose on public bodies a duty to adopt policies in common law, or whether the duty will be confined to the context where an ECHR right is at issue.

Aside from *Purdy*, there are other possible doctrinal bases for a duty to adopt a policy. Hilson has suggested that a duty to adopt a policy may potentially be grounded in unreasonableness—that is, in certain situations, an authority may be acting unreasonably

[176] *R (Pretty) v DPP* [2001] UKHL 61.

[177] J.R. Spencer, 'Assisted Suicide and the Discretion to Prosecute' (2009) 68(3) CLJ 493.

[178] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016) ch 5.

[179] McHarg (n 31) 289-290.

[180] *Ibid*.

if it does not have a policy.[181] There is some support for this claim. In *R v North West Lancashire Health Authority, ex p A*, the court held that '[t]he 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….'[182]

Another basis for a common law duty to adopt a policy is what the courts have called a duty of prescription. The decision in *R (Northumbrian Water Ltd) v Water Services Regulation Authority* provides an illustration.[183] One of the grounds of challenge related to a public body's duty to have and publish a policy that set out how it proposed to exercise its discretion. Citing Fordham J's decision in *R (ZLL) v Secretary of State for Housing, Communities and Local Government* with approval, the court affirmed that public bodies had a duty at common law to provide prescriptive policy guidance in certain contexts.[184] The court called this the 'duty of prescription' and referred to *Lumba* in support.[185] This duty is closely related to the right to informed representation. Following *ZLL*, the court held that the duty applied 'where there are broad discretionary powers needing a statement of criteria, in order to secure appropriate consistency, to protect against arbitrariness, to allow informed representations and to facilitate informed challenge'.[186] The duty is also

[181] Hilson (n 123).

[182] *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977.

[183] *R (Northumbrian Water Ltd) v Water Services Regulation Authority* [2023] EWHC 2410.

[184] *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin).

[185] *R (Northumbrian Water Ltd) v Water Services Regulation Authority* [2023] EWHC 2410 [93].

[186] *Ibid* [96].

aligned with the decision in *Nzolameso v Westminster City Council*, where the Supreme Court suggested that a public body's obligation to ensure that decisions are 'properly evidenced and properly explained' was a basis for it to have a policy governing how temporary accommodation is procured and allocated to persons.[187] On the facts, however, the court held that the duty of prescription did not apply. This was because the public body's discretion in this case was not unbounded, and the situation at hand was not one where multiple private individuals in similar circumstances were subject to decisions by different caseworkers.[188]

Accordingly, there are several routes by which the law could impose a duty on public bodies to adopt a policy. Fundamental questions about this doctrine remain unsettled—it is not clear whether there is a duty at common law for public bodies to adopt a policy, what the doctrinal basis of this duty is, and whether the law should impose such a duty. There remains room for development in the law.

2.3.2 Duty to publish a policy

As with adopting policies, there is likewise no general common law duty to publish policies. But the courts have appeared increasingly inclined to impose such a duty. A useful starting point is the Supreme Court decision in *Lumba*. Here, the court suggested that public bodies have a duty to publish their policies if doing so is necessary for an individual to be able to make informed and meaningful representations to a decision-maker before a decision is

[187] *Nzolameso v Westminster City Council* [2015] UKSC 22 [38]-[42]; McHarg (n 31) 290.

[188] *R (Northumbrian Water Ltd) v Water Services Regulation Authority* [2023] EWHC 2410 [98].

made.[189] Similarly, in *Nzolameso*, the Supreme Court suggested that it is important for policies to be published in order to ensure that decisions of public bodies are properly evidenced and explained.[190] The duty of prescription in *Northumbrian Water Ltd* would also extend beyond requiring a public body to adopt a policy. The rationale behind the duty of prescription—'to secure appropriate consistency, to protect against arbitrariness, to allow informed representations and to facilitate informed challenge'—would extend to a duty to publish policies.

Accordingly, English law appears to be moving towards recognising a duty to publish policies. At the same time, there remains much room for development in this area of law. One area of uncertainty is about the scope of this doctrine. As Elliott and Varuhas have argued, the duty to publish a policy has thus far been narrowly applied to 'basic aspects of well-being', but the rationale for this duty is in principle capable of more general application.[191] Also, it is thus far still unclear what the doctrinal basis for this duty is. McHarg suggested that one possibility is the non-fettering rule.[192] If the non-fettering rule requires public bodies to hear representations on whether exceptions to a policy should be made, it is necessary for persons to first know what the policy is. Weeks argued that this duty rests on procedural fairness, since affected persons have a right to know the basis on which decisions have been made about them.[193]

[189] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [34]-[38].

[190] *Nzolameso v Westminster City Council* [2015] UKSC 22 [39].

[191] Elliott and Varuhas (n 121).

[192] McHarg (n 31).

[193] Weeks (n 178).

2.3.3 Duty to consult

The final developing area of the law on policies is about the duty to consult in the making of a policy. The starting point is that there is no general duty to consult at common law. In *R (BAPIO Action Ltd) v Secretary of State for the Home Department*, the Court of Appeal was reluctant to impose a general duty to consult for several reasons.[194] For one, the court noted that there were very wide implications of doing so and that introducing such a duty would possibly cause 'a host of litigable issues' to be brought before the court.[195] For example, who is entitled to be consulted, and how should a consultation be conducted to discharge this duty? The Court of Appeal thought that the answers to such questions required a level of specificity which the courts could not furnish without assuming the role of a legislator, and suggested that a general duty of consultation should be imposed by Parliament, not the courts.[196]

But there is authority in support of the proposition that a duty to consult can arise in specific situations. One example is where an affected person has a legitimate expectation of being consulted.[197] The Court of Appeal in *BAPIO Action Ltd* recognised that an established practice, for example, can give rise to a legitimate expectation of being

[194] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139.

[195] *Ibid* [44].

[196] *Ibid* [45].

[197] McHarg (n 31).

consulted before a decision is made.[198] The Supreme Court in *R (Moseley) v Haringey LBC* also confirmed that legitimate expectations is a doctrinal basis for a duty to consult.[199]

What is interesting about the Supreme Court decision in *Moseley* is that it suggested that legitimate expectations is not the only possible doctrinal basis for this duty. The court observed that the common law duty to consult affected persons before taking a decision rested ultimately on 'the duty cast by the common law upon a public authority to act fairly.'[200] It is true that the court thought that the requirements of fairness are 'often illumined by the doctrine of legitimate expectations.'[201] But the reasoning in *Moseley* suggests that it may be possible for a duty to consult to be imposed even if no legitimate expectation has arisen, as long as the interest of fairness requires.

This leaves the door open for development of the law in this area. McHarg has argued that the nature of rule-making can form the normative foundation for a duty to consult before policies are adopted.[202] If we accept that a rationale for rule-making is its ability to take into account more evidence and considerations than if decision-makers were to make individual decisions in each case, then it is arguable that a duty to consult would allow rule-making to better fulfil the function of improving the quality of decisions. As the court in *BAPIO Action Ltd* pointed out, there are legitimate concerns against imposing such

[198] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 [39] and [43].

[199] *R (Moseley) v Haringey LBC* [2014] UKSC 56.

[200] *Ibid*.

[201] *Ibid*.

[202] McHarg (n 31).

a duty. But at the least, as McHarg argued, 'a duty to consult should not be dismissed out of hand.'[203]

2.4 Unestablished areas

In this final section, I will describe areas of the law on policies that can be characterised as unestablished. Similar to the less-established doctrines, these areas of the law lack a sufficient body of case law. But the uncertainty in these areas goes even further. In these areas, there is either no doctrine or there is substantial uncertainty about the doctrines that exist. Accordingly, these areas of law allow for even more room for development.

2.4.1 The law on public guidance

The first of these areas is the law on public guidance. In initial terms, such policies guide the conduct of private persons and do not shape the decisions of public bodies.

I will describe policies in the form of public guidance and discuss the open questions they raise in more detail in Chapter 3. For present purposes, it suffices to mention that while English law accepts that public guidance can be reviewed, the law in this area is very sparse.[204] As Daly has noted, there are few challenges to such guidance.[205] This means that there are major questions that remain unsettled about public guidance. The first is about

[203] *Ibid*.

[204] See, as an example of their reviewability, *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

[205] Stephen Daly, *Tax Authority Advice and the Public* (Bloomsbury Publishing 2020) ch 5.

their reviewability. It is true that English law accepts that they can be reviewed. But it is not immediately clear why and whether they should be reviewable. Public guidance is unlike other kinds of policies which guide the conduct of public bodies. They do not shape decisions of public bodies. So why should they be subject to judicial review at all?

Indeed, while English law has accepted that public guidance can be reviewed, this is not a foregone conclusion. Other common law jurisdictions have taken the position that public guidance is not subject to judicial review. The Singapore High Court decision of *Han Hui Hui v Attorney-General* provides an example.[206] A multi-ministry taskforce had issued guidance to employers with respect to how they should deal with unvaccinated employees who could not be physically present at the workplace under the prevailing Covid-19 restrictions. This guidance did not shape the decisions of public bodies and was directed purely at employers. The Singapore High Court held that this guidance did not have legal effect and was therefore not susceptible to judicial review.[207]

A second issue that remains unsettled about public guidance follows from the first. If public guidance can be reviewed, what are the principles that guide such review? Since they are distinct from other types of policies, many of the usual principles of review otherwise applicable to other policies do not apply to public guidance. For example, since public guidance does not guide the decision-making of public bodies, the duty to comply cannot apply to public guidance.

[206] *Han Hui Hui v Attorney-General* [2022] SGHC 141.

[207] *Ibid* [58]-[59].

Yet, if public guidance is susceptible to judicial review, its adoption and content should be reviewable in principle. Public guidance clearly bears important implications for the rule of law. It is a type of policy that takes the form of general rules directed at guiding the conduct of the public. This means that it bears an important functional similarity to law. This suggests that principles which concern the adoption and content of law could be applicable also to public guidance. McHarg argued that Fuller's principles of the rule of law, such as non-contradiction and constancy, could be drawn upon to structure how public guidance can be reviewed.[208] Similarly, Daly argued that public guidance (which he called soft law) could be evaluated on the basis of rule of law criteria: correctness, clarity, accessibility, scrutiny and reliability.[209]

2.4.2 Responses to unlawful policies

Another undeveloped area of the law on policies is about the responses to unlawful policies. The law is relatively clear on how to respond to unlawful decisions based on policies. The usual judicial review remedies apply easily in this context. For example, a decision which has contravened the non-fettering rule would be quashed through judicial review.

Matters are less clear where a policy itself is unlawful, for example, for authorising unlawful conduct. The decisions in *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* provide a useful illustration of this issue.[210] In these cases, the Civil

[208] McHarg (n 31).

[209] Stephen Daly, 'The Rule of (Soft) Law' (2021) 32(1) King's Law Journal 3.

[210] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWCA Civ 1356; *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWHC 13 (Admin).

Aviation Authority had issued a guidance note directed at travel organisers and agents to explain the type of air packages which travel companies would be required to protect under an Air Travel Organiser's Licence. The Association of British Travel Agents challenged the guidance note on the basis that it had misstated the law.

At first instance, the court found that the guidance note had misstated the law. It thought that the appropriate remedy was to quash the guidance, and that it was in the public interest to do so.[211] On appeal, the Court of Appeal agreed that the guidance note misstated the law. But it thought that the appropriate remedy was not a quashing order. This was because the guidance note contained 'nothing which affects existing or future rights: there is no need for an order that it be quashed'.[212] The court thought that the more appropriate remedy was a declaration directing that the guidance note should be withdrawn.[213]

This case provides a useful illustration of how the law on responses to unlawful policies remains unclear. The basic question of what remedies are possible for unlawful policies remains open. Is a quashing order even possible against a policy? A quashing order negates the legal effect of an exercise of legal powers. But a policy arguably does not have legal effect, as the Court of Appeal in *Association of British Travel Agents* observed. This would mean that a quashing order might not even be a legally possible remedy against an unlawful policy. An alternative remedy would be a declaration. This raises another question: in what terms should such declarations be granted? The Court of Appeal in *Association of*

[211] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWHC 13 (Admin) [87]-[88].

[212] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWCA Civ 1356 [65].

[213] *Ibid* [65].

British Travel Agents granted a declaration which directed that the relevant policy should be withdrawn. The issue is that a declaration like this appears similar in effect to a mandatory order. Should this be the proper remedy for unlawful policies?

The key point to highlight here is that the law on responses to unlawful policies remains ambiguous. Bell has also raised this ambiguity. In her empirical study of administrative law cases, she observed that there was no unified response to unlawful policies. Courts have quashed unlawful policies in some cases and have issued declarations in others.[214] She noted that it is particularly problematic that 'courts commonly make the remedial choice in these cases without offering any explanation of why, for instance, quashing is favoured over a declaration.'[215] In addition to the ambiguity about whether a quashing order or declaration is more appropriate for an unlawful policy, Bell pointed out that another unsettled question is about what happens to other policy provisions which are identical to the unlawful one but which have not yet been challenged. How should public bodies treat such provisions? Also, if a policy provision is unlawful, are all decisions made under the policy also automatically unlawful?[216] While such questions are clearly of practical importance, the law on these issues remains unclear.

2.5 Conclusion

[214] Joanna Bell, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] PL 200, 217-218.

[215] *Ibid*.

[216] *Ibid* 218-219.

In this chapter, I have described the established rules in the law on policies, highlighted the doctrinal, taxonomical and normative questions that remain in these rules, and pointed out areas of the law on policies which are less-established or unestablished.

This chapter provides the foundation for the rest of the thesis in two ways. First, it makes clear that policies have distinctive consequences for how courts approach judicial review. While this body of law does draw from general administrative law rules, administrative law has recognised specific doctrines that apply to policies and their use. This discussion therefore lends support to Fisher's call for deeper academic engagement with the law on policies.[217] More fundamentally, it raises a question: just what is distinctive about policies as compared to other types of government action, such that the law treats policies differently? Chapter 3 will aim to answer this question. It will explain how a policy is a distinctive legal concept, which in turn explains why the law on policies is a distinctive legal category that is worth studying.

Second, this chapter provides a useful starting point in developing an interpretive theory of the law on policies. It has described the law on policies and has identified the open questions that remain. After arriving at a deeper understanding of the law on policies in Chapter 3, the rest of this thesis will turn towards building an interpretive theory to explain the law. I will propose an interpretive theory in Chapter 4 and substantiate it over Chapters 5 to 7. The description of the law in this chapter will serve as the foundation for these chapters. The open questions identified here will also be addressed in Chapters 5 to 7.

[217] Fisher (n 3).

Chapter 3 The features of policies

The previous chapter provided an overview of the legal rules in the law on policies. This chapter will take a further step towards deepening our understanding of the law on policies. It will discuss the law's understanding of what policies are. How are policies a distinct category of government action in judicial review? Specifically, I will be studying the concept of a policy in English common law—that is, the concept that English speakers typically refer to by the word 'policy', but which can be referred to in other ways. My objective is to understand the features of policies that identify them in law as a distinct category of government action. For example, if X is a general guide to conduct that is not law, then it is a policy. Here, the search is for the necessary conditions that allow something to be identified as a policy in law.

A critic may argue that a general account of the features of policies is not necessary in a quest to explain the law. The objection may be framed in this way. The law has regulated a wide range of policies. Each of these policies can serve different functions and concern different subject-matter. In seeking an explanation for the law, the proper inquiry should be to take each policy as it comes, along with its specific context. It is not necessary to first work out what policies are at a more general level.

I will offer two responses. First, it is true that the specific context of each policy does affect how the law applies to it. But this does not mean that it is pointless to seek a general account of the features of policies. It is important to have a general account because the law uses the concept of a policy. As the previous chapter described, the law uses the concept of a policy to help determine the application of certain legal duties relating to the

content and use of policies. This means that a policy is an identifiable concept. When something has been identified as a policy, this triggers the application of these legal duties. It is therefore meaningful to seek an understanding of just what this concept is. This will help us understand the conceptual similarity across all policies which justifies the triggering of certain legal duties despite the variations in types of policies. Second, having a general account of the features of policies is not inconsistent with recognising their diversity. As this chapter will illustrate, a study of the different types of policies and of their legal significance flows naturally from an understanding of the common features that unite them all in the first place.

With all this in mind, the discussion will proceed as follows. I will begin by framing the scope of inquiry. What have courts understood to be policies? Here, I will describe three policies as illustrative examples. Having defined the scope of inquiry, I will identify the general features of a policy. This explains how policies are a distinctive legal concept. Once the unifying features of policies have been identified, I will move to discuss another dimension of policies: their diversity. While all policies necessarily share certain common features, several types of policies can be identified and categorised. After these categories of policies have been explained, I will discuss their legal significance. There are differences in how the legal rules applicable to policies, discussed in the previous chapter, apply to each type of policy. Understanding these differences helps us to achieve a more comprehensive understanding of the law on policies and identify more open questions in the law that have to be answered. In the subsequent chapters, building on this understanding of the law on policies, I will turn to explain it.

3.1 Identifying the scope of inquiry

In this section, I will raise three examples of what the courts refer to as policies. I will then clarify what kind of 'policy' I am not concerned with. This will frame the scope of inquiry for the rest of this chapter.

The policy in *Gillick v West Norfolk and Wisbech Area Health Authority* provides the first example.[1] This case centred around a policy issued by the Department of Health and Social Security to area health authorities. This policy was part of a memorandum of guidance on the provision of contraceptive advice to persons under the age of 16. The relevant part of the policy read as follows:

> 'The department… will proceed from the assumption that it would be most unusual to provide advice about contraception without parental consent.
>
> It is, however, widely accepted that consultations between doctors and patients are confidential; and the department recognises the importance which doctors and patients attach to this principle… To abandon this principle for children under 16 might cause some not to seek professional advice at all. They could then be exposed to the immediate risks of pregnancy and of sexually-transmitted diseases, as well as other long-term physical, psychological and emotional consequences which are equally a threat to stable family life…

[1] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

> The department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor.'[2]

As Lord Fraser noted in *Gillick*, this policy would convey to doctors 'that the decision whether or not to prescribe contraception for a girl under 16 was in the last resort a matter for the clinical judgment of a doctor, even if the girl's parents had not been informed that she had consulted the doctor, and even if they had expressed disapproval of contraception being prescribed for her.'[3] Accordingly, this policy, published by the Department of Health and Social Security, would guide the conduct of the health authorities and doctors to whom it was issued. It therefore could attract legal duties which the courts have imposed on policies. For example, the policy would be unlawful if it provided advice which was 'erroneous in law'.[4]

A second example of the kind of policy that this chapter is concerned with is the set of instructions that the UK government issued to the public during the Covid-19 pandemic. In an attempt to limit the spread of Covid-19, the UK government published general instructions intended to get members of the public to practise social distancing. The following are some examples of the instructions that were published:[5]

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[2] *Ibid* 163-164.

[3] *Ibid* 164.

[4] *Ibid* 193-194.

[5] Tom Hickman, 'The Continuing Misuse of Guidance in Response to the Pandemic' (25 January 2021), LSE COVID-19 Blog: https://blogs.lse.ac.uk/covid19/2021/01/25/the-continuing-misuse-of-guidance-in-response-to-the-pandemic/.

> ‘You can continue to exercise alone, with one other person or with your household or support bubble. This should be limited to once per day, and you should not travel outside your local area.’
>
> ‘When around other people, stay 2 metres apart from anyone not in your household. This includes the person you are exercising with, unless they are from your household – meaning the people you live with – or your support bubble.’

Such instructions are different from the policy in *Gillick*. For one, they are not addressed to public bodies, but instead to the general public. Nevertheless, they are similar in important ways. They attract similar legal duties. For example, the duty which the court imposed on the policy-makers in *Gillick* can also apply to such instructions. In *R v Secretary of State for the Environment, ex p Greenwich London Borough Council*, the court held that a similar guidance which was addressed to the general public would be unlawful if it misstated the law, or if it contained guidance or advice that was manifestly inaccurate or misleading.[6]

A final example of what this chapter is concerned with is the policy at issue in the Supreme Court decision of *Mandalia v Secretary of State for the Home Department*.[7] The UK Border Agency had issued a process instruction to all its caseworkers to guide them in their processing of visa applications. This process instruction contained, among other

[6] *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

[7] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

things, a set of 19 steps which caseworkers were supposed to take in situations where there was missing evidence or a minor error in the application.

To illustrate, step three provided that '[w]e will only go out for additional information in certain circumstances which would lead to the approval of the application. Before we go out to the applicant we must have established that evidence exists, or have sufficient reason to believe the information exists.'[8] Step four provided that if a caseworker was unsure whether the evidence existed, he was to discuss the issue with the line manager. Also, '[w]here there is uncertainty as to whether evidence exists, benefit should be given to the applicant and the evidence should be requested'.[9]

This process instruction was a detailed internal guidance published by a public body to shape how its own caseworkers would make decisions. It is a common and obvious example of an administrative policy. It attracts legal duties specific to policies, such as the duty to comply described in the previous chapter. Indeed, one of the key issues that the court had to address in *Mandalia* was whether the Border Agency's departure from its policy was lawful.

Overall, this policy, together with the other two, are the kinds of policies which form the scope of discussion in this chapter. Whether the object in question is referred to as a 'policy' is not relevant. For instance, the *Gillick* policy was referred to as guidance. I am seeking to explain the concept of a policy, even if it may be described by some other

[8] *Ibid* [26].

[9] *Ibid* [27].

term. In the next section, I will identify the shared features which make all three examples of policies.

But before moving to do so, I need to make an important clarification about the scope of discussion. There is a kind of policy which I am not seeking to explain. One way that the courts have used the term 'policy' refers to what may be called 'high-level policy'—that is, objectives towards which the government as a whole or parts thereof have decided to work towards. For instance, a government may adopt a policy to increase the birth rate of the population. Such a policy falls within this use of the term 'policy'. Dworkin's definition of the term 'policy' as 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community' provides another example of the use of the word 'policy' in this sense.[10]

The term 'policy', used in this sense, demarcates the boundaries of law. As Fisher pointed out, 'to talk of policy is to talk of something that is not meant for legal analysis.'[11] 'Policies' in this sense fall within the realm of non-justiciability. Drawing on the Supreme Court's elaboration of the concept of non-justiciability in *Shergill v Khaira*, such 'policies', as a result of their subject matter, would be beyond 'the constitutional limits of the court's competence' as against Parliament as well as the executive.[12]

[10] Ronald Dworkin, 'The Model of Rules' (1967) 35(1) University of Chicago Law Review 14, 23.

[11] Elizabeth Fisher, 'Why Doctrinal Administrative Lawyers Need to Think More About Policy' (2023) 29(4) AJAL 254, 258.

[12] *Shergill v Khaira* [2014] UKSC 33.

High-level policies are not my concern here. My concern is instead with administrative policies of the kind illustrated by the three examples above. The two categories differ, first, in their subject matter. Administrative policies govern administrative matters, such as the procedures officials should follow or the considerations they should take into account when exercising their powers. High-level policies, by contrast, concern broader, non-administrative matters. They may also differ in their normative character. Administrative policies operate as norms: they guide, require, permit, or constrain official conduct. A high-level policy, however, articulates an objective, value, or strategic priority without purporting to prescribe any course of conduct, and it may therefore be unclear what would count as complying with or breaching it. This means it may not be a norm at all. Because administrative and high-level policies differ both in subject matter and in normative function, they raise distinct issues and should be considered separately.

3.2 The features of an administrative policy

Having defined the scope of my inquiry, I now move to discuss the features of policies. In other words, what are the common features of the three examples of policies in the previous section, such that they can all be characterised as policies? The discussion in this section will be based upon the law on policies. The courts thus far have seldom paid direct attention to the question of the features of policies. Nevertheless, by looking at what the courts have considered to be policies, several common features can be identified.

3.2.1 Generality

Public bodies make decisions and they make policies. What do courts think is the difference? The facts of *Mandalia* provide a useful illustration. As we have seen, the Border Agency in *Mandalia*, in order to decide whether to approve visa applications, adopted a policy of granting visas to those who could demonstrate the means to live in the UK by proving the ownership of a certain amount of funds. Suppose that an application for a visa was dealt with and approved in accordance with this policy. Suppose now that the Border Agency had not adopted such a policy. When faced with a second visa application, it decided to assess and subsequently approve the application by considering whether the person has demonstrated the means to live in the UK. What is the difference between how the agency addressed the first and second visa applications?

One might think that the difference is that when the agency adopted a policy, it had an effect in the future. After all, policies can have prospective and retrospective effect. Prospective effect refers to 'acting in the future on future events', while retrospective effect refers to 'acting in the future on past events'.[13] The policy in *Mandalia* had both effects. It had retrospective effect since it applied to visa applications made before it entered into force and changed the applicants' future legal status through the grant of a visa. It also had prospective effect since it would apply to future visa applications involving new sets of facts which had not occurred before the policy came into force.

But this does not suffice to distinguish policies from decisions. Decisions also can have effects in the future. The decision made in the second situation had retrospective effect, since it meant that the applicant was given a visa for a certain duration extending into the

[13] Ben Juratowitch, *Retroactivity and the Common Law* (Hart Publishing 2008) ch 1 'Concepts, Labels and Limitations', 6.

future. Decisions also can have prospective effect. Suppose that a public body informs company X that its next grant application has to be accompanied by a complete statement of accounts. Such a decision does have implications for the future. Company X's next grant application will be implicated by this decision. Yet the courts would not analyse this decision as a policy. If the public body subsequently applied the requirement of a complete statement of accounts strictly to company X, the company would not be able to challenge its decision on the basis that the public body had applied a policy too rigidly. An application of the requirement is not a rigid application of a policy but is simply the natural result of an administrative decision. Indeed, applying the non-fettering rule in such a circumstance would extend the scope of the non-fettering rule to a very wide range of actions by public bodies.

The reason that it appears odd to think of such decisions as policies is that policies are general. To understand what generality means, it is useful to refer to Gardner's explanation of law's generality: a law is general in the sense that it can apply to 'an indeterminate class of people and cases'.[14] In a similar vein, Austin identified two ways in which laws are general: 'as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.'[15] Drawing from both definitions, this means that there are two kinds of generality. A norm is general if it applies to an indeterminate class of subjects. A norm is also general if it applies to an indeterminate number of occasions.

[14] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) ch 8.

[15] John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) 17.

Returning to policies, they are general in at least one of these ways. The decision to require a full statement of accounts for company X's next grant application lacks either sense of generality. It is therefore more accurately characterised as a discrete decision. Suppose, however, that the public body decides that all future grant applications by company X have to be accompanied by a full statement of accounts. This would not be general in the sense of applying to an indeterminate class of subjects. The class of subjects is clearly determinate. Yet, it would be general in the sense that it applies on an indeterminate number of occasions. This decision can therefore be understood as the adoption of a policy. Suppose now that a public body decides that the next grant application by every company has to be accompanied by a full statement of accounts. This is not general in the sense of applying on an indeterminate number of occasions. No company is caught more than once. Yet, it is general in the sense that it applies to an indeterminate class of subjects. Accordingly, this too can be counted as the adoption of a policy.

3.2.2 Guide to conduct

To identify the next essential attribute of administrative policies, it is helpful to consider the following example. Suppose that the policy in *Gillick* were to be reworded:

> 'The department realises that in such exceptional cases the nature of any counselling will in many cases be assessed by the doctor or other professional worker concerned and foresees that the decision whether or not to prescribe contraception is likely to be for the clinical judgment of a doctor.'

This rewritten paragraph is general, since it applies to an indeterminate class. Yet, it is clearly not a policy. The distinctive legal consequences that the courts have attached to policies would be unlikely to apply to it. For example, it is difficult to attach a duty to comply to this paragraph when it does not require any action at all.

The reason is that policies are guides to conduct. The rewritten *Gillick* policy is no longer a policy because it is descriptive and not a guide to conduct. The court in *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* affirmed the capacity to guide conduct as a key attribute of policies.[16] One of the key issues in this case was whether the document in question attracted a duty to comply. The court held that a policy that attracts such a duty has to be, among other things, a 'prescriptive instrument'.[17] This meant that a policy has to provide 'a set of criteria or considerations whose purpose is to promote consistency and foreseeability in the discharge of the decision-making function.'[18] In other words, a policy has to serve as a guide to conduct. The court applied this test to hold that the document in question did not attract a duty to comply, since it was better characterised as a decision rather than a 'prescriptive instrument'.[19]

Because policies are guides to conduct, merely descriptive statements are not policies. Suppose that a public body publishes a textbook on administrative law. The textbook contains a description of the law for the purpose of helping law students

[16] *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2937 (Admin).

[17] *Ibid* [76]. The court also held that the duty to comply would apply only if the policy also performed an 'identifiable external decision-making function', referring to *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580.

[18] *Ibid* [76].

[19] *Ibid* [77]-[78].

understand the law. It does not guide conduct and is therefore clearly not a policy. However, some statements may be descriptive and also guide conduct at the same time. Suppose that a public body publishes a circular for the general public containing a summary of the relevant laws governing visa applications. Such a circular would appear descriptive. But it does guide conduct. It would have been published for the purpose of getting persons to comply with the relevant laws. This means that this circular can be considered a policy.

The possibility that descriptive statements that guide conduct can be policies matches with the courts' use of the term 'policy'. The courts have described summaries of the law as policies and have attached distinctive legal consequences to them. For example, in *R (A) v Secretary of State for the Home Department*,[20] the Supreme Court held that a policy is unlawful 'where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.' Accordingly, policies which appear descriptive may nevertheless still serve as guides to conduct.

This attribute has been kept deliberately broad here in two respects. First, it does not matter whether the relevant power being guided arises from statute, the common law, or some other source. Policies guide conduct no matter the source of power that is being exercised by a public body. Accordingly, there is no need for present purposes to enter the debate over whether and to what extent the executive branch's prerogative powers and

[20] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

administrative powers are legal in nature.[21] Second, this attribute is broad enough to include policies which do not guide the conduct of public bodies at all. Recall the social distancing guidelines discussed in section 3.1. Those guidelines were directed at the general public and guided the conduct of private persons. But they also fall within the concept of a policy which this chapter is concerned with. This attribute captures policies which guide the conduct of public bodies, and also those which only guide the conduct of private persons.

3.2.3 Practice-independent

Suppose that immigration officers, in deciding whether to approve visa applications, had a longstanding practice of doing so only for applicants who were able to demonstrate the means to live in the UK by proving the ownership of a certain amount of funds. This practice was widely accepted across the agency. Officers who did not follow the practice were subject to criticism. In other words, there was a practice around how the immigration officers approved visa applications.

A practice can constitute or ground norms if they are accompanied by a normative attitude.[22] Yet, a practice is different from a policy. A policy can give rise to a practice, when officials follow a policy. But a policy is practice-independent. Suppose that a public body has adopted a policy, but that officials generally do not follow it when making decisions. In such a situation, one would not think that the policy has ceased to exist. Rather,

[21] Adam Perry, 'The Crown's Administrative Powers' (2015) 131 LQR 652.

[22] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994); Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61; Geoffrey Brennan, Lina Eriksson, Robert E Goodin and Nicholas Southwood, *Explaining Norms* (OUP 2013) ch 2.

the policy has simply been repeatedly violated. In contrast, suppose that officials one day stop making decisions in accordance with their usual practice of doing so. In this situation, the previous official practice has ceased to exist.

Can the content of a practice shape a policy? One might initially think so, based on the Court of Appeal decision of *R v North West Lancashire Health Authority, ex p A*.[23] The health authority had adopted a policy on gender reassignment surgeries. The policy provided that such procedures should be commissioned with caution but allowed exceptions on the basis of overriding clinical need. The policy was subsequently applied to deny requests to refer the applicants to a clinic which could perform such surgeries. One of the issues was whether the policy was a blanket one that contravened the non-fettering rule. The court noted that the policy, as written, did require authorities to consider exceptions on an individual basis. But the authority's actual policy, in light of their belief that such treatment was ineffective, amounted to a blanket refusal of all requests for exceptions. This meant that the authority had a blanket policy that violated the non-fettering rule, despite what the written form of the policy said.[24]

This case *prima facie* suggests that the public body's practice was determinative of what its policy actually was. This would mean that policies are not actually independent of practice. But I argue that we should not draw this conclusion. Rather, the court was simply being insufficiently precise in its usage of terminology. The health authority's policy was not a blanket one. It was the authority's practice that was a blanket refusal to consider exceptions. This practice violated the non-fettering rule, not its policy. The policy remained

[23] *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977.

[24] *Ibid* 993-994.

lawful and the practice did not change the content of the policy. Accordingly, policies are indeed practice-independent. This understanding of *North West Lancashire Health Authority* would suggest that the non-fettering rule is equally applicable to practices. A fuller discussion of this point is beyond the present scope, but it suffices to say that this claim is not *prima facie* objectionable in principle. Much would depend on whether the justification for the non-fettering rule could apply equally to practices, since they too are general guides to conduct.

3.2.4 Not law

Thus far, I have established that policies are practice-independent general guides to conduct. This distinguishes policies from decisions by public bodies. But this is insufficient as a set of conditions to identify policies. Primary legislation enacted by Parliament also contains general guides to conduct. It does not help to say that policies are guides to conduct which are enacted by public bodies excluding Parliament. This is because delegated legislation meets the criteria too. Yet, delegated legislation is clearly not a policy.

An additional condition to identify policies is necessary. Simply put, policies are not part of English law. They can be drafted in a legislative style. For example, the Immigration Rules are drafted with a clarity and precision surpassing some examples of primary legislation. They can even be used like law to guide the conduct of the general public, like the Covid-19 social distancing rules described earlier. Yet, neither the Immigration Rules nor the Covid-19 social distancing rules are law.

The claim that policies are not law is probably uncontroversial. But one may wonder why this is the case. After all, policies are legally relevant, as the previous chapter described. Policies can affect people's rights and duties, just like laws. So why are they not laws?

The answer can be found by observing an analogy between policies and constitutional conventions. While judges have given constitutional conventions legal effect, they have done so in a way that is different from law. As Marshall argued, judges do not treat conventions directly as sources of law.[25] Rather, conventions are drawn upon to clarify what the law means.

Perry built on this argument to draw a distinction between directly relevant and indirectly relevant norms. Perry argued that a norm is directly relevant 'if and only if (1) it is relevant to deciding on people's rights and duties within [the legal system], (2) not merely because it is relevant to deciding on the interpretation, applicability, or consequences of some other norm.'[26] A norm is indirectly relevant 'if and only if (1) it is relevant to deciding on people's rights and duties within [the legal system], (2) because it is relevant to deciding on the interpretation, applicability, or consequences of a norm of direct relevance within [the legal system].'[27] Directly relevant norms are laws within the legal system, while indirectly relevant norms are not.

[25] Geoffrey Marshall, *Constitutional Conventions* (OUP 1987) 15.

[26] Adam Perry, 'Law's Boundaries' (2020) 26 Legal Theory 103, 113.

[27] *Ibid*.

Like conventions, policies are indirectly relevant. They do not decide people's rights and duties. If a public body adopts a policy to guide how it deals with visa applications, the policy itself does not change any legal rights or duties. A person cannot directly enforce the policy against the public body. But the policy triggers the application of certain grounds of review. If the public body departs from the policy, the duty to comply will apply to require it to provide good reasons for departing. If it applies the policy rigidly, the non-fettering rule will apply to require it to be willing to consider whether it should make an exception in the case at hand. It is clear therefore that the legal relevance of a policy is indirect in nature. This explains how policies can be legally relevant and yet not laws.

3.2.5 Created by a public body

The preceding discussion clarifies how policies are distinct from decisions and also how they are distinct from primary and delegated legislation. Policies are practice-independent general guides to conduct which are not law. But the rules of private entities or persons would meet these conditions. Yet, they are not policies.

A final condition is necessary. Simply put, a policy is created by a public body or bodies recognised in law to be exercising public functions. Indeed, this thesis is concerned with the law of judicial review, which necessarily applies to such bodies. Non-legal general guides to conduct such as those created by private entities or persons are not within the scope of this thesis.

To sum up the discussion thus far, I have identified the following essential attributes of administrative policies: they are practice-independent non-legal general guides to conduct created by public bodies. The three examples of policies described earlier share these features. These attributes help us understand what is distinctive about policies as compared to other types of government action, and the unifying features that all types of policies share despite their variations. They explain why policies are a distinctive legal concept. This in turn explains why the law on policies is a distinct legal category worthy of being the object of an interpretive method.

3.3 Types of policies

I have thus far focused on understanding the unifying features of policies. I now turn to study the diversity among them. There is a wide variety of policies which share the unifying features identified above. It will be helpful to understand the different types of policies before moving to explain the law on policies.

Scholars have sought to offer taxonomies of policies. Baldwin identified various examples of policies: procedural rules, interpretive guides, instructions to officials, prescriptive rules, evidential rules, commendatory rules, voluntary codes and rules of practice.[28] This classification focused on the different functions of each policy in administrative governance. As Weeks observed, Baldwin's taxonomy of policies was based

[28] Robert Baldwin, *Rules and Government* (Clarendon Press 1995) 81–85; John Houghton and Robert Baldwin, 'Circular Arguments: the Status and Legitimacy of Administrative Rules' [1986] PL 239; Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016) ch 2.

on ‘intention rather than effect’, insofar as the classification was premised on how the policy-drafter intended the policy to be used.[29]

While such a taxonomy sheds light on the different kinds of policies that exist as a matter of fact, my concern is to provide an account of how the law understands policies. This means that a classification of policies along the lines of legal significance will be more useful than a comprehensive factual account of all the different kinds of policies that exist. In this regard, Hickman and Poole’s proposed taxonomy is particularly useful.[30] They preferred to use the term ‘guidance’ in place of ‘policy’, even as they acknowledged that the term ‘policy’ is generally preferred by judges.[31] This was intended to avoid confusion. They noted that the term ‘policy’ is also used to describe high-level governmental objectives, even though administrative policies were what they had in mind by the term.[32]

Using Hickman and Poole’s preferred terminology for now, they argued that there are three types of guidance: self-directing, coordinating and public. Self-directing guidance, as the name suggests, is adopted by a public body to structure its own exercise of discretion. Such guidance encompasses policies which are published by a higher-ranking group or officer to direct the decisions of lower-level groups or officers within the same public body.[33] As Hickman and Poole observed, such guidance can have different audiences: officers who have to apply the guidance, and persons outside the public body who may be

[29] Weeks (n 28).

[30] Tom Hickman and Thomas Poole, ‘Judicial review and guidance’ (2024) 140(Jul) LQR 381.

[31] *Ibid* 381.

[32] *Ibid* 382.

[33] *Ibid* 387-388.

affected by the guidance. Nevertheless, the key characteristic of such guidance is the fact that it is adopted and applied by the same public body. The policy in *Mandalia* described earlier is an example of a self-directing policy, as is the policy in *Lumba v Secretary of State for the Home Department)* concerning the power of immigration detention.[34]

Coordinating guidance, as defined by Hickman and Poole, is 'addressed from one public body or official to a different public body or official with independent decision-making responsibility and concerns how the latter should exercise their powers.'[35] The key distinction with self-directing guidance is that for this type of guidance, the public body publishing the guidance is distinct from the one applying it. The policy in *Gillick* described earlier is an example of such guidance.[36]

Public guidance is 'provided by a public body to private persons or private entities to guide their conduct.'[37] In Hickman and Poole's view, the difference between such guidance and self-directing guidance is that the public body issuing the guidance is not informing persons how it will be making decisions, but is providing information to the public to guide their conduct.[38] Examples of such guidance include the one described earlier issued by the central government to the public during the Covid-19 pandemic to

[34] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; see also *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

[35] Hickman and Poole (n 30) 388.

[36] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; see also *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58.

[37] Hickman and Poole (n 30) 388-389.

[38] *Ibid*.

impose social distancing rules.[39] Public guidance has also been referred to as 'soft law'. As Daly observed, such instruments share the following traits: 'they seek to change or guide the behaviours of their addressees', 'they do not create by themselves rights or obligations for the addressees' and 'they represent, by their content and the way that they are structured, a degree of formalisation and structure which brings them closer to looking like rules of law.'[40]

Hickman and Poole's classification of policies provides a useful breakdown of the different types of policies. All three types are practice-independent non-legal general guides to conduct created by public bodies. Yet, they are distinct in an important way: they all guide different kinds of conduct. An account seeking to explain the law on policies should be able to take this into account. I will build on this in the subsequent chapters. But before going further, I will clarify two points about this classification.

For one, self-directing guidance can also sometimes concern different public bodies. They can therefore sometimes be misunderstood as coordinating guidance. The classic case of *H Lavender & Son Ltd v Minister of Housing and Local Government*[41] provides an example. The Minister of Housing and Local Government had adopted a policy that certain land should not be released from mineral working unless the Minister of Agriculture was not opposed to it. The court held that such a policy unlawfully fettered the discretion of the

[39] *Ibid* 389.

[40] Stephen Daly, 'The Rule of (Soft) Law' (2021) 32(1) King's Law Journal 3. Daly observed that there are two types of soft law instruments: Type 1 (embodying discretionary decisions) and Type 2 (instruments which merely seek to interpret, explain and/or apply the primary law over which the relevant public body has no formal discretion). Note that while Daly classified both Type 1 and Type 2 soft law instruments as examples of 'soft law', when translated into the terminology of this thesis, Type 1 instruments are better characterised as self-directing policies while Type 2 instruments are public guidance.

[41] *H Lavender & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231.

Minister of Housing and Local Government since it essentially amounted to a delegation of his decision to the Minister of Agriculture.[42]

Since the policy in this case concerned the relationship between two public bodies, one might have initially thought that this is a coordinating guidance. The key point about this policy, however, is that it was adopted by the Minister of Housing and Local Government to govern the exercise of his own discretion. Accordingly, it is better classified as a self-directing guidance. Another example of such a policy can be found in the Singapore High Court decision of *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board*, where the Port of Singapore Authority adopted a policy to accept the directions of the Singapore Tourist Promotion Board and Gambling Suppression Branch in refusing allocations of berths to cruise vessels.[43] Unsurprisingly, the Singapore High Court also found that this policy would fall foul of the non-fettering rule.

In addition, I think the distinction between self-directing and public guidance deserves further emphasis. As Hickman and Poole acknowledged, self-directing guidance can guide the conduct of public bodies and also of the general public.[44] For example, a self-directing guidance on the requirements for visas would guide immigration officers as to how to make decisions, and also guide visa applicants on how to ensure successful applications. This can cause some confusion. One might think that if this is the case, self-directing guidance is also often a type of public guidance. To avoid this confusion, it is

[42] *Ibid* 1240-1241.

[43] *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52.

[44] On this point, see the discussion of *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580 in Hickman and Poole (n 30) 394-395.

helpful to state the true distinction between self-directing and public guidance in terms of a negative condition: a document is public guidance only if it does not govern decision-making of a public body. If it does, then it would be self-directing guidance instead.

This means that a policy which governs decision-making of a public body *and* at the same time is intended to help the general public structure their affairs accordingly—for example, policies relating to the conditions that must be met for visas to be granted—should be classified as self-directing guidance. In contrast, a policy which is not directed at public bodies at all and is solely intended to shape the behaviour of the general public—for example, guidance informing private businesses about the types of measures that should be put in place in workplaces to accommodate both vaccinated and non-vaccinated employees[45]—should be classified as public guidance.

It should be clear then that public guidance is different in kind from the other types of guidance. For one, non-compliance with public guidance does not provide grounds for an application for judicial review, unlike non-compliance with the other types of guidance. This is because the nature of public guidance means that it is not possible for a public body to comply with it. There is nothing for a public body to comply with. The only kinds of legal duties that can be imposed upon public bodies in relation to public guidance concern its adoption or content.

Nevertheless, as I noted earlier, public guidance such as the Covid-19 social distancing rules falls within the concept of a policy which I plan to explain in this thesis.

[45] *Han Hui Hui v Attorney-General* [2022] SGHC 141.

Accordingly, public guidance will continue to be included in the discussion. But I will make a minor adjustment to the terminology of the classifications to reflect this difference between public guidance and the other two types of guidance. In the rest of this thesis, I will refer to Hickman and Poole's categories of 'self-directing guidance' and 'coordinating guidance' as self-directing policies and coordinating policies respectively. The terminology of public guidance will remain unchanged.

The following table summarises the differences between each kind of policy.

Self-directing policy	**Coordinating policy**	**Public guidance**
Guides conduct within the same public body that originated the policy.	Guides conduct of a different public body from the one that originated the policy.	Guides conduct of private persons or entities. Does not guide conduct of public bodies.

3.4 The law on each type of policy

I have thus far identified the common features of policies and discussed the three types of policies. Given that there are different types of policies, a question that arises is whether the law treats each type of policy differently. In this final section, I will discuss the legal significance of this categorisation of policies. I will compare the legal requirements that the law places on the use and adoption of each type of policy. It will soon become clear that while the law on self-directing policies provides the default understanding of how the

law treats policies, the law treats the other two categories of policies differently. This discussion will provide a more comprehensive understanding of the law on policies and help to raise additional open questions in the law that should be answered in the subsequent chapters.

3.4.1 Self-directing policies

The law on policies has treated self-directing policies as the default type. Indeed, the main legal rules on policies were developed with such policies in mind. For example, the key authorities for the duty to comply all concern self-directing policies: *Mandalia* and *Lumba* are notable examples.[46] The same can be said for the non-fettering rule: the policies in *R v Port of London Authority, ex p Kynoch Ltd* and *British Oxygen Co Ltd v Minister of Technology* were self-directing policies.[47] This means that the legal rules on policies discussed in the previous chapter apply straightforwardly to self-directing policies.

In light of this, the Court of Appeal decision in *R (Good Law Project) v Prime Minister* is worth further discussion.[48] A set of government policies required ministers and officials to use neither private emails nor personal electronic communications devices and methods in official business. The applicant here claimed that these policies were not complied with.

[46] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12.

[47] *R v Port of London Authority, ex p Kynoch Ltd* [1919] 1 KB 176; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

[48] *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580.

The policies in this case were self-directing policies. Yet, the court held that the principle in *Mandalia* did not apply to these policies. The reason that the court thought *Mandalia* could be distinguished was that these policies governed internal administration, rather than the exercise of public power. They were 'directed to ministers and civil servants, and not to the public.'[49] The court thought that finding a duty to comply in such circumstances would sit uneasily with the principle that policies do not have to be slavishly followed and would deter the use of policies.[50] The Court of Appeal's reasoning in *Good Law Project* was followed by the High Court in *Riverside Park Ltd*, where the court held that one of the conditions for a policy to attract a duty to comply was that it must have 'an identifiable external decision-making function'.[51]

There are many things that can be said about the decision in *Good Law Project*. For present purposes, it is sufficient to state that the decision in *Good Law Project* should not call into question the general rule that self-directing policies are subject to a duty to comply. As I mentioned earlier, this rule has been affirmed repeatedly by the Supreme Court. The rule is also widely accepted by legal scholars. As McCabe observed, the law has not treated self-directing policies as merely relevant considerations that public bodies have to take into account.[52] Varuhas and Elliott have similarly observed that the law requires public bodies to follow their own policies and have suggested that this approach is justified by the rule

[49] *Ibid* [59].

[50] *Ibid* [60]-[64].

[51] *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2937 (Admin) [76].

[52] Patrick McCabe, 'Failure to Adhere to Policy: A Category of Jurisdictional Error?' (2019) 26(3) AJAL 146, 155-156.

of law values of certainty and consistency.[53] This means that another explanation is needed for *Good Law Project*. I will return to this issue in Chapter 5.[54]

3.4.2 Coordinating policies

What is striking is that the law has treated the other two types of policies differently. Indeed, while it is relatively clear that the duty to comply and the non-fettering rule apply to self-directing policies, it is more uncertain whether they also apply to coordinating policies.

I begin with the duty to comply. As a starting point, a couple of cases suggest that coordinating policies, like self-directing policies, have to be complied with unless there are good reasons to the contrary. For example, returning to *Mandalia*, the Supreme Court suggested that coordinating policies should also be dealt with under the principle of consistency. The court reasoned that a concern with the legitimate expectations doctrine is that it fits uneasily in circumstances 'in which reliance is placed on guidance issued by one public body to another'.[55] This clearly refers to coordinating policies. The court then proposed that the principle of consistency would be able to accommodate such circumstances more easily. This suggests that the court thought that the principle of consistency would apply to coordinating policies. The House of Lords decision in *R (Munjaz) v Mersey Care NHS Trust* is another example.[56] There was a coordinating policy published by the Secretary of State for Health and directed at hospital authorities. This

[53] Mark Elliott and Jason Varuhas, *Administrative Law: Texts and Materials* (5th edn, OUP 2017) 184-185.

[54] See in particular section 5.1.4.

[55] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 [29].

[56] *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58.

policy governed how hospitals should treat the use of seclusion for detained psychiatric patients. While this was a coordinating policy, the court held that it was not merely advisory. Departures from it had to be justified by cogent reasons.[57]

These cases suggest that coordinating policies have to be complied with unless there are good reasons to the contrary. This would mean that the legal position on coordinating policies is the same as that for self-directing policies.

But another possible approach to coordinating policies can be found in the authorities. There is case law suggesting that public bodies should treat coordinating policies as relevant considerations. The Court of Appeal decision in *R (WL) (Congo) v Secretary of State for the Home Department* is a case in point.[58] I mentioned in Chapter 2 that the court here noted that self-directing policies have to be followed unless there is good reason to the contrary. Significantly, it observed at the same time that 'a different analysis is needed where the decision is by a different body'[59]—in other words, where a coordinating policy is at issue. The court held that in such situations, a failure by a public body to have regard to a coordinating policy issued by another body 'is not a breach of any expectation created by the authority, but may be categorised as a failure 'to have regard to material considerations', under familiar *Wednesbury* principles.'[60] This suggests that the law requires coordinating policies to be treated as relevant considerations that public bodies have to take into account.

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[57] *Ibid* [21] and [68].

[58] *R (WL) (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111.

[59] *Ibid* [58].

[60] *Ibid.*

In sum, there are two lines of authority governing whether a duty to comply applies to coordinating policies. One line suggests that the duty applies to coordinating policies in the same way that it does to self-directing policies. A second suggests that coordinating policies should be treated as raising relevant considerations, rather than giving rise to a duty to comply. Accordingly, this raises an open question about whether the duty to comply should apply to coordinating policies.

Turning to the non-fettering rule, a similar open question arises. Does the rule also apply to coordinating policies? As I mentioned in the previous section, all the non-fettering cases thus far have concerned self-directing policies. The question of whether the non-fettering rule applies to coordinating policies has not been addressed in the case law. Yet, in principle, coordinating policies can also be applied rigidly by public bodies, without a willingness to consider exceptional circumstances. Should this be unlawful? In Chapter 5, I will address these open questions about the applicability of the duty to comply and non-fettering rule to coordinating policies.

3.4.3 Public guidance

In the previous two sections, I discussed the differences in how the law treats self-directing and coordinating policies by reference to the duty to comply and the non-fettering rule. Turning to public guidance, the legal differences become even sharper. The duty to comply and the non-fettering rule cannot apply to public guidance. This is because public guidance is directed at the general public. It is not used in decision-making, which means that the

law does not lay down rules for how public bodies should use public guidance in the same way that it does for self-directing and coordinating policies.

What legal requirements then has the law placed on the use of public guidance? As a starting point, English law has taken the position that public guidance is susceptible to judicial review. *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* provides a useful example.[61] The Secretary of State for the Environment had decided to distribute to all households in England a leaflet titled: 'The Community Charge (the so-called 'Poll Tax'): How it will work for you'. The applicant argued that this leaflet was misleading. It made no reference to the joint and several liability of people over 18 who were married or living together as husband and wife. It suggested that liability to pay the community charge was several only. The applicant sought an order of prohibition to restrain the leaflet's distribution, or a declaration that such distribution was *ultra vires*.

This leaflet was a clear example of public guidance. It was an information leaflet that purported to explain the law to the public. It was not meant to be applied by public bodies. Yet, the court accepted that it could review the leaflet. It held that it would do so if the leaflet misstated the law, or if it contained guidance or advice that was manifestly inaccurate or misleading. On the facts, this leaflet did not meet these conditions. It was not literally inaccurate and it was at most misleading by omission. This meant that the leaflet was lawful.

[61] *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

This establishes that public guidance is indeed susceptible to review, and that it can be reviewed for misstatements of law or manifestly inaccurate advice. In other words, the rule against policies authorising unlawful conduct, discussed in the previous chapter, applies to public guidance. The High Court decision in *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* affirmed these points.[62] The Civil Aviation Authority had issued a guidance note directed at travel organisers and agents to explain the type of air packages which travel companies would be required to protect under an Air Travel Organiser's Licence ('ATOL'). The Association of British Travel Agents challenged the guidance note on the basis that it had misstated the law.

One of the issues that the High Court had to address was whether the content of this guidance was susceptible to review. The court thought so. One of the court's reasons for thinking so was based on the effect that it thought the guidance would have on travel agents. Counsel for the Civil Aviation Authority argued that it was possible that travel agents could take their own advice and act accordingly. In other words, travel agents would not treat the guidance as a rule and would merely weigh it as a consideration in decision-making.

But the High Court thought otherwise. It thought that travel agents would be much more likely to treat the guidance as a rule and act in accordance with it, even if it was mistaken in law, since travel agents would be concerned that they would otherwise fall foul of the ATOL Regulations.[63] This meant that even though the guidance was not a legal rule,

[62] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWHC 13 (Admin). The High Court's reasoning on this point was approved by the Court of Appeal in *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWCA Civ 1356.

[63] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWHC 13 (Admin) [81].

it ought to be susceptible to judicial review and withdrawn if it misstated the law. This challenge to the susceptibility of the guidance note to judicial review was not pursued on appeal, but the Court of Appeal affirmed the High Court's reasoning.[64]

Further, the courts have affirmed that it is important for public guidance to state the law accurately even if its content was qualified. In *R (Bradley) v Secretary of State for Work and Pensions*, the court had to address whether the Secretary of State was unreasonable in rejecting an ombudsman's finding of maladministration in relation to a leaflet published by the Department of Work and Pensions.[65] The ombudsman had found that the leaflet contained information that was 'inaccurate, incomplete and potentially misleading.'[66]

The Secretary of State tried to claim that the leaflet was not inaccurate or misleading because it was qualified. The leaflet had contained a clear disclaimer to the effect that it 'should not be treated as a complete and authoritative statement of the law'.[67] But the court rejected this argument. Even though the leaflet had been qualified, the court noted that a reader would still believe the leaflet on its face. A reader could not be expected to have knowledge of the legislative background and the government's intentions as set out in letters and regulations.[68] This meant that a reader would be misled by the leaflet.

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[64] *R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority* [2006] EWCA Civ 1356 [5].

[65] *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin).

[66] *Ibid* [73]-[74].

[67] *Ibid* [89].

[68] *Ibid* [92].

In sum, a key difference between public guidance and the other two types of policies is that the duty to comply and the non-fettering rule do not apply to the former but to the latter. Yet, an important similarity between all three types is that the rule against policies authorising unlawful conduct applies equally to all. Indeed, the law on public guidance provides that public guidance is reviewable, and that it can be reviewed on the ground that it contains misstatements of law. However, aside from these propositions, the law says very little else. This means that the law on public guidance raises several fundamental open questions. For one, while it has been treated as reviewable, why should it be? Public guidance does not guide the conduct of public bodies, unlike the other types of policies. It is also not a legal rule. If so, why should it be subject to judicial review at all? Also, on what grounds are public guidance reviewable? As I mentioned in Chapter 2, scholars have argued that principles of the rule of law should shape review of public guidance.[69] Should these arguments be accepted? I will address these questions in Chapter 7.

3.5 Conclusion

In the previous chapter, I described the different legal rules that apply to policies. This raised the question: what is distinctive about policies such that they attract distinctive legal rules? I sought to answer this question in this chapter. Here, I studied the question of what policies are and identified their unifying features. In so doing, I explained how policies are a legal concept distinct from other types of government action: they are practice-independent non-legal general guides to conduct created by public bodies. This in turn

[69] See, for example, Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) CLP 267; Daly (n 40).

explains why the law on policies is a distinct legal category worthy of being the object of an interpretive method.

In this chapter, I also described the different types of policies which all share these unifying features: self-directing policies, coordinating policies, and public guidance. I then discussed the legal significance of this categorisation of policies—the legal rules applicable to policies apply differently to different kinds of policies. This raised additional open questions in the law that need to be resolved. Accordingly, at this juncture, we have developed a comprehensive foundational understanding of the law on policies. In the subsequent chapters, I will build on this to explain the law on policies.

Chapter 4 Policies and non-arbitrariness

In Chapter 2, I described the different legal rules in the law on policies. In the previous chapter, I discussed the features common to all policies and also the differences in how the law treats different types of policies. As such, at this point, we have a better appreciation of how the law on policies is a distinct legal category, and have also arrived at a deep and comprehensive understanding of the law on policies itself. I am now in a good position to turn to identify the best account for the law.

I will argue in this chapter that the value of non-arbitrariness is a plausible explanation for the law on policies. In brief, this is because non-arbitrariness can *prima facie* fit and justify the law on policies. Policies can further non-arbitrariness. But they can also be damaging to the value of non-arbitrariness without proper checks on their use and content. The law provides such a check.

My account of the law on policies is valuable for several reasons. It helps to explain the law on policies as a whole, bringing coherence to this distinct body of law. As the subsequent chapters will show, it will allow for deeper insights into the law than would have been possible if the focus had been on the discrete legal doctrines applicable to policies. This account of the law on policies also will contribute to resolving the open questions in the law that were identified in Chapters 2 and 3.

This chapter will proceed as follows. I will first explain the nature of non-arbitrariness. I will identify and discuss two aspects of it: exercise and power non-arbitrariness. I will then argue that both aspects, taken together, form a plausible account

of the law on policies. Having established that non-arbitrariness is a plausible account, the subsequent chapters will demonstrate that it is the best account for the established law on policies and take this forward to study its implications for the open questions and uncharted areas in the law.

4.1 Two aspects of non-arbitrariness

Suppose that an immigration officer has a legal power to grant visas for staying in the UK. The law confers upon her absolute discretion. She may decide on any basis that she chooses, and her decisions are not subject to review by any party.

There is something obviously problematic about this situation. We might say that what is problematic here is the nature of the immigration officer's power. She is free to decide visa applications on the basis of her whims and fancies. Even if she actually decides visa applications by taking into account proper reasons, the very power she possesses is arbitrary in nature. There is nothing stopping her from taking into account wholly improper reasons in deciding the next case. This tells us that non-arbitrariness is concerned about the nature of power. Power is arbitrary if it is not subject to constraints.

Suppose now that the legal powers conferred upon the immigration officer are altered. This time, the law places constraints on her power. For example, it requires the power to be exercised for proper purposes, such as encouraging the flow of skilled labour into the UK. Her decisions can be reviewed by the courts. But when faced with a visa application, she is indifferent to the purposes for which her power should be used. She tosses a coin to decide the application.

In this situation, we would no longer think that the immigration officer wields arbitrary power, since her power is subject to constraints. Yet, it is natural to conclude that there is still something problematic going on here. But what exactly is objectionable? Even though her power is not arbitrary by nature, we would think that there is still arbitrariness in how she has exercised her power. She has exercised her power arbitrarily by being indifferent to the proper reasons for which she should use her power. This is the basis for our discomfort with the situation. Accordingly, non-arbitrariness is also concerned about how power is exercised.

Finally, suppose that even though the immigration officer tosses a coin to decide the application, it nevertheless happens that her decision does encourage the flow of skilled labour into the UK. This means that her decision, assessed objectively, was actually correct. It did achieve the purpose of her power.

Yet, I think that our discomfort with the situation will remain. Even though the decision was correct, a problem remains with how the decision was made. The decision remains arbitrary. This suggests that arbitrariness is distinct from wrongness, as defined by the substantive outcome of a decision. A correct decision can still be arbitrary, while a wrong decision is not necessarily arbitrary.

These examples illustrate three points. First, non-arbitrariness is concerned about the nature of power. Power that is not subject to any constraints is arbitrary. Second, non-arbitrariness is also concerned about the exercise of power. Even if a power is non-arbitrary, it can be exercised in an arbitrary manner. These aspects of arbitrariness are connected. An

arbitrary power will facilitate the arbitrary exercise of power. But they remain conceptually different. Third, arbitrariness is distinct from wrongness.

For ease of reference, in the rest of this chapter, I will refer to the first aspect of non-arbitrariness as 'power non-arbitrariness' and the second as 'exercise non-arbitrariness'. In the following sections, I will first identify and explain the features of exercise non-arbitrariness. I will then turn to do the same for power non-arbitrariness.

4.2 Exercise non-arbitrariness

There are accounts of arbitrariness in the literature which explain exercise non-arbitrariness. I will study Raz's and Endicott's reflections on arbitrariness in turn. I will then distil the key features of their accounts to articulate a principle of exercise non-arbitrariness.

4.2.1 Joseph Raz

Starting with Raz, he discussed the nature of arbitrariness in several works. In his article 'Legal Principles and the Limits of Law', he was primarily concerned about responding to Dworkin's attack on legal positivism.[1] But as he did so, he discussed the relationship between discretion and arbitrariness. Raz argued that judges do not necessarily act arbitrarily even though they have discretion. The reason is that while judges have discretion, they are still 'legally bound to act as they think is best according to their beliefs and values'.[2] Judges do not act arbitrarily in exercising their power of judgment because they

[1] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) Yale Law Journal 823.

[2] *Ibid*.

are bound to act on reasons that they think are the best. This serves to distinguish judicial discretion from 'arbitrariness, whim, and caprice.'[3]

Raz developed his idea of non-arbitrariness further in his well-known chapter on the rule of law in *The Authority of Law*.[4] The rule of law is often rightly contrasted with arbitrary power. But arbitrary power is broader than the rule of law.[5] Compliance with the rule of law does not necessarily achieve non-arbitrariness. Raz offered the following definition of arbitrariness: 'an act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them.'[6] He highlighted that this means that arbitrariness depends on the state of mind of those exercising power.[7]

In a later article, 'The Law's Own Virtue', Raz addressed the topic of non-arbitrariness again. He noted as before that arbitrary government is fundamentally opposed to the rule of law.[8] But in this work, he defined arbitrary government as 'the use of power that is indifferent to the proper reasons for which power should be used'.[9] He refined and elaborated upon his earlier ideas in two ways.

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[3] *Ibid*.

[4] Joseph Raz, *The Authority of Law* (OUP 1979) ch 11 'The Rule of Law and Its Virtue'.

[5] *Ibid* 219.

[6] *Ibid*.

[7] *Ibid*.

[8] Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) OJLS 1.

[9] *Ibid* 5.

First, he elaborated upon the proper purposes which justify the use of power. He argued that the reasons for which power should be used are identified by law: 'governments are constituted by law and, in creating them, the law, explicitly or implicitly, identifies their purposes.'[10] Accordingly, a government acts arbitrarily when it does not try to follow the law, while a government acts in accordance with the rule of law when it acts 'with manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation.'[11]

Second, Raz's later definition leaves out from the conditions of arbitrariness acting with 'belief' that an exercise of power will not serve the purposes which can justify use of power. This obviously does not mean that acting with such belief is acceptable. Rather, Raz thought that doing so is objectionable not because it is arbitrary, but because it contravenes the nature of government—it is in the nature of government that it ought to follow the law.[12]

How then does a government avoid acting arbitrarily? Raz proposed a set of features of the rule of law, conformity to which would tend to secure non-arbitrariness. The doctrine of the rule of law requires 'conformity to what we know as the main features of public accountability'.[13] For instance, reasons for decisions should be publicly declared, decision-making processes should be fair and unbiased, there should be proper opportunities to consider relevant arguments, and decisions should be reasonable relative to the declared reasons. These requirements are *pro tanto* reasons 'which can be overridden

[10] *Ibid*.

[11] *Ibid* 7-8.

[12] *Ibid* 7.

[13] *Ibid* 8.

by conflicting considerations.'[14] For example, there may be certain decisions for which reasons ought not to be publicly declared, potentially due to sensitive national security considerations. Here, overriding the requirement of public declaration of reasons for decisions would serve the interests of the governed.

Overall, Raz thought that these features of the rule of law may not eliminate arbitrary power entirely. Nor would they guarantee just laws. But they would serve the important function of protecting people from arbitrary power by 'tending to secure that the government acts with the manifest intention of serving the interests of the governed.'[15]

4.2.2 Timothy Endicott

Endicott's account of non-arbitrariness linked non-arbitrariness and justification even more directly. He sought to explain the concepts of non-arbitrariness and the rule of law by analysing a pair of decisions from the Supreme Court of India and the Supreme Court of Canada, where the courts had held that public authorities had acted arbitrarily. He noted that the decisions followed a similar line of reasoning. In both cases, the courts had concluded that a public body's decision was arbitrary on the basis that it went against the relevant public purposes.[16]

Endicott observed that this mode of reasoning would attract the concern that the judges themselves had acted arbitrarily. Bentham, for example, would have concluded that

[14] *Ibid*.

[15] *Ibid* 14.

[16] Timothy Endicott, 'Arbitrariness' (2014) 27(1) Canadian Journal of Law and Jurisprudence 49.

such reasoning amounted to the assertion of significant interpretive power, allowing judges to rule by their will rather than by law.[17] This was the 'Benthamite problem of arbitrariness: given the freedom that an interpreter has, to substitute his or her will for that of the lawmaker, how can we be ruled by law?'[18]

Endicott suggested three putative solutions, none of which he thought would resolve the Benthamite problem. First, we might think that the problem of arbitrariness will be addressed if interpreters give effect to the literal meaning of legal texts. However, texts often do not constrain judges much, especially since many laws are framed in broad terms. At the same time, the use of broad language in legal texts does not necessitate arbitrariness. It is true that if a rule is vague, significant interpretive power is allocated to a judge. But such an allocation is not problematic if there is good reason for it. Endicott raised the example of the Unfair Contract Terms Act 1977. While its terms were very broad, this was not necessarily problematic, since it made sense for judges to have the power to determine which exemption clauses are reasonable.[19]

A second putative solution to the problem of arbitrariness in interpretation would be to say that judges have to refer to the lawmaker. Again, Endicott thought that this solution was not satisfactory.[20] For one, lawmakers may not always be in continuous operation. This means that implementing this solution can be practically difficult. Also, referring to the lawmaker may not necessarily resolve disputes. Endicott raised the example

[17] *Ibid*.

[18] *Ibid* 54.

[19] *Ibid* 56.

[20] *Ibid* 57-58.

of a dispute between contracting parties about the meaning of a contract. It will not do in such a situation to say that we have to refer to the lawmakers (the contracting parties) to resolve the dispute. Finally, a reference to the lawmaker risks eliding the roles of lawmaker and adjudicator. This would accord to lawmakers too much power.

A third putative solution to the problem of interpretation would be to give effect to the intention of the lawmaker. While this is a commonly-accepted solution, Endicott suggested that when interpreters say they are giving effect to a lawmaker's intention, 'they are usually just thinking about what would be a reasonable way of dealing with the application of this text in the circumstances, adding the premise that the institution that promulgated the text was reasonable, and concluding that the lawmaker intended the conclusion that they favour.'[21] Accordingly, what interpreters actually do is to adopt reasonable interpretations, rather than search for what lawmakers meant as a matter of fact.

Returning to the Indian and Canadian Supreme Court decisions, Endicott thought that they were not necessarily arbitrary. These decisions were not 'unreasoned acts of will' because the judges operated under constraints.[22] These constraints included the inability of judges to set national policy, their limited fact-finding ability, the possibility of overrule by subsequent courts and the political culture of the community. In defining the nature of arbitrariness, Endicott argued that '[a] country is not ruled by law when it is ruled by the arbitrary caprice—by the sweet will and whims—of executive or legislative or judicial officials.'[23] A decision is arbitrary in general when it is 'not distinguished, by reasons in

[21] *Ibid* 60.

[22] *Ibid* 66-67.

[23] *Ibid* 70.

favour of it, from an unreasoned choice.'[24] A decision is arbitrary specifically in the sense of being a departure from the rule of law 'whenever the law itself ought to demand a justification other than the fact that the decision maker made it, and there is no such justification.'[25]

4.2.3 The features of exercise non-arbitrariness

I turn now to identify the key features of exercise non-arbitrariness by drawing upon Raz's and Endicott's accounts.

The first feature of exercise non-arbitrariness is that it identifies arbitrariness by reference to how a power has been exercised. Raz's definition of arbitrariness is concerned with 'the use of power'.[26] Endicott's definition similarly centres around the arbitrariness of decisions.

The Supreme Court of India judgment which Endicott discussed, *Centre for Public Interest Litigation & Others v Union of India & Others*,[27] helps to illustrate this. The Indian government decided to hand out 2G mobile phone spectrum on a 'first come, first served' basis to multinational telecommunications corporations, in a bid to attract investment and extend telephone services across India. The court found that this policy was arbitrary

[24] *Ibid*.

[25] *Ibid*.

[26] Raz, 'The Law's Own Virtue' (n 8) 5.

[27] *Centre for Public Interest Litigation & Others v Union of India & Others*, Supreme Court of India, Writ Petition (Civil) No 423 of 2010, decided on 2 Feb 2012 [2G Spectrum].

because it did not serve the relevant public purposes. An auction would have better served the public interest by compensating the Indian people for the allocation of a public resource to private parties, and would have also been more effective at avoiding corruption.

How would Raz's and Endicott's accounts assess whether there was arbitrariness in this situation? Both accounts would look at how the power to distribute mobile phone spectrum was exercised. For example, Raz's account would consider whether the Indian government's exercise of power was indifferent to the proper purposes for which power should be used. Endicott's account would similarly be concerned about whether there were relevant reasons justifying the Indian government's exercise of power.

This is not to say that exercise non-arbitrariness is unconcerned with the nature of power. Indeed, Endicott suggested that certain kinds of power are arbitrary. The reason that the Indian and Canadian Supreme Court decisions were not necessarily arbitrary was that judicial power is subject to institutional and political constraints. This suggests that Endicott thought that arbitrariness can also be identified by reference to the features of power, independent of its exercise. Also, arbitrary power facilitates the arbitrary exercise of power. Accordingly, while exercise non-arbitrariness identifies arbitrariness by reference to the exercise of power, it can also encompass a concern with the features of power.

The second feature of exercise non-arbitrariness is that it is assessed from the power-holder's perspective. This means that arbitrariness is different from wrongness. In other words, in determining whether an exercise of power is arbitrary, what matters is the power-holder's state of mind, instead of whether the decision objectively meets a certain standard of justification. To illustrate the difference, suppose that a government minister is

concerned about acting in accordance with the proper reasons, but makes a mistake in his understanding of these reasons and ends up acting for the wrong purposes. If the power-holder's perspective is a necessary and sufficient condition for arbitrariness, then this minister may have acted unlawfully but not arbitrarily. But if what matters is whether the decision meets an objective standard of justification, then the minister has acted arbitrarily.

It is useful to observe that this distinction has important consequences. If meeting a certain objective standard of justification were a necessary or necessary and sufficient condition for non-arbitrariness, it would mean that where a power-holder in good faith is concerned about the proper purposes for the use of power but makes an honest mistake, one would be compelled to see this as an exercise of arbitrary power. This is strange. This might be a wrongful exercise of power. But labelling such exercise of power as 'arbitrary' seems a step too far.

For example, suppose that an official decides to grant a foreigner certain privileges to housing that are ordinarily available only to citizens. He believes, based on his understanding of the law, that it requires foreigners to be treated the same as citizens for the purposes of access to housing. Assume that he is mistaken. In evaluating the official's actions, we would not hesitate to say that he has acted wrongfully. But has he acted arbitrarily? I think that we would not ordinarily say that he has. After all, he has done his best to act on what he believed the law required. We might have a different reaction if he had made the decision by tossing a coin, or if he had decided to grant the foreigner privileges because he liked their appearance.

Raz's account clearly provides that it is the power-holder's perspective that matters. This is apparent even in his earlier reflections on arbitrariness. In 'Legal Principles and the Limits of Law', he argued that judges do not act arbitrarily so long as they are bound to act on the reasons that they think are the best.[28] Raz maintained this position in his later works. His definition of arbitrariness in 'The Law's Own Virtue' provides that a power-holder acts arbitrarily if he is indifferent to the proper reasons for which power should be used.[29] The centrality of the power-holder's perspective is clear here. To exercise power in a non-arbitrary way, the power-holder does not necessarily have to intend to fulfil the proper reasons for which power should be used. But he has to at least be concerned about these reasons, for example, by considering them in decision-making.

Endicott's account also suggests that the power-holder's perspective must be taken into account. A recurrent expression he used to describe arbitrary rule is rule by 'the sweet will and whims' of power-holders.[30] The centrality of the power-holder's perspective is implicit in this expression. A power-holder does not act by his 'sweet will and whims' if he is concerned about the proper purposes for the use of power but is objectively mistaken.

The third feature of exercise non-arbitrariness is that it requires a power-holder to be concerned about acting for the relevant reasons. These reasons are drawn from the law. Raz's account provides that the relevant reasons are identified by the law. Similarly, Endicott's definition of arbitrariness means that the relevant reasons depend on the justifications that the law demands. Suppose that a statute grants power to an officer to

[28] Raz, 'Legal Principles' (n 1).

[29] Raz, 'The Law's Own Virtue' (n 8) 5.

[30] Endicott (n 16) 54, 56-58, 62, 70.

approve applications for employment passes. The officer acts arbitrarily if, in exercising his power, he is indifferent to the statute's purposes—for example, to meet the country's needs for skilled labour in specific sectors.

The scope of relevant reasons can go beyond a statute's purpose. As Raz described how a government acts in accordance with the rule of law, he stated that a government has to act 'with manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation.'[31] This suggests that the law's morally proper interpretation and implementation supplies relevant reasons as well. For example, an officer should not be indifferent to the need to maintain consistency in how employment pass applications are treated. As a requirement of the rule of law, consistency is relevant under a morally proper interpretation and implementation of the statute, even if the statute does not mention it.

Accordingly, the relevant reasons that power-holders have to be concerned about are what the law makes relevant. This can be contrasted with an alternative view: that power-holders have to be concerned about any relevant reason that contributes to an exercise of power being objectively justifiable, whether the reasons come from legal or extra-legal sources. I think that the position that exercise non-arbitrariness takes is preferable to the alternative view. Since the alternative view is based on an objective standard of justification, it runs into the problem that people may have very different ideas of what makes an exercise of power justified. There may be significant disagreement as to what the relevant reasons are. In contrast, exercise non-arbitrariness requires us to derive

[31] Raz, 'The Law's Own Virtue' (n 8) 7-8.

reasons from the law. It will be easier to agree on what these reasons are, even if people have different comprehensive doctrines.

4.2.4 The first principle of non-arbitrariness

In summary, the following are the key features of exercise non-arbitrariness. First, it identifies arbitrariness by reference to how a power is exercised. Even if a power is non-arbitrary, its exercise can still be arbitrary. Second, it is concerned with the power-holder's perspective. It is different from wrongness. The power-holder's state of mind is central in determining if an exercise of power is arbitrary. Third, it looks at whether a power-holder was concerned about acting for the relevant reasons for the use of power. The relevant reasons are those that the law makes relevant.

I can now distil a principle that specifies the conditions of non-arbitrariness under the aspect of exercise non-arbitrariness. Building on the preceding discussion, the following is the first principle of non-arbitrariness:

1. An exercise of power is non-arbitrary if a power-holder is not indifferent to the proper reasons for the use of power.

The 'proper reasons for the use of power' are those that the law makes relevant. As mentioned earlier, they include the purpose of the statute, as well as the law's 'morally proper interpretation and implementation.'[32] They include not just the substantive grounds

[32] *Ibid*.

for the exercise of power, but also the procedure by which power is exercised. Indeed, Raz's account of non-arbitrariness draws attention to the importance of procedure. It will be recalled that his requirements of the rule of law focused on the decision-making procedure—decisions have to be fair and unbiased, with proper opportunities to consider relevant arguments, *inter alia*.[33]

Acting for the proper reasons for the use of power is certainly valuable. Whether a power-holder acts for these reasons helps us to determine whether a power-holder has acted wrongfully. But it is important to notice that the principle requires that a power-holder is not indifferent to these reasons. This reflects the concern of exercise non-arbitrariness with the perspective of the power-holder. It draws from Raz's definition of arbitrariness. A power-holder must act on the basis of what he thinks are proper reasons for the use of power. This means that whether the use of power is non-arbitrary is a different question from whether the use of power is correct. The use of power can be wrongful and non-arbitrary at the same time, if the power-holder was concerned about acting for proper reasons but was mistaken about the content of these reasons.

A question that arises is whether this principle specifies a necessary and/or sufficient condition for non-arbitrariness. I am agnostic about whether it is a necessary condition. There may be other possible routes to achieving non-arbitrariness in the exercise of power. But my claim here is that this principle is a sufficient condition. If a power-holder satisfies this principle, the power-holder has not exercised power arbitrarily.

[33] *Ibid.*

This first principle of non-arbitrariness is focused on the exercise of power. But arbitrariness is not only about the exercise of power, as the next section will make clear.

4.3 Power non-arbitrariness

In contrast to exercise non-arbitrariness, the second aspect of non-arbitrariness identifies arbitrariness by reference to the features of power. In this section, I will first discuss Pettit's and Lovett's work as classic accounts of power non-arbitrariness. Pettit's and Lovett's accounts fall within the republican tradition. Republicanism is a political theory about how freedom and justice can be achieved within a society. In brief, republicanism argues that freedom requires freedom from domination.[34] A person is subject to domination when he is subject to arbitrary power. A just society is one which minimises domination.[35]

Republican accounts of non-arbitrariness reflect power non-arbitrariness. They emphasise the features of power, independent of how it is exercised. They suggest that power can be arbitrary even if it is always exercised in the interest of those subject to power. To illustrate, suppose that A and B are in a master-slave relationship. Republican accounts would find that the existence of such power is problematic, even if A always exercises his power benevolently.

After describing Pettit's and Lovett's accounts of non-arbitrariness, I will argue that the key feature of power non-arbitrariness is whether power is deliberatively isolated. This

[34] Samuel Arnold and John R Harris, 'What is arbitrary power?' (2017) 10(1) Journal of Political Power 55.

[35] *Ibid*.

serves to unite both Pettit's and Lovett's insights. Finally, I will specify the conditions of power non-arbitrariness.

4.3.1 Philip Pettit

Pettit's ambition was to articulate a vision of what freedom meant within the republican tradition.[36] Over the course of his career, Pettit continuously refined his account of freedom. But a consistent theme in his work remained a recognition that freedom from domination is distinct from freedom from interference. Pettit argued that 'it is possible to have domination without interference and interference without domination'.[37] As Pettit explained, '[d]omination can occur without interference, because it requires only that someone have the capacity to interfere arbitrarily in your affairs; no one need actually interfere. Interference can occur without domination, because interference need not involve the exercise of a capacity for arbitrary interference, only the exercise of a much more constrained ability'.[38]

Laws illustrate this point. Pettit noted that while laws interfere with liberty, they do not necessarily result in a deprivation of freedom in the republican sense. This is because the republican conception of freedom focuses on freedom from domination, rather than

[36] Philip Pettit, 'Before Negative and Positive Liberty' in *Republicanism: A Theory of Freedom and Government* (OUP 1997) ch 1.

[37] *Ibid* 22.

[38] *Ibid* 23.

freedom from interference. The consequence is that laws can actually secure freedom by preventing domination.[39]

What then does 'domination' mean? In his earlier work, Pettit argued that there are three aspects to any relationship of domination: someone dominates another to the extent that (1) 'they have the capacity to interfere' (2) 'on an arbitrary basis' (3) 'in certain choices that the other is in a position to make'.[40] How can power be used arbitrarily? Pettit argued that interference is arbitrary if 'it is chosen or not chosen at the agent's pleasure', 'without reference to the interests, or the opinions, of those affected'.[41] This means then that interference is non-arbitrary 'to the extent that it is forced to track the interests and ideas of the person suffering the interference'.[42] Pettit suggested that only 'relevant' interests and ideas have to be tracked—such interests are 'those that are shared in common with others', not those which are 'sectional or factional in character'.[43]

The question is how arbitrariness, thus defined, can be constrained. Pettit argued that two types of constraints can force a powerful agent to track relevant interests and ideas.[44] First, preconditions on action can be placed upon powerful agents such as the state. Such preconditions can include procedural requirements or substantive legal conditions that must be satisfied before a power is exercised. Second, penalties can be imposed on

[39] *Ibid* 36.

[40] Philip Pettit, 'Liberty as non-domination' in *Republicanism: A Theory of Freedom and Government* (OUP 1997) 52.

[41] *Ibid* 55.

[42] *Ibid*.

[43] *Ibid* 56.

[44] *Ibid* 58.

actions which amount to arbitrary interference. This means that legal powers do not necessarily result in domination, as long as they are suitably constrained such that they are forced to track the relevant interests of those being governed.[45]

In his later work, Pettit remained consistent to his account of freedom as non-domination and how it is distinct from freedom as non-interference. But he refined his ideas on what domination entails. Pettit adjusted the terminology he used to explain the concept of domination. Instead of identifying domination with arbitrary interference, he preferred to use the term 'uncontrolled interference'. The reason for this shift in terminology was Pettit's concern that the term 'arbitrary' could be misunderstood.[46] A common understanding of 'arbitrary' was that it referred to interference not subject to established rules. But Pettit noted that interference subject to established rules can still result in domination if such interference is uncontrolled by the dominated party. Also, 'arbitrary' raised the connotation of 'wrongful' behaviour, which may lead to people disagreeing as to what exactly amounted to wrongful or objectionable behaviour. Pettit thought that the term 'uncontrolled interference' captured more accurately the true concern with domination and was also value-independent, which meant that people could agree more readily on when such a term could apply.

While Pettit adopted different terminology in his later work, the substance of his ideas remained consistent. As with his previous work, he argued that non-domination required the existence of controls on power which would ensure that the exercise of power

[45] *Ibid*.

[46] Philip Pettit, 'Freedom as non-domination' in *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 58.

would track one's interests.[47] He argued that if the people controlled the government's interference with their lives, they would not be subject to domination and would enjoy freedom in relation to state power.[48]

But in his later work, Pettit offered a more detailed elaboration on what exactly such 'control' entailed. The paradigm case of control that would result in freedom from domination would be 'intentional control in which you exercise influence as an agent' and which 'leads to the realization of some desired end'.[49] Pettit argued that there were three conditions for control to exist. First, control must be individualised, so that each person has 'equal access to a system of popular influence and that system of influence has to give the state an equally acceptable direction – that is, a direction that they are all actually disposed to accept'.[50] Second, control must be unconditioned, meaning that control mechanisms cannot only be effective if the government is willing to go along with the direction of the control.[51] Third, control must be efficacious, such that unwelcome exercises of power would be viewed merely as 'tough luck', instead of breeding resentment at how state power has been exercised.[52]

Accordingly, in Pettit's view, the people must have control on power for non-arbitrariness to obtain. This is how we achieve the objective of having power being

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[47] *Ibid*.

[48] Philip Pettit, 'Political legitimacy' in *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) ch 3.

[49] *Ibid* 155.

[50] *Ibid* 170.

[51] *Ibid*.

[52] *Ibid* 177-178.

exercised in the interest of the people. This means then that Pettit's account, in contrast to exercise non-arbitrariness, is about the nature of the power. The key contribution of his account is directed at the features of power that power-holders should be permitted to wield.

4.3.2 Frank Lovett

Pettit's account has been characterised as an account of substantive non-arbitrariness. This is because it provides that there must be controls on power which achieve certain substantive outcomes for non-arbitrariness to obtain—for example, that control must give the state a direction that each person is 'actually disposed to accept'.[53] This can be contrasted with procedural non-arbitrariness, which Lovett argued for. Placing his theory within the republican tradition, Lovett accepted that a person or group is subject to domination if 'some other person or group has the capacity to exercise arbitrary power over them'.[54] Lovett argued that 'arbitrary' within the republican context does not mean randomness and is also not synonymous with 'discretionary'.[55] Rather, 'arbitrary' in the republican context refers to power being exercised 'according to the 'will or pleasure' of the person or group holding that power'.[56]

In response to Pettit, Lovett thought that the better understanding of arbitrary power is that it exists when power is not procedurally constrained.[57] In Lovett's view, 'the more

[53] *Ibid* 170.

[54] Frank Lovett, 'What counts as arbitrary power?' (2012) 5(1) Journal of Political Power 137, 137.

[55] *Ibid* 138.

[56] *Ibid* 139.

[57] *Ibid* 139.

procedurally constrained the exercise of social power is, the less arbitrary it is, and vice versa'.[58] When is a power procedurally constrained? Two conditions must be met. First, power must be subject to constraints that are effective in restricting the exercise of power. Second, these constraints must be reliably effective, such that there is a high probability that the constraints will be respected across a wide range of possible worlds.[59] The reliability of a constraint will often be secured through some form of external backing—for example, by giving an independent body like the courts the power to enforce such constraints against the power-holder.[60] Notably, in contrast to Pettit, for non-arbitrariness to obtain, Lovett argued that these conditions were sufficient. There was no further need for exercises of power to track the interests of those subject to power.

Lovett's understanding of the constraints on power required to secure non-arbitrariness is less demanding than Pettit's. An example will help to demonstrate this. Suppose that A is in a relationship of domination over B. Suppose further that another person C has set out some rules governing what A is able to do to B, and has the ability to force A to comply with these rules. But B has no say over the content and application of these rules. In this situation, Lovett's account of non-arbitrariness would hold that there has indeed been a reduction in the degree of arbitrary power. A is now subject to reliably effective constraints which are secured through external backing. Pettit's account of non-arbitrariness, on the other hand, would find that there has been no real reduction in arbitrary power. After all, even though A is now subject to constraints imposed by C, the fact remains that B is unable to exercise any kind of meaningful control over how A's power is exercised.

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[58] *Ibid*.

[59] *Ibid* 139-140.

[60] *Ibid*.

There is no guarantee that the constraints imposed by C will track B's interests. The conditions for control resulting in freedom from domination would not be met under Pettit's account.

In Lovett's view, his understanding of non-arbitrariness is closely associated with the ideal of the rule of law.[61] He argued that its key advantage, especially when compared to substantive non-arbitrariness, was that it was feasible for people with different comprehensive doctrines in society to agree with it—as Lovett suggested, 'regardless of a person's conception of the good, she can appreciate the value of knowing where she stands, and being able to plan out a life on that basis'.[62]

Nevertheless, Lovett's account is aligned with Pettit's on an important point. Since both accounts are republican accounts, they are both about domination and the preservation of freedom. This means that both accounts share a similarity in being concerned with the nature of power. From the preceding example, it is clear that while Lovett does have a different idea from Pettit as to what amounts to sufficient control on power, both Lovett and Pettit are united in their concern that power must be subject to proper controls. Both accounts are therefore classic examples of power non-arbitrariness.

4.3.3 The feature of power non-arbitrariness: deliberative isolation

[61] *Ibid* 140.

[62] *Ibid* 149.

Having described two classic accounts of power non-arbitrariness, I turn now to distil the key features of such an account. But a preliminary issue that must be addressed is how we should understand the relationship between the preceding two accounts. One might initially think that they are in opposition. Indeed, Lovett's account was offered as a response to Pettit's. And proponents of one account have offered critiques of the other. For instance, Lovett argued that substantive non-arbitrariness set the requirement for non-domination too high, such that power will often be considered arbitrary. He thought that this diminishes our hope for true freedom from domination. One reason that Lovett thought that Pettit's threshold for non-domination was too high was that in many cases, there may be an insufficiently rich fund of shared reasons by which persons subject to social power can constrain the exercise of power.[63] Another criticism that Lovett levelled against Pettit's account was that it required additional criteria distinguishing external constraints which reduce arbitrariness from those which do not. Lovett argued that this would introduce disagreement and reduce the value of Pettit's account as an account which people holding diverse viewpoints could agree upon.[64] As noted earlier, Lovett thought that a key strength of procedural non-arbitrariness was that it was not vulnerable to the same criticism. Lovett's account has been subject to critique as well. For example, Arnold and Harris argued that if Lovett was right that the existence of external constraints on power was necessary and sufficient for non-domination, then this means that blanket policies which discriminate on the basis of race would be desirable under procedural non-arbitrariness.[65]

[63] *Ibid* 145-146.

[64] *Ibid*.

[65] Arnold and Harris (n 34).

But is it necessary to view both accounts as opposed to each other? I think that it is possible to understand both accounts as complementary. Pettit's account of non-arbitrariness can be seen as an account that eliminates arbitrariness fully. In other words, when those subject to power are able to exert control over the power exercised over them, this results in complete non-domination. It is a sufficient condition for non-arbitrariness. Lovett's account, in contrast, does not eliminate arbitrariness fully. Rather, it tells us how the degree of arbitrary power can be reduced. It provides neither a necessary nor sufficient condition for non-arbitrariness.

The idea of 'deliberative isolation', offered in McCammon's republican account of non-arbitrariness, helps to explain how exactly Lovett's account reduces arbitrariness and Pettit's account eliminates arbitrariness. McCammon argued that absolute deliberative isolation occurs when a power-holder is not accountable to anyone else as to how they use their power.[66] In such a situation, a power-holder possesses arbitrary power. But when a power-holder is subject to external constraints, this reduces their deliberative isolation.[67] Their ability to exercise power at will without being called to account is reduced. This explains how Lovett's account has value in reducing arbitrary power. Yet, Lovett's account is insufficient as a condition for non-arbitrariness, since a slave can still be subject to domination even if a master's power is effectively and reliably constrained.[68] Pettit's account, in contrast, is able to completely eliminate arbitrary power. When a person has some kind of 'say-so' over how power is exercised over him, he achieves freedom from

[66] Christopher McCammon, 'Domination: A Rethinking' (2015) 125 Ethics 1028, 1046.

[67] *Ibid*.

[68] *Ibid*.

domination.[69] In McCammon's view, non-domination requires a person subject to power to be able to ensure that interferences are justified by reasons that people can be reasonably expected to endorse.

An illustration can help to explain how McCammon's account of non-arbitrariness reconciles Lovett's and Pettit's. Suppose that A is in a relationship of domination over B. Recall that Lovett's account holds that an external constraint imposed by a third party C reduces the scope of arbitrary power that A exercises over B, but that Pettit's account would not find any reduction in A's power over B. McCammon's account, applied to the same situation, would agree with Lovett that the introduction of C's constraint reduces the scope of arbitrary power A exercises over B. After all, A's ability to exercise power in deliberative isolation has been reduced—A now has to answer to C.

At the same time, McCammon's account would be aligned with Pettit in concluding that more can be done to reduce A's arbitrary power over B. Suppose now that B can force A to provide a justification for decisions made in relation to B. If A's justifications are not acceptable to reasonable citizens, B also can invalidate these decisions. This is the kind of constraint which McCammon's account suggests is necessary for B to be truly free from A's domination.

Returning to Lovett's account, this illustration helps to highlight a specific detail of how his account reduces arbitrary power. Indeed, one may observe that the introduction of C's constraint does not necessarily reduce the arbitrary power that B may overall

[69] *Ibid* 1050.

experience. After all, one may argue that B is now simply subject to C's power instead. But if A is now subject to reliable and effective constraints enforced by C, it remains true that the scope of arbitrary power that A is able to exercise over B is now reduced. In other words, while there may not necessarily be an overall reduction in the scope of arbitrary power that B experiences, Lovett's account contributes to reducing the arbitrary power that a specific power-holder can wield. This remains valuable. For example, one may be more concerned about specific power-holders as compared to others, potentially due to the relative balance of power each may wield in an institutional context or how certain power-holders are selected to wield power. An account which tells us how the arbitrary power of certain power-holders can be reduced is valuable, even if this does not necessarily achieve a total reduction in arbitrary power.

Accordingly, I think the key feature of power non-arbitrariness can be understood through the concept of deliberative isolation. It unites both Pettit's and Lovett's accounts. A power-holder's arbitrary power is reduced if his power is accountable to an external party. A power-holder's arbitrary power is eliminated if his power is accountable to persons subject to power who can ensure that there is reasonable justification for exercises of power.

Endicott's work on arbitrariness also suggests that deliberative isolation is the key feature of power non-arbitrariness. Recall that Endicott was concerned about explaining whether the Indian and Canadian Supreme Court decisions he had highlighted were themselves decided arbitrarily. It is telling to observe how he reached the conclusion that these decisions were not necessarily arbitrary. He argued that this was because judicial power is subject to institutional and political constraints. This argument refers to the nature of power and reflects power non-arbitrariness. And the crux of his argument is that power

is not arbitrary if it is subject to institutional and political constraints that hold it accountable—in other words, if power is not deliberatively isolated.

Postema's work lends further support to the idea that deliberative isolation is the key feature of power non-arbitrariness. It also provides an elaboration of the features of deliberative isolation. Postema argued that the rule of law is opposed to arbitrary power.[70] Like Raz, Postema argued that the rule of law would not entirely abolish arbitrary power. Rather, its value is that it can limit arbitrary power.[71] Arbitrary power can be identified by reference to its features, independent of its exercise. Such power has two main features. First, it is unilateral, in the sense that the power-holder's 'perspective on the action is the only relevant deliberative perspective.'[72] Second, it is unaccountable, in the sense that power-holders 'are not answerable to any third party, and in particular not to the subjects of their power.'[73] Both features express the idea that power is arbitrary if the will of the power-holder is all that matters; that is, if power is deliberatively isolated. But they usefully highlight different aspects of this idea. A power is unilateral if the will of the power-holder is all that matters prior to a decision being made—for example, if a power-holder is not obliged to take into account any relevant considerations aside from what he wishes to. A power is unaccountable if, after a decision has been made, the power-holder does not have to answer either to the subjects of the power or a third party like a court.

[70] Gerald Postema, *Law's Rule* (OUP 2022) ch 1.

[71] *Ibid* ch 2.

[72] *Ibid*.

[73] *Ibid*.

Accordingly, the key feature of power non-arbitrariness is that it identifies arbitrariness by reference to whether a power is deliberatively isolated. In contrast to exercise non-arbitrariness, power non-arbitrariness would hold that arbitrariness depends on whether power can be exercised in deliberative isolation.

4.3.4 The second principle of non-arbitrariness

I turn now to distil the conditions of power non-arbitrariness. We can add a second principle of non-arbitrariness:

2. A power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable justification. Arbitrary power is reduced if a power-holder is accountable to an external party.

This second principle, in contrast to the first, is about the features of power. It allows us to identify arbitrariness without reference to how a power has actually been used. For example, we would be able to conclude that the power that a master holds over a slave is arbitrary simply by looking at the kind of power the master wields. Arbitrariness obtains as long as the power is not subject to any requirement of accountability.

There are two parts to the principle. The first reflects McCammon's perspective on substantive non-arbitrariness. It sets out a condition for the elimination of arbitrary power. Drawing from the earlier discussion, the complete elimination of arbitrary power requires persons subject to power to be capable of exercising control over how power is exercised. In McCammon's view, deliberative isolation is eliminated when persons subject to power

are able to force power-holders to exercise power for reasons that can be reasonably endorsed—in other words, for justifiable reasons. The standard of justification is an objective one. It does not require that all persons subject to power actually accept the reasons. But the reasons must be capable of being accepted.

The second part sets out a condition for the reduction of arbitrary power. As was described earlier, deliberative isolation may not be completely eliminated merely by the imposition of effective and reliable external constraints on power. Yet, such constraints do reduce deliberative isolation. Deliberative isolation is reduced as long as power-holders are required to account to an external party, even if this party is independent of the persons subject to power. The second part of this principle expresses how such external constraints contribute to non-arbitrariness. While such external constraints are not sufficient to achieve the elimination of arbitrary power, the reduction of arbitrary power exercisable by specific power-holders is nevertheless a valuable objective.

Both parts of the principle set out sufficient conditions. As with the first principle of non-arbitrariness, I am agnostic about whether there may be other possible routes to making power non-arbitrary. But I claim that this second principle sets out sufficient conditions. If the extent to which power can be exercised in deliberative isolation is eliminated or reduced, this is sufficient to eliminate or reduce its arbitrariness respectively. No additional conditions have to be met.

4.4 Non-arbitrariness and the law on policies

To sum up the discussion thus far, I have discussed two aspects of non-arbitrariness: exercise and power non-arbitrariness. I have also offered two principles of non-arbitrariness to reflect each aspect:

1. An exercise of power is non-arbitrary if a power-holder is not indifferent to the proper reasons for the use of power.

2. A power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable justification. Arbitrary power is reduced if a power-holder is accountable to an external party.

In this section, I turn to the question of whether these principles of non-arbitrariness offer a plausible account of the law on policies. What is a 'plausible account'? In Chapter 1, I explained that I will be adopting the criteria of fit and justification to evaluate the success of an interpretive theory: an interpretive theory should fit the existing legal materials and justify them by showing them in their best light. In the rest of this chapter, I will provide a *prima facie* case that both principles of non-arbitrariness satisfy these criteria. In the subsequent sections, I will first point out that power non-arbitrariness alone does not serve as a plausible account for the law on policies. It struggles to fit with important aspects of the law. Exercise non-arbitrariness alone fits better. But there are still aspects of the law that do not cohere well with exercise non-arbitrariness. It is when both aspects of non-arbitrariness are taken together that we have an account that fits with and justifies the law on policies. The remainder of this thesis will complete this argument by relating non-arbitrariness to the law in detail and proving that it is indeed the best explanation of the law on policies.

4.4.1 Power non-arbitrariness

Power non-arbitrariness alone does not serve as a plausible account of the law on policies because it struggles to satisfy the first criterion of *prima facie* fit with the law. As described earlier, it identifies arbitrariness by reference to the nature of power. For example, Lovett and Pettit accepted that domination can occur even in the context of a benevolent master-slave relationship. They thought that the kind of power that the master has over the slave leads to domination, regardless of how the master exercises it.

But the law on policies is primarily about the exercise of power. There are several examples we can point to. For one, through the legitimate expectations doctrine and principle of consistency, the law imposes legal duties on a public body's decisions to change its policies or depart from them in a specific instance.[74] The law also requires a public body to act on a correct interpretation of policies.[75] All of these legal duties are concerned with how a public body has exercised its power, rather than ensuring whether those powers possess structural features that ensure they are exercised in the interests of those subject to them.

This is not to say that power non-arbitrariness is unconcerned about how power is exercised, or that it cannot explain the law on policies at all. Legal rules that constrain how a public body exercises power are also controls on power. Indeed, it is possible to argue

[74] See, for example, *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *R (Patel) v General Medical Council* [2013] 1 WLR 2801.

[75] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

that the law on policies is directed at reducing deliberative isolation by holding public bodies to account for how they use policies. For example, the duty to comply reduces the arbitrary power of public bodies in their application of policies. If they choose to depart from their policies, they face the prospect of accounting to the courts for their decision and providing good reasons for their departure. Legal rules such as the duty to comply therefore promote power non-arbitrariness in this sense.

The issue, however, is that this makes indirect the relevance of power non-arbitrariness as an explanation for rules governing the exercise of power. If much of the law on policies is about the exercise of power, a more direct explanation of the law would be preferable. More fundamentally, the focus of power non-arbitrariness on the features of power independent of its exercise means that it fails to account for important dimensions of the law. For instance, even if power non-arbitrariness can explain why there is a duty to comply with policies, it struggles to explain why public bodies must also remain willing to consider departing from those policies where there is good reason to do so. The non-fettering rule takes issue with blanket policies applied rigidly. Yet, power non-arbitrariness would be promoted by such policies—they would help constrain the power of decision-makers. The non-fettering rule therefore requires an explanation that is capable of accounting for what is objectionable about rigid exercises of power.

There are also problems specific to Lovett's and Pettit's accounts of power non-arbitrariness as explanations of the law on policies. Beginning with Lovett's account, it similarly struggles to explain the non-fettering rule. Recall that he argued that controls on power have to be effective and reliable. But the law is not solely concerned about the imposition of effective and reliable constraints on power. If it were, it would have no issue

with the adoption and application of blanket policies, since they serve as constraints on power. Yet, the non-fettering rule takes issue with blanket policies. Accordingly, the law is concerned also with the substance of constraints on power in a way that Lovett does not adequately account for.

Turning to Pettit's account, it is clear that the law is not concerned about giving people control over power in the three senses that he requires. The requirements of individualised and efficacious control specify democratic ideals that are of little concern to the law on judicial review.[76] It is difficult to claim that the law is directed towards influencing the state to move in a direction that everyone is equally disposed to accepting and having people view unwelcome exercises of power as 'tough luck'. These conditions are focused on the effects that control must achieve. However, the law on policies is focused not on the outcome of control, but on making sure that each exercise of power is made within permissible parameters. For example, if a public body has adopted a policy, the law requires the public body to comply with it unless it has good reason to the contrary. The law is not concerned about ensuring that the eventual decision is in line with a direction everyone is equally disposed to accept. Pettit's requirement of unconditional control also squares uneasily with the law. He required control to be unconditional such that its effectiveness does not depend on the willingness of government to go along with it. But in judicial review, it is the court which reviews the exercise of public power. And courts have the discretion to reject the challenge and even to refuse leave for a judicial review application to proceed. An affected person is therefore still at the mercy of the courts. Judicial review might not meet this requirement of unconditional control.[77]

[76] Farrah Ahmed, 'Arbitrary Power: Caricature and Concept' (2024) 43 Law and Philosophy 641, 665.

[77] This might not necessarily be an insurmountable issue. Indeed, it could be argued that Pettit thought that 'control' is capable of encompassing procedures such as judicial review—see, for example, Frank Lovett and

Returning to the account of power non-arbitrariness proposed in this chapter, the important point for present purposes is that it is relevant to the law on policies, but that it is not sufficient as a stand-alone explanation. Taken by itself, it struggles to account for important aspects of the law on policies.

4.4.2 Exercise non-arbitrariness

Exercise non-arbitrariness, in contrast, fits better with the law even on its own. First, the concern of exercise non-arbitrariness with the exercise of power fits directly with what judicial review is primarily concerned about. The grounds of judicial review ensure that public power is exercised within legal limits. For example, as observed earlier, the legal rules concerning the duty to comply and the interpretation of policies apply to a public body's exercise of power.

Second, the concern of exercise non-arbitrariness with the reasons for the use of power fits well with many of the legal rules on policies. For example, the law requires public bodies to have good reasons for decisions to depart from policies.[78] A rigid adherence to policies is also not legally permissible under the non-fettering rule. Rather, public bodies must be willing to consider reasons which may justify departure from a

Philip Pettit, 'Preserving Republican Freedom: A Reply to Simpson' (2019) 46(4) Philosophy & Public Affairs 363—in response to Thomas W Simpson, 'The Impossibility of Republican Freedom' (2017) 45(1) Philosophy & Public Affairs 27.

[78] See, for example, *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *R (Patel) v General Medical Council* [2013] 1 WLR 2801.

policy.[79] By making public bodies accountable in this manner for their decisions to depart from or adhere to their policies, the law encourages public bodies to be concerned about the relevant reasons for making such decisions. These legal rules therefore can be explained by exercise non-arbitrariness.

Third, the concern of exercise non-arbitrariness with the perspective of the power-holder fits with the law on policies. The law on policies is concerned about how a power-holder has made a decision. Taking the duty to comply with policies as an example, if public bodies depart from their policy, the law requires that they must have had good reasons for doing so.[80] The requirement is not whether such a decision is objectively justifiable. Rather, the focus is on whether the decision-maker was concerned about the relevant reasons at the time that it was made.

Finally, exercise non-arbitrariness matches how judges have rationalised the law on policies. For example, in *British Oxygen Co Ltd v Minister of Technology*, Lord Reid explained the non-fettering rule on the ground that a public body must be 'always willing to listen to anyone with something new to say'.[81] This rationalisation of the non-fettering rule coheres well with Raz's argument that the decision-making process should 'allow proper opportunities to consider relevant arguments and information' in order to promote the rule of law and thereby secure non-arbitrariness.[82] Also, in *Mandalia v Secretary of*

[79] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

[80] See, for example, *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; *R (Patel) v General Medical Council* [2013] 1 WLR 2801.

[81] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL), 625.

[82] Raz, 'The Law's Own Virtue' (n 8).

State for the Home Department, the Supreme Court rationalised the requirement for public bodies to act consistently with their policies as based on 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public', citing Laws LJ in *R (Nadarajah and Abdi) v Secretary of State for the Home Department* with approval.[83] Again, this tracks with Raz's observation that 'stability and predictability' would tend to secure non-arbitrariness.[84]

Yet, there are also elements of the law which cohere less easily with exercise non-arbitrariness. The House of Lords decision in *R (Purdy) v Director of Public Prosecutions* is a case in point.[85] I discussed this case in Chapter 2. To recall, the applicant was considering travelling to another country to undergo an assisted suicide. But she was concerned that if her husband helped her with this journey, he might be prosecuted in the UK for an offence under section 2(1) of the Suicide Act 1961. She asked the Director of Public Prosecutions for clarity as to when prosecutions would be brought under the Act. The Director refused to give further information. She then sought judicial review of this refusal to provide details of prosecutorial policy.

The court noted that the applicant was asking for clarity on prosecutorial policy so as to be able to make a decision on when to undergo assisted suicide.[86] She did not seek immunity from prosecution. The applicant's right to private life under Article 8(1) of the

[83] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 [29]; *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[84] Raz, 'The Law's Own Virtue' (n 8).

[85] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

[86] *Ibid* [31].

ECHR was engaged, which meant that any interference with the right had to be done in accordance with law, pursuant to Article 8(2). One of the requirements for an interference to be in accordance with law was that the law or rule in question had to be 'sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law.'[87]

The question was whether the Code for Crown Prosecutors provided sufficient guidance to meet the requirements of Article 8(2). The House of Lords held that it did not: 'in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all.'[88] The Code did not provide sufficient guidance to help Crown Prosecutors decide whether it will be in the public interest to prosecute in situations such as the one that the applicant was concerned with.[89] This was problematic since the application of the Code in such circumstances would not be predictable or consistent. As a result, the court held that the Director of Public Prosecutions was required to promulgate a policy stating the facts and circumstances which will be taken into account in deciding whether to prosecute under section 2(1) of the Suicide Act 1961.[90]

What was the basis of the court's objection to the policy in *Purdy*? On first impression, one might think that *Purdy* reflected a concern with the exercise of power. The court was concerned about how power might be more likely to be exercised arbitrarily

[87] *Ibid* [40].

[88] *Ibid* [53].

[89] *Ibid* [54].

[90] *Ibid* [56].

down the road, without a clear policy. This is true. Yet, framed as such, the court's true objection in *Purdy* was to the nature of the power that Crown Prosecutors would have in these special circumstances. The Code of Crown Prosecutors was so vague that in these situations, prosecutors would have an overly-wide discretionary power in deciding whether to prosecute. This means that the law on policies goes beyond the aspect of exercise non-arbitrariness. There are elements of the law which do not fit readily with it.

4.4.3 Drawing on both aspects of non-arbitrariness

Thus far, we have observed that power non-arbitrariness on its own struggles to fit with the law. Exercise non-arbitrariness fares better in terms of fit, but also encounters difficulties in relation to certain aspects of the law. As *Purdy* illustrates, the law on policies is also concerned about power non-arbitrariness.

The solution, then, is straightforward. Both aspects of non-arbitrariness should be taken together. When both aspects are taken together, we will have an account that meets the first criterion of *prima facie* fit with the law. Such an account would fit with the legal rules in this area and match with how judges themselves have rationalised the law.

This combined account also *prima facie* satisfies the second criterion of justification. It offers a plausible account for the law's concern with policies. The rest of this section will explain why.

The starting point is that non-arbitrariness is an attractive moral ideal. There is clearly something wrong with power that is exercised without regard to the proper reasons

for which power should be used. If a public body departs from its own policies on its 'sweet will and whims', it has done something objectionable. The same applies if it is indifferent as to whether the content of its policies is consistent with the law. Similarly, there is also something clearly objectionable about power that is unaccountable to anyone. This is why the power of tyrants gives us cause for concern, and why procedures such as judicial review are widely accepted as valuable controls on public power.

Turning back to policies, it is clear that they can reduce both power and exercise arbitrariness. For one, policies can help power-holders concern themselves with the relevant reasons by extending the influence of prior deliberation. If a policy is well-drafted to incorporate the relevant reasons for the use of power, then subsequent power-holders will simply have to use the policy to also be concerned about these reasons. Policies can therefore facilitate a concern with relevant reasons better than leaving power-holders to make each decision afresh.

Also, policies can facilitate non-arbitrariness by promoting consistency. As Raz explained, consistency is a requirement of the rule of law and it contributes to non-arbitrariness. Policies can further consistency through their generality. They help to strike a balance between a need to preserve discretion and the interest in consistency of decision-making.[91] Even public guidance can further consistency, although it does not affect the exercise of power. The use of public guidance applies a consistent standard to the public, as opposed to requiring public bodies to make discrete decisions about each person.

[91] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016) ch 2; Patrick McCabe, 'Failure to Adhere to Policy: A Category of Jurisdictional Error?' (2019) 26(3) AJAL 146.

Finally, policies can promote non-arbitrariness by providing an additional avenue of accountability. A policy can provide a transparent statement of how a public body intends to make certain decisions.[92] If a public body is held accountable for the content of its policies, this would reduce power arbitrariness. Similarly, if a public body is held accountable for whether it abides by its policies, this reduces exercise arbitrariness.

Policies therefore can play an important role in reducing both aspects of arbitrariness. Indeed, the preceding paragraphs answer the question of what advantages policies bring in terms of non-arbitrariness which could not be obtained if the law simply regulated particular decisions of public bodies. Otherwise, one might object that judicial review already requires public bodies to abide by rules of natural justice and to make decisions which are not *Wednesbury* unreasonable, *inter alia*. One might therefore think that the availability of judicial review of decisions already reduces the possibility of arbitrariness.[93] It is true that judicial review of decisions promotes non-arbitrariness. But the preceding paragraphs demonstrate that it is also true that policies can further reduce the scope of arbitrary power in a distinctive way. As Hickman and Poole argued, if there were no policies at all, 'the absence of co-ordinated decision-making would be likely to generate less rational and defensible decisions'.[94]

[92] Shona Wilson Stark, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2020).

[93] Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (OUP 2002) ch 1.

[94] Tom Hickman and Thomas Poole, 'Judicial review and guidance' (2024) 140(Jul) LQR 381.

However, it is worth noting the manner in which the preceding paragraphs have been framed. They have argued that policies are capable of bringing these advantages. But policies on their own do not necessarily bring these benefits. The existence of a policy is not sufficient for non-arbitrariness. It is obvious that policies can be used arbitrarily.[95] Policies will fail to help power-holders to be concerned about the relevant reasons if their content is unlawful. They will also make no contribution to accountability if power-holders are not held accountable for how they apply policies.

This is where we return to the link between non-arbitrariness and judicial review of policies. For policies to promote non-arbitrariness, an important condition must be satisfied: public bodies have to be called to account for their adoption and use of policies. While the courts are not the only candidate to play such a role, they are uniquely well-suited to do so. The courts are independent from public bodies, have authority to hold public authorities to account for their decisions, and have created sophisticated techniques by which to do so without interfering excessively with executive discretion. Legal accountability through the courts also allows public bodies to be held to account for specific decisions in a manner that would not be possible through political accountability in Parliament.

Accordingly, this provides us with a plausible account of the law on policies. Non-arbitrariness is an attractive moral ideal. Policies can further the interest of non-arbitrariness in an important and distinctive way. But certain conditions must obtain for policies to further the interest of non-arbitrariness. This is where the law on policies becomes relevant. The law provides these conditions. This explains the law on policies.

[95] Richardson (n 93).

This means that non-arbitrariness *prima facie* meets the second criterion of justification: it explains the law in a way that shows how the law might be thought to be justified.

As such, a combined account of non-arbitrariness, concerned with both exercise and power non-arbitrariness, is a plausible account of the law on policies. In the subsequent chapters, I will substantiate this account. Diving into the details of the law, I will prove that this account is the best interpretive theory of the law on policies—it can fit and justify the law and also fruitfully address open questions.

Chapter 5 Departing from or adhering to a policy

I have made two sets of claims thus far. The first set is about how the law understands what administrative policies are. I argued that they are practice-independent non-legal general guides to conduct created by public bodies. This helps us to understand what is distinctive about policies as compared to other types of government action. I have also accepted and built upon Hickman and Poole's typology of policies: self-directing policies, coordinating policies, and public guidance. Overall, this first set of claims clarifies that while there are features common to all administrative policies that allow them to be identified as a distinct category of government action, there are also important differences between policies.

The second set of claims is about the principles of non-arbitrariness. I argued that the principles of exercise and power non-arbitrariness, taken together, provide a plausible account of the law on policies. To recall, exercise non-arbitrariness is the principle that an exercise of power is non-arbitrary if a power-holder is attentive to the proper reasons for the use of power. Arbitrariness is different from wrongness. But the degree of wrongness is indicative of arbitrariness—a blatantly and absurdly wrong decision indicates that it could have been made with an indifference to the proper reasons for the use of power. Power non-arbitrariness provides that a power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable justification. It also accepts that arbitrary power is reduced if a power-holder is accountable to an external party. In the previous chapter, I argued that a combined account of these principles can *prima facie* fit and justify the law on policies.

The rest of the chapters in the thesis will substantiate the second set of claims. Having established that non-arbitrariness is a *prima facie* plausible account of the law, I will move to prove that it is the best interpretive theory of the law on policies. In this chapter and the next, I will start by discussing how non-arbitrariness can explain the established doctrines in the law on policies. This will demonstrate how non-arbitrariness fits and justifies the law on policies. In these chapters, I will also apply non-arbitrariness to the open questions that remain in these doctrines and will show that it provides useful answers to them. After discussing the established doctrines, I will move in Chapter 7 to the less-established doctrines and unestablished areas in the law on policies and explore what non-arbitrariness suggests about the way ahead for the law.

With the roadmap for the rest of this thesis thus laid out, I turn to the focus of this chapter. Here, I will be discussing the duty to comply with policies and the non-fettering rule. While both doctrines have developed independently, they are conceptually connected. The duty to comply tells public bodies that they cannot freely disregard policies. At the same time, the non-fettering rule says that public bodies cannot adhere rigidly to their policies. Accordingly, there is a tension between both doctrines that requires explanation. This makes it useful to discuss them together.

In this chapter, I will first discuss the duty to comply before moving to the non-fettering rule. For each doctrine, I will start with the most fundamental normative question it raises: why does it exist at all? I will answer this question through the principles of non-arbitrariness. I will then discuss the implications of this interpretive theory for the various questions that remain open in each area of law.

5.1 The law on the duty to comply

5.1.1 Why must policies be complied with?

As I described in Chapter 2, one well-established doctrine in the law on policies is that public bodies have a duty to comply with policies unless there is good reason to the contrary.

The existence of this duty is not in doubt. But it raises a basic normative question: why does the law impose such a duty on public bodies? The question of why policies attract a duty to comply can be broken down further into two questions. First, why is there a duty to comply with policies? Second, why can the duty be overridden if there are good reasons to the contrary?

Non-arbitrariness provides an explanation for both questions. Starting with the first, this concerns the fundamental relationship between policies and non-arbitrariness. The starting point is that policies can promote non-arbitrariness. They do so in several ways. First, the use of a policy can facilitate consistency and predictability in how public bodies make decisions. As I mentioned in Chapter 4, the promotion of these principles of the rule of law furthers exercise non-arbitrariness.[1] Second, policies can help decision-makers to be concerned about the important considerations bearing upon each decision. Following a well-drafted policy which captures such considerations helps to ensure that exercises of power are not made with indifference to the relevant reasons for the use of power. Third, a policy can serve as a constraint on how public bodies exercise their power. In other words,

[1] Joseph Raz, 'The Law's Own Virtue' (2019) 39(1) OJLS 1.

it reduces the scope of uncontrolled discretion that public bodies have. This promotes power non-arbitrariness.

But suppose that, even if public bodies adopted policies, they were free to depart from their policies at their whim. An immigration agency adopts a policy to help line officers decide whether to approve visa applications, but these officers are free to ignore the policy if they wish. Ignoring the policy results in no consequences and the officers' decisions will still be equally valid. If this were the case, the policy would not promote non-arbitrariness at all. The adoption of the policy would make no difference to consistency of decision-making, since officers are free to depart from it. The policy would also contribute little to helping officers identify the important considerations that they have to take into account. And the policy would not contribute to regulating or constraining the discretion of decision-makers.

This means that for policies to promote non-arbitrariness, public bodies must be under a duty to comply with them. A legal duty to comply would promote non-arbitrariness in two ways. First, the mere fact of a legal duty to comply reduces the scope of discretion that public bodies have in how they use their policies. Through judicial review, the courts are able to hold public bodies to account for their application of policies. This would reduce arbitrary power. Second, a legal duty to comply is likely to increase public bodies' rates of compliance with policies as a matter of fact. This would better facilitate the ability of policies to bring the benefits of non-arbitrariness discussed earlier—consistency and well-considered decision-making. Accordingly, non-arbitrariness explains why there is a duty to comply with policies in the first place.

To be clear, a legal duty to comply with policies is not sufficient to ensure that policies will promote non-arbitrariness. For example, requiring public bodies to comply with a policy that authorises unlawful conduct would not facilitate non-arbitrariness. Other legal rules must be in place as well, such as the rule against policies authorising unlawful conduct.[2] The point for present purposes is that a legal duty to comply is a necessary condition for policies to promote non-arbitrariness, even if it is not sufficient.

I now move to the second question: why can the duty be displaced if there are good reasons to the contrary? This question can also be broken down into two parts. First, why is the duty not absolute? After all, if it is so important for public bodies to comply with their policies, one might think that the duty to comply should be absolute. Non-arbitrariness explains why. Suppose that the law required public bodies to always comply with their policies. Even if exceptional circumstances arose justifying a departure, the law would still require a public body to apply its policy strictly. It is clear that this would result in arbitrariness in the exercise of power. A legal rule like this would require public bodies to exclude from their consideration reasons that they ought to take into account in their application of policies. This means that non-arbitrariness suggests that public bodies should be neither entirely free to disregard their policies nor required blindly to apply their policies no matter the circumstances.

Second, why is the relevant standard for displacing the duty whether there are good reasons for it? Again, non-arbitrariness explains why. It does not forbid departures from policies. Rather, what exercise non-arbitrariness requires of a public body is that it is not

[2] This will be discussed in more detail in Chapter 6.

indifferent to the proper reasons for the exercise of power. Departing from a policy is a kind of exercise of power. This means that non-arbitrariness requires public bodies to be attentive to proper reasons in its decisions to depart from a policy. This is exactly what the 'good reason' standard achieves. It provides an incentive for public bodies to ensure that they have good reasons for departing from a policy, in order for their decisions to be lawful. Power non-arbitrariness similarly points towards a 'good reason' standard for the duty to comply. Such a standard means that the power to apply policies is now subject to a control which precisely requires public bodies to have reasonable justification for their decisions.

Explaining the duty to comply through non-arbitrariness is consistent with the explanations for the duty that have been proposed thus far in the literature. Sedley's suggestion that the duty to comply is related to a duty not to act unreasonably falls under the principle of exercise non-arbitrariness.[3] Exercise non-arbitrariness clarifies what exactly it means for a public body to act unreasonably: a public body does so when acting with indifference to the proper reasons for the use of power. Exercise non-arbitrariness also accommodates Dotan's proposal of reliance and equality as values that the duty to comply protects, as well as the arguments of Varuhas, Elliott and Forsyth that the duty to comply is based on the values of certainty and consistency.[4] Non-arbitrariness is similarly concerned about certainty, consistency, and protecting the interests of persons subject to

[3] Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011) 258-259.

[4] Yoav Dotan, 'Why Administrators should be Bound by their Policies' (1997) 17(1) OJLS 23; Mark Elliott and Jason Varuhas, *Administrative Law: Texts and Materials* (5th edn, OUP 2017) 184-185; Mark Elliott, 'Legitimate Expectations: Procedure, Substance, Policy And Proportionality' (2006) 65(2) CLJ 254, 254-255; Jason Varuhas, 'In Search of a Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 29-30; Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 JR 429, 433.

the power of public bodies. Promoting all of these proposed values would also promote non-arbitrariness.

At the same time, non-arbitrariness makes an important contribution that goes beyond these existing proposals. For one, it is capable of explaining the specific legal rule that public bodies have to comply with policies unless they have good reason to the contrary. For example, the values of protecting reliance and equality tell us that policies should be complied with. But they do not go further to explain why the law adopts the 'good reason' standard for the duty to comply. Also, non-arbitrariness provides an overarching explanation for why all these values matter. Rationality, protecting reliance, and equality all contribute to achieving non-arbitrariness.

5.1.2 Should change of policies give rise to legal duties?

I turn now to consider how non-arbitrariness bears on another normative question I raised in Chapter 2: should a change of policy give rise to legal duties? I observed that the law recognises that public bodies can sometimes be required to apply their old policy to an applicant where applying its new policy would result in conspicuous unfairness. But should it?

The starting point is that a change of policy can be arbitrary. The previous section offered several reasons explaining why a duty to comply is necessary to promote non-arbitrariness. These reasons apply equally to a change of policy. Policies will not promote non-arbitrariness if public bodies are free to change their policies and apply new ones to applicants at their whim. This means then that non-arbitrariness would *prima facie* justify

imposing legal duties on public bodies also to situations involving a change of policy. This matches how the courts have sometimes considered changes of policy to be problematic. For example, in *R (Patel) v General Medical Council*, the Court of Appeal held that the General Medical Council had unlawfully frustrated the applicant's legitimate expectation that its old policy on requisite medical qualifications would apply to him.[5] The Council was free to change its policy, but should have put in place transitional arrangements for the applicant. Since it did not do so, its decision was unlawful. Also, in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd*, the court noted that changes of policy are capable of raising concerns about fairness, even though the court ultimately found that there was no issue of fairness in the case at hand.[6]

At the same time, the courts do recognise that there is a difference between changes of policy and departures from policy. As I mentioned in Chapter 2, the courts are much less willing to impose duties in change of policy situations. As Lord Diplock held, '[a]dministrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government.'[7] And in *R v Secretary of State for the Home Department, ex p Hargreaves*, the Court of Appeal thought that the reasoning in *Hamble (Offshore) Fisheries Ltd*, which suggested that changes of policy could attract the legitimate expectations doctrine, was 'heresy'.[8]

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[5] *R (Patel) v General Medical Council* [2013] 1 WLR 2801, 2815–2829.

[6] *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 1 CMLR 533 [47].

[7] *Hughes v Department of Health and Social Security* [1985] AC 776, 788.

[8] *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906, 921.

The question then is what justifies the difference in treatment between changes of policy and departures from policy. One commonly-offered justification rests on the fundamental principle in administrative law that public bodies should have the discretion to decide how to discharge their functions. The argument would be that imposing duties on public bodies for changes in policy would affect this discretion. Indeed, it will be observed that Lord Diplock's comment in the previous paragraph is based on this idea. But this does not justify the difference in treatment between the two situations. After all, the concern of preserving a public body's discretion applies with equal force to departure from policy situations. A public body may wish to depart from its policy in order to address 'changing circumstances'. Preventing a public body from doing so through a legal duty to comply would equally impinge on a public body's discretion to decide how to perform its functions.

An alternative explanation is needed. I argue that the difference between change of policy and departure from policy situations rests not so much in the intrinsic wrongness of one action as compared to the other, but rather in the courts' ability to assess the balance of reasons in each type of case. A court is generally less well-placed to assess the reasons for a change of policy. This is because these reasons often include polycentric considerations such as resource allocation or macro-political concerns which go beyond the expertise of the courts. The kinds of reasons that go into a change of policy generally concern how an entire class of persons should be treated. Assessing these reasons would require a court to consider the wisdom of trade-offs between different groups—a task which courts, by institutional design, are less well-suited to perform. In contrast, the courts are better-placed to assess reasons for a specific departure from a policy. The courts are used to evaluating specific concerns relating to discrete decisions in administrative law. It is less likely that

courts would have to weigh up trade-offs between groups or consider macro-political concerns in departure from policy situations.

This is not a blanket rule. Discrete decisions can sometimes also raise resource allocation concerns.[9] But it is still generally true that courts will be less competent to judge the balance of reasons in change of policy cases, as compared to departure from policy cases. This means that the difference between change of policy and departure from policy cases can be understood in terms of the deference that the courts should accord to public bodies. Change of policy cases generally justify more deference than departure from policy cases.

The change of policy cases can be explained on the basis of deference as well. Courts generally prefer to defer to public bodies in such situations. For example, in *R v Secretary of State for the Home Department, ex p Hargreaves* and *In re Findlay*, the court in both cases held that public bodies had the discretion to change their policies and apply new policies to affected persons.[10] The facts of these cases—which concerned changes of rules relating to making applications for home leave and for eligibility for parole—suggested that the decisions in question were well within the expertise of public bodies, which in turn suggested that the courts should take a deferential attitude. In *Patel*, in contrast, there was a discrete set of persons who had relied on the public body's representation to their detriment. Providing a remedy in such limited circumstances would

[9] See, for example, *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

[10] *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906; *In re Findlay* [1985] AC 318 (HL).

lie more comfortably within the court's expertise. The case for deference was therefore weaker, justifying the court's intervention to provide a remedy.

In sum, non-arbitrariness sheds light on how the law should address change of policy situations. It suggests that such situations should in principle still give rise to legal duties. But they should be treated differently from departure from policy situations. The courts are better-equipped to address arbitrariness in departure from policy cases as compared to change of policy cases. This means that courts should be more careful of holding that a change of policy is unlawful, as compared to a departure from policy. This explains how the cases have been decided thus far.

This perspective is consistent with the literature. Ahmed and Perry argued that the legitimate expectations doctrine should not apply to change of policy situations, in light of their proposed rule-based account of the legitimate expectations doctrine.[11] I think that this is correct. The legitimate expectations doctrine is less ideal as the doctrinal basis for any legal duty in change of policy situations, since any expectation generated by a previous policy would be destroyed once a new policy has been adopted. But their argument is directed at the scope of the legitimate expectations doctrine. It does not preclude the possibility of a legal duty being based on an independent doctrinal basis. This means that it is consistent with their argument to say that legal duties apply also to change of policy situations, as long as it is not based on the legitimate expectations doctrine.

[11] Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) CLJ 61.

Similarly, Clayton argued that change of policy cases ought not to be addressed under the legitimate expectations doctrine.[12] He thought that the decisions of public bodies in such situations should be reviewed only on the basis of *Wednesbury* unreasonableness. Going beyond would cause judges to contravene the principle of separation of powers. Insofar as Clayton's concern was the scope of the legitimate expectations doctrine, the proposal here is consistent with Clayton's argument for the reasons I mentioned in the previous paragraph. If Clayton's concern was about the standard of review, then the issue is about what the 'good reasons' standard requires. This will be discussed in a later section. But the important point for present purposes is that Clayton did not think there should be no legal duty at all on public bodies in change of policy situations. This means that the argument here is consistent with Clayton's position.

5.1.3 Classifying the duty to comply

The next question to address is a taxonomical one: should the duty to comply fall under the legitimate expectations doctrine, or should it have an independent doctrinal basis? As I described in Chapter 2, there are doctrinal implications to this taxonomical issue. For one, the doctrinal basis of the duty to comply influences whether the duty applies to situations where a person does not know of the relevant policy.

The interpretive theory offered here provides a useful perspective on this question. If the duty to comply is based on non-arbitrariness, an independent principle of consistency

[12] Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) CLJ 93, 104.

would directly express its normative basis. Drawing from Raz's account of non-arbitrariness, promoting consistency is directly related to promoting non-arbitrariness.[13]

But legitimate expectations can *prima facie* also be explained in terms that fit with non-arbitrariness. Indeed, the legitimate expectations doctrine has been justified on the basis of consistency. For example, Sedley LJ in *R v Secretary of State for Education and Employment, ex p Begbie* held that public authorities should be held to their representations for the sake of certainty.[14] Another way that legitimate expectations has been justified can also be linked to non-arbitrariness—the idea of fairness. Judicial support for fairness as the foundation of the doctrine can be found in *Council of Civil Service Unions v Minister for the Civil Service*. While discussing the concept of legitimate expectations, Lord Roskill suggested that the fundamental concern in such situations was 'the duty to act fairly'.[15] Scholars have also noted that fairness is a possible justification for legitimate expectations. Ahmed and Perry described a fairness account of the doctrine as expressing 'the idea that promises, practices, and policies generate legitimate expectations because of their relationship to fairness'.[16] Also, Allan suggested that the doctrine of substantive legitimate expectations is merely a restatement of the general principle of fairness in a more technical form.[17] Non-arbitrariness is linked to such ideas of fairness through its concern for ensuring that persons affected by power are not subject to the whims of public power.

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[13] Raz (n 1).

[14] *R v Secretary of State for Education & Employment, ex p Begbie* [2000] 1 WLR 1115; [2000] ELR 445 (CA) [29].

[15] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 415.

[16] Ahmed and Perry (n 11) 69.

[17] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP 1994) 197.

But the issue with legitimate expectations is that it goes beyond non-arbitrariness. For example, one explanation for legitimate expectations is 'almost-contractual' in nature.[18] It suggests that just as private law rights can be generated by the conduct of a contracting party through the doctrine of estoppel, the doctrine of legitimate expectations can confer analogous public law rights on individuals.[19] This explains why knowledge of a promise and reliance upon it have usually been seen as important considerations determining whether a legitimate expectation has arisen.[20] Such concerns are much less relevant to non-arbitrariness. What matters for non-arbitrariness is the nature of the power that public bodies possess and how they exercise it. The law on policies reflects this perspective too—where policies are concerned, the courts have held that an applicant does not need to know about a policy for a public body to be under a duty to comply with it.[21] Accordingly, if non-arbitrariness is the basis for the duty to comply, the legitimate expectations doctrine fits less easily with it as compared to the principle of consistency.

This discussion on how the duty to comply should be taxonomised has concrete doctrinal implications. It means that the courts should not apply the legitimate expectations doctrine to policies, contrary to cases such as *R v Secretary of State for the Home Department, ex p Asif Khan*, *R (Rashid) v Secretary of State for the Home Department* and

[18] Rebecca Williams, 'The multiple doctrines of legitimate expectations' (2016) 132 (Oct) LQR 639, 641.

[19] It should be noted, however, that this is not to say that private law estoppel applies against public authorities: see Joanna Bell, 'The doctrine of legitimate expectations: power-constraining or right-conferring legal standard?' [2016] PL 437, 446.

[20] *R v Secretary of State for Education & Employment, ex p Begbie* [2000] 1 WLR 1115; [2000] ELR 445 (CA).

[21] See, for example, *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.

R (Patel) v General Medical Council.[22] Rather, the courts in cases such as *R (Nadarajah and Abdi) v Secretary of State for the Home Department* and *Mandalia v Secretary of State for the Home Department* have embarked on the right trajectory in moving towards an independent principle of consistency as the doctrinal basis for the duty to comply.[23]

This proposal is consistent with the literature as well. As I mentioned earlier, Clayton argued that the duty to comply squares poorly with the legitimate expectations doctrine, since reliance is a factor in the doctrine and it is not clear why reliance ought to matter in whether the duty is imposed.[24] Similarly, Elliott thought that having the legitimate expectations doctrine serve as the foundation for the duty to comply would strangely result in the duty not applying to individuals ignorant of the policy.[25] As a result, he argued in favour of an independent principle of consistency. Stark took the same position as Clayton and Elliott. Strikingly, she argued that the crux of the duty to comply was that 'where a policy has been adopted, applications of it must not be arbitrary.'[26] This principle, in her view, was best captured by an independent doctrine of consistency. It is worth observing that Stark's understanding of the duty to comply is on all fours with the normative basis of the duty that has been proposed in this chapter. The argument here builds on her idea by providing a more concrete understanding of what arbitrariness means.

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[22] *R v Secretary of State for the Home Department, ex p Asif Khan* [1984] 1 WLR 1337; *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744; *R (Patel) v General Medical Council* [2013] 1 WLR 2801.

[23] *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

[24] Clayton (n 12) 102-103.

[25] Elliott (n 4) 254-255.

[26] Shona Wilson Stark, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2020).

5.1.4 In what circumstances does the duty to comply arise?

The next question to discuss is a doctrinal one. In what circumstances does the duty to comply arise? This is an important and fundamental question that has recently started to attract judicial attention. If a public body has a duty to comply with policies, a natural question that arises is about the scope of this duty.

I suggested in Chapter 2 that the cases show that there are two kinds of explanations for why a duty to comply does not arise: the first is that there was no policy, and the second is that there was a policy, but it was not one to which the duty to comply attached. This raises open questions. If this is the case, then what are the conditions that make something a policy, and what are the conditions that must be met for a policy to give rise to a duty to comply?

I begin by addressing the first question: what makes something a policy? The discussion in Chapter 3 on the features of a policy bears directly on this. I argued that the law understands policies as practice-independent non-legal general guides to conduct created by public bodies. This helps shape the scope of the duty to comply with policies, since things that do not meet these conditions are not policies at all. Accordingly, a document describing how the immigration authority processes visa applications is not a policy. Neither is a convention among immigration officers governing the kind of information they request from applicants.

To illustrate the doctrinal implications of this proposal, it is useful to consider the decision in *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities*.[27] I discussed this case in Chapter 2. To recall, the Secretary of State had sought to claw back funds from a developer. The developer argued that this was a departure from the department's own policies since the clawback decision did not follow the policy documents' recommendation that assets could be disposed of after five years without a clawback of funds. Also, the Secretary of State took into account factors which were not referred to in the policy documents. The court ultimately held that the duty to comply did not arise in this case. This was because the alleged policy documents merely captured a decision with several 'essential elements', including that the Secretary would have to exercise discretion on a case by case basis and that assets could be disposed of after five years without a clawback as a 'general guide'.[28] Accordingly, this was not a policy that attracted the duty to comply.

The claims in this thesis about what policies are suggest that the court's decision reflects an overly narrow understanding of a policy. Policies are guides to conduct. And the policy documents in *Riverside Park Ltd* surely were guides to conduct—they offered a 'general guide' as to when assets could be disposed of without a clawback, and set out the manner by which decisions had to be made. This would serve to provide guidance for future decisions. By holding that even these documents did not attract the duty to comply, the High Court narrowed significantly the scope of the duty to comply and increased the possibility of arbitrary exercises of power. A preferable way for the court to have reached

[27] *R (Riverside Park Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2937 (Admin).

[28] *Ibid* [77].

the same outcome would have been to accept that the duty to comply applied, but to hold that the department had offered good reasons for its departure from the policy.

I turn now to the second question: which policies attract the duty to comply? Not all policies do so. Consider public guidance, for example. The law does treat public guidance as policies attracting specific legal consequences. Yet, public guidance cannot attract a duty to comply, since it is not directed at public bodies at all.

To understand which policies do attract the duty, it is useful to return to *Riverside Park Ltd*. To recall, the court suggested that there were two conditions for a policy to attract the duty to comply: it must have 'an identifiable external decision-making function' and be 'a document which, viewed objectively, serves as a prescriptive instrument for that function.'[29] These conditions provide a useful starting point for discussion. The second condition clearly provides a useful insight. If a policy does not play a prescriptive function for a public body's decisions—such as public guidance—it cannot give rise to any duty to comply. It cannot be complied with, after all. But it is important not to interpret this condition too narrowly. As I argued earlier, the court in *Riverside Park Ltd* adopted a problematically narrow understanding of this condition.

However, it is less clear whether the first condition should be adopted in law. In proposing this condition, the court in *Riverside Park Ltd* was influenced by the Court of Appeal decision in *R (Good Law Project) v Prime Minister*.[30] In *Good Law Project*, the court held that internal policies on the use and preservation of electronic communications

[29] *Ibid* [76].

[30] *R (Good Law Project) v Prime Minister* [2022] EWCA Civ 1580.

did not attract the duty to comply. These policies were internal in the sense that they were 'directed to ministers and civil servants, and not to the public'.[31] The Court of Appeal thought that it was not its role to 'attempt to micro-manage how the executive conducts its affairs in the selection and preservation of documents, or in the use of communications technology by ministers and officials.'[32]

The principles of non-arbitrariness help to shed light on whether the first condition should be adopted. Non-arbitrariness is clearly concerned about policies which involve an external decision-making function. But is it also concerned about 'internal' policies, such as the ones in *Good Law Project*? The answer is yes. But before explaining why, it is important to first point out that non-arbitrariness explains why the courts have been concerned about drawing a distinction between 'internal' and 'external' policies in the first place. Recall that non-arbitrariness is ultimately concerned about arbitrary power. Specifically, it is concerned about domination—the power that public bodies have over private persons or entities. This means that some kinds of power are of concern to the principles of non-arbitrariness, while others are not. For example, non-arbitrariness would be concerned about the power of a government agency to make decisions about who ought to be granted licences to carry on businesses, while it would not be concerned about the power of the same body to sell unwanted computer equipment to another government department. Accordingly, if a policy governs power that is exercised over private persons or entities, a failure to comply with it would give rise to a concern of arbitrariness. But if a policy governs power exercised between government actors, the same concern of arbitrariness would not arise.

[31] *Ibid* [59].

[32] *Ibid* [60].

This explains the courts' instinct in *Good Law Project* and *Riverside Park Ltd* that only some kinds of policies should give rise to a duty to comply. Returning to the 'internal' policies in *Good Law Project*—policies which are 'directed to ministers and civil servants, and not to the public'[33]—I argue that they can give rise to a concern of arbitrariness. But this is only if they concern powers that can be used to affect the rights and duties of private persons or entities. For example, consider a policy adopted by a government transportation authority which governs how a fictional 'Vehicle Registration Fee' (VRF) is calculated. This VRF is payable by all persons who purchase a vehicle. The policy provides that the VRF is calculated by reference to the import tax imposed on the vehicle by the customs authority. The reasoning in *Good Law Project* would classify this as an 'internal' policy since it governs internal relations between government actors. At the same time, however, this policy does have an effect on the quantum of VRF that is eventually imposed on persons. Non-arbitrariness would therefore be concerned about whether this policy has been complied with, even though it is an 'internal' policy.

This means that internal policies can raise concerns of arbitrariness. It follows then that a duty to comply can attach to internal policies, as a matter of principle. Nevertheless, it is important to observe that accepting that internal policies can attract a duty to comply does not necessarily mean that judicial review will always provide redress in situations involving internal policies. Other principles of judicial review will serve as a control on the duties of public bodies in relation to such policies. For example, an applicant would have

[33] *Ibid* [59].

to demonstrate standing to challenge such decisions. A suitable remedy in judicial review would also have to be available for a judicial review application to succeed.

The important point is that a duty to comply should in principle attach to some internal policies. Accordingly, while the Court of Appeal in *Good Law Project* was right to say that the policy before it did not attract a duty to comply, the distinction it drew between internal and external policies was not the best way to reach this conclusion. Rather, the proper question is whether the policy has an effect on power exercised over private persons or entities. In the final analysis, any policy that plays a prescriptive function for a public body, i.e. that serves as a guide to conduct, and which has an effect on power exercised over private persons or entities should attract the duty to comply.

Another question regarding which policies attract the duty to comply is about whether the duty should extend also to coordinating policies. This is a question I raised in Chapter 3. As a starting point, can coordinating policies give rise to a concern of arbitrariness? The answer is yes. Suppose that the Secretary of State issues a policy about how public hospitals should make decisions about treatment priorities. A local hospital authority entirely ignores this policy in making a decision about how a patient should be treated. In such a situation, the authority would have been indifferent to a proper reason for the use of power. The Secretary of State's policy was at least a reason that should have been taken into account, even if the authority ultimately disagreed with it. In being indifferent to the policy, the hospital authority has acted arbitrarily.

But at the same time, departing from a coordinating policy appears less objectionable than departing from a self-directing policy. There is more of a concern of

arbitrariness where a self-directing policy is concerned. A public body has a reason to follow its self-directing policy simply because it is its own statement of how it intends to make decisions. This is because a public body ought to mean what it says. Consistency, an aspect of non-arbitrariness, requires this. This means that when a public body is indifferent to its self-directing policy, there is an issue of arbitrariness. But the same issue does not arise where coordinating policies are concerned. If a public body does not comply with a coordinating policy, it has not failed to mean what it says. Now, if a public body commits to complying with a coordinating policy, the situation would be different. After all, the public body in substance would have adopted a self-directing policy to follow a coordinating policy. But in the absence of such a commitment, a departure from a coordinating policy presents less of an issue of arbitrariness.

Accordingly, coordinating policies give rise to a concern of arbitrariness. Yet, they do so to a lesser extent than self-directing policies. I think the way to give effect to both ideas is for coordinating policies not to attract a duty to comply in the same way as self-directing policies. Coordinating policies should be taken into account by public bodies to avoid arbitrariness. But the duties of public bodies in relation to coordinating policies should not extend to require compliance unless there is good reason to the contrary. There is authority for this proposition. As I pointed out in Chapter 3, there is case law suggesting that coordinating policies should be treated differently from self-directing policies—they should be treated as relevant considerations that public bodies have to take into account.[34] This means that non-arbitrariness explains the distinction that the law has recognised between self-directing and coordinating policies with respect to the duty to comply.

[34] *R (WL) (Congo) v Secretary of State for the Home Department* [2010] EWCA Civ 111; *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; *R (Corbett) v Cornwall Council* [2020] EWCA Civ 508.

How then can we make sense of *Mandalia v Secretary of State for the Home Department* and *R (Munjaz) v Mersey Care NHS Trust*?[35] After all, as I mentioned in Chapter 3, these cases suggested that coordinating policies should be treated the same way as self-directing policies, i.e. they have to be followed unless there are good reasons to the contrary. But I argue that these cases are not strong authority for this claim. *Mandalia* concerned a self-directing policy. This means it is limited authority for any claims concerning coordinating policies. As for *Munjaz*, it is useful to pay closer attention to the House of Lords' reasoning. Lord Bingham and Lord Hope were both very much influenced by the fact that the policy in this case had received parliamentary sanction and was preceded by a process of consultation.[36] These considerations led their Lordships to conclude that this policy ought to be given a greater degree of binding effect than would normally be the case. Accordingly, as Hickman and Poole have also argued, *Munjaz* is best understood as an exception to the usual rule.[37]

In sum, I have set out what makes something a policy and the conditions under which there is a duty to comply with a policy. A policy is a practice-independent non-legal general guide to conduct created by public bodies. Things that do not meet these criteria, such as conventions, are not policies at all and cannot give rise to a duty to comply. Yet, not all policies give rise to a duty to comply. A policy must play a prescriptive function for a public body and have an effect on power exercised over private persons or entities to give

[35] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58.

[36] *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 [20]-[21], [68].

[37] Tom Hickman and Thomas Poole, 'Judicial review and guidance' (2024) 140(Jul) LQR 381, 392-393.

rise to this duty. This means that public guidance does not attract a duty to comply. Neither does a policy which purely governs internal relations between government actors. Finally, coordinating policies should not give rise to a duty to comply. They should give rise to relevant considerations that have to be taken into account. But only self-directing policies should attract the duty to comply.

5.1.5 When is it unlawful not to comply with a policy?

The final issue to discuss in this section goes to the content of the duty to comply. If the duty to comply requires public bodies to comply with policies unless there is good reason to the contrary, how exactly should a court determine whether a public body has good reason for departing?

Exercise non-arbitrariness is directly relevant here. To recall, it provides that non-arbitrariness requires a decision-maker to be attentive to the proper reasons for the use of power. This means that the legal rule on the duty to comply should be directed at encouraging public bodies to do so in order to avoid arbitrariness.

It is not possible to set out an exhaustive list of reasons that amount to good reasons for departing from a policy. Rather, it is more productive to identify the factors that a court should take into account in assessing whether a public body's reasons for departing are good reasons. Two factors can be identified.

The first is the content of the policy. Here, I will draw upon and clarify the reasoning of the Court of Appeal in *R (Duke of Sussex) v Secretary of State for the Home Department*.

As I mentioned during my discussion of this case in Chapter 2, the court suggested that one factor that would shape whether RAVEC had a good reason to depart from its policy was the nature of the policy. For example, a court ought to be more deferential where the policy in question was in 'an area of national importance that was peculiarly within the expertise of law enforcement agencies, RAVEC and the Royal Household itself', and which raised an issue of 'Government and democratic accountability.'[38]

The nature of the policy is relevant. But I suggest that this factor should not be taken into account in the way that the Court of Appeal did. In *Duke of Sussex*, the court considered this factor as part of its reasoning about the deference it should accord to RAVEC. However, this results in a substantial overlap with the second factor that the court identified: 'the deference that the court ought to pay to the decision maker in deciding whether it had a good reason to depart from its policy.'[39] There is nothing wrong with both of the court's factors being about deference. One could say that each factor gets at a different reason for according deference to a decision-maker. Yet, understanding both factors as solely about deference risks missing out an important element about the nature of a policy that should be taken into account in the 'good reason' test.

It will be more useful for this factor to be about the content of the policy in question, which would help to fix which reasons could be 'good reasons' to depart. Suppose that a public body departs from a policy in the area of national security. It would have acted arbitrarily if its decision was based purely on a manpower constraint, without regard to the implications for national security. This would amount to an indifference to the proper

[38] *R (Duke of Sussex) v Secretary of State for the Home Department* [2025] EWCA Civ 548 [65].

[39] *Ibid* [66].

reasons for the use of power. To be clear, a public body is certainly entitled to make decisions on the basis of manpower constraints. But what the law should require is for a public body to also take into account national security implications when deciding on such a basis, if a policy is about national security. Drawing upon *Duke of Sussex* to provide another example, if a policy is related to security arrangements for the royal family—'an area of national importance'—this tells us that a public body needs to have important reasons which take security into account to justify departing from it. Accordingly, the content of the policy should shape the nature of the reason that a public body offers to justify a departure from it.

The second relevant factor is about the deference that ought to be accorded to the decision-maker. Again, this draws from the Court of Appeal decision in *Duke of Sussex*.[40] As I mentioned above, the court suggested that a second factor that would shape whether RAVEC had a good reason to depart from its policy was 'the deference that the court ought to pay to the decision maker in deciding whether it had a good reason to depart from its policy.'[41]

Building on this, I suggest that three factors should be taken into account in deciding the deference that ought to be paid to the public body. The first would be the procedure and form of the policy. Here, what would be relevant is the formality of the policy and whether the policy was adopted after a process of consultation—in other words, the considerations the court originally took into account under the factor it described as 'the nature of the policy'.

[40] *Ibid.*

[41] *Ibid* [66].

The second would be the nature of the subject matter. If the public body has specific expertise in the area at hand, relative to the court, then the court ought to attach more weight to the public body's decision. Similarly, if the subject matter at hand is politically sensitive—such as the security arrangements for the royal family—the court should also defer to the public body's views. Viewed through the lens of exercise non-arbitrariness, in such situations, the court is less well-placed to assess the proper reasons for the use of power.

A third would be whether a public body is departing from or changing its policy. As I argued earlier, if a public body was changing its policy, the court should defer more to it as compared to if the public body was departing from its policy. This is because a court is better-placed to assess reasons for specific departures, as compared to reasons for a change in general policy. Accordingly, what exactly the public body is seeking to do with its policy will affect an assessment of the proper reasons that it should take into account.

These reasons would shape the standard of review. For example, where the nature of the subject matter requires more deference to the public body, a less stringent standard of review would suffice as the standard for the duty to comply. *Duke of Sussex* provides a good example of a lower standard of review being applied. Given the expertise of the public body and the politically sensitive nature of the issue, the court thought that it was reasonable for RAVEC to depart from its policy and establish bespoke arrangements each time the applicant returned to the UK.[42]

[42] *Ibid* [69]-[75].

In contrast, a more rigorous standard of review would be more appropriate where serious consequences to individual rights are at stake.[43] For example, in *R (Rashid) v Secretary of State for the Home Department*, the subject matter at hand concerned an application for asylum affecting the applicant's right to reside in the UK. The court did not apply the lower standard of unreasonableness but instead asked whether there was unfairness amounting to an abuse of power.[44] Similarly, in *Mandalia v Secretary of State for the Home Department*, the court was concerned with a situation where the applicant's right to stay in the UK was at issue. In setting out the 'good reasons' standard for the duty to comply, the Supreme Court also did not draw upon the usual language of unreasonableness.[45] This suggests that the court had in mind a more rigorous standard of review in this case as well.

In the final analysis, two factors should influence whether the 'good reason' standard is met. The first is the content of a policy. This affects the nature of the reason that a public body has to give to justify departing from a policy. The second is the deference that ought to be accorded to a decision-maker. This requires a court to consider the procedure and form of the policy, the nature of the subject matter, and whether a public body is departing from or changing its policy. This would affect the standard of review that a court adopts to determine if a good reason has been given.

5.2 The law on the non-fettering rule

[43] *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.

[44] *Ibid* [34]-[37].

[45] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 [29]-[30].

I turn now to discuss a second established doctrine in the law of policies: the non-fettering rule. As I mentioned at the beginning of this chapter, this doctrine is conceptually connected with the duty to comply. While the connection between both doctrines has been discussed, important aspects of their relationship remain underexplored. I will discuss this issue later in this section.

I will begin by demonstrating that the principles of non-arbitrariness can explain why policies have to be applied flexibly. I will then apply this theory to two doctrinal issues: when does the non-fettering rule apply, and what exactly does it require of public bodies?

5.2.1 Why must policies be applied flexibly?

As I described in Chapter 2, the non-fettering rule requires public bodies to treat their policies flexibly and keep an open mind about exceptional situations which may justify a departure. It is unlawful for a public body to treat a policy like a blanket rule and apply it rigidly to all situations. But it is not immediately clear why this should be the case. After all, if a public body has a policy, the interest of consistency does suggest that the policy should be adhered to. The duty to comply recognises this interest. Why then does the law at the same time require public bodies to be willing to depart from their policies?

To recall, there are three explanations that have been offered for the non-fettering rule: Parliament's intent, error-avoidance, and the fair hearing rule. Non-arbitrariness provides another possible explanation. Exercise non-arbitrariness requires an exercise of power to be attentive to the proper reasons for the use of power. If so, it is clear that the

blanket application of a policy without regard to individual circumstances leads to the possibility of arbitrariness. When a decision-maker applies a policy very rigidly, he becomes indifferent to reasons that he should have taken into account. The facts of *British Oxygen Co Ltd v Minister of Technology* provide a useful illustration.[46] As I mentioned in Chapter 2, the Board of Trade placed a minimum value condition for grants to be given for industrial equipment purchases—grants would only be given for items costing £25 or more. It applied this policy to reject the applicant's application for a grant. This was because the applicant had purchased gas cylinders worth £20 each. Yet, the applicant had purchased £4 million in total of these gas cylinders. If the Board had rigidly applied its policy as a blanket rule here, this would have been arbitrary. It would have displayed an indifference to circumstances that should have been considered in how the policy applied—specifically, that the applicant had spent £4 million for the purpose of industrial development, and that a grant in this situation could have furthered the purpose of the Board's power. The non-fettering rule discourages such arbitrary rigidity and thereby facilitates exercise non-arbitrariness.

Non-arbitrariness also provides a deeper insight into the law than the explanations that have been offered thus far. Starting with Parliament's intent, as I mentioned in Chapter 2, scholars have argued that this rationale for the non-fettering rule is problematic. Perry argued that the reasons for presuming such intent would apply equally to non-statutory powers, which means that there is no special reason to confine the non-fettering rule only to statutory powers.[47] McHarg argued that such a rationale makes an unjustified assumption about Parliament's intent, since Parliament could equally have intended a power to be

[46] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL).

[47] Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76(2) CLJ 375, 386-387.

guided by rigid rules.[48] Non-arbitrariness would support these arguments, since power can be exercised rigidly and in an arbitrary manner no matter its source. Accordingly, Parliament's intent is insufficient as an explanation for the non-fettering rule.

As for error avoidance, non-arbitrariness reflects the core of this rationale, since it is similarly concerned about how public bodies should not unduly exclude relevant reasons from consideration. But non-arbitrariness provides a stronger grounding for this concern. If error-avoidance explains the non-fettering rule on the basis that it helps to achieve optimal outcomes, one might question whether the rule really does do so. As Perry has argued, one might think, among other things, that applying rules rigidly can actually help to achieve good outcomes in decision-making by increasing efficiency and predictability.[49] Non-arbitrariness takes a different approach by holding that the exclusion of relevant reasons is directly problematic under exercise non-arbitrariness. Non-arbitrariness also explains the link between error-avoidance and the law. After all, one might otherwise wonder why it is the law's concern to achieve optimal outcomes, when judicial review orthodoxy requires a focus on legality rather than the merits of decisions. Non-arbitrariness, on the other hand, is not susceptible to this criticism.

Finally, non-arbitrariness coheres well with the fair hearing rule as an explanation for the non-fettering rule. If a public body refuses to hear an affected person out and applies its policy in a rigid manner to all persons, this demonstrates a form of arbitrariness as well. As Raz argued, non-arbitrariness requires a public body to 'allow proper opportunities to

[48] Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) CLP 267, 293.

[49] Perry (n 47) 388-391.

consider relevant arguments and information'.[50] This fits with how the courts have understood the non-fettering rule to be about the willingness of public bodies to hear affected persons out.

An issue with the fair hearing rule as an explanation for the non-fettering rule is that, as McHarg argued, it would limit the application of the rule to contexts in which fair hearings are required. This means that the non-fettering rule would not apply to the content of policies, independent of a decision, since the fair hearing rule extends only to how rules have been applied.[51] Whether or not this is a cogent criticism, the more important point is that non-arbitrariness as a foundation for the non-fettering rule would not be susceptible to it. Non-arbitrariness explains why it is important for applicants to be heard, but grounds this idea in a more fundamental value that is not limited by the fair hearing rule. It applies both to how policies are used as well as the content of policies. This means that non-arbitrariness captures the substance of the fair hearing rule as an explanation and at the same time addresses criticisms that have been directed against it. Accordingly, non-arbitrariness provides an improvement from the existing three rationales that have been offered for the non-fettering rule.

5.2.2 Scope of the non-fettering rule

The next issue I will discuss is about the scope of the non-fettering rule. This is closely related to the rationale for the rule, discussed in the previous section. Indeed, the Supreme Court in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* limited

[50] Raz (n 1).

[51] McHarg (n 48) 295-296.

the scope of the rule to policies governing statutory power.[52] This followed naturally from its position that the rule's rationale was Parliament's intent.

If non-arbitrariness is accepted as the rationale for the non-fettering rule, this naturally changes the scope of the rule. Non-arbitrariness does not distinguish between statutory or non-statutory powers. It is concerned about any exercise of power that is indifferent to the proper reasons for the use of power. This means that the court's reasoning in *Sandiford* on the scope of the non-fettering rule ought not to be followed. Since the court had gone further to conclude that the government had not fallen foul of the rule at all, it would have been preferable for the court to decide the case on this basis, rather than by limiting the scope of the non-fettering rule to policies governing statutory powers.

Another issue concerning the scope of the rule is about whether the non-fettering rule should apply to coordinating policies.[53] Thus far, the cases on the non-fettering rule have concerned self-directing policies. It remains unclear whether the rule should similarly apply to coordinating policies. If non-arbitrariness is the rationale of the non-fettering rule, the question then is whether the rigid application of a coordinating policy can give rise to arbitrariness. The answer is yes. Whether a policy is a self-directing or coordinating one, applying it rigidly would equally mean that a public body has closed its mind to reasons that may justify an exception from the policy. This means that the potential for arbitrariness is the same where coordinating policies are concerned. Accordingly, the principles of non-arbitrariness suggest that coordinating policies should also fall within the scope of the non-fettering rule.

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[52] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

[53] I raised this question in Chapter 3.

5.2.3 The legal requirements of the rule

The final question on the non-fettering rule is doctrinal in nature: what exactly does the rule require of public bodies? There are two separate issues that relate to the rule's legal requirements. First, what does flexibility mean? This goes to the rule's content. Second, are there exceptions to the rule? In other words, can public bodies apply their policies rigidly if certain conditions are met? If so, what are these conditions?

Non-arbitrariness provides a useful perspective on both issues. Starting with what flexibility means, if non-arbitrariness requires a public body to be attentive to the proper reasons for the use of power, then the law can facilitate this through the following test of flexibility: public bodies have to be willing to consider whether there are good reasons for departing from their policies. The law does not require public bodies to actually depart from their policies if there are good reasons for doing so. Rather, a public body would fall foul of this rule by failing to consider at all the possibility of making an exception.

Understood as such, this proposed standard for the non-fettering rule would resolve a deeper question about how the duty to comply relates to the non-fettering rule. Both rules otherwise appear *prima facie* to be pointing in opposite directions: the duty to comply requires public bodies to comply with their policies, while the non-fettering rule appears to require public bodies to depart from their policies. By clarifying the legal content of the non-fettering rule, it becomes clear that both rules are actually compatible: the duty to comply requires a public body to apply its policy unless there are good reasons to the contrary, while the non-fettering rule merely requires a public body to be willing to consider

whether there are good reasons for departing. Stated thus, the duty to comply leads to a substantive outcome—getting a policy to be applied—while the non-fettering rule is more procedural in nature. This means that there is no conflict between both rules.

The Supreme Court's reasoning in *Sandiford* provides support to this framing of the non-fettering rule. As I mentioned earlier, the court held that the non-fettering rule did not apply. But it went on to suggest that the requirements of the non-fettering rule were satisfied in any event. It is instructive to pay attention to how the court reasoned to this conclusion. The court observed that the government had carefully considered whether the applicant's specific circumstances should modify how the policy applied, and had come to the conclusion that there were no compelling reasons to depart from the policy.[54] Accordingly, the government had demonstrated its willingness to consider whether there were good reasons for departing from its policy. This meant that the requirements of the non-fettering rule were satisfied.

It is worth noting that another possible way that the non-fettering rule could be framed is to require a public body to adhere to its policies unless it has provided a fair hearing to affected persons. As I noted above, this would also contribute to non-arbitrariness. But the standard proposed here has an important advantage over a direct application of the fair hearing rule. It makes clearer to public bodies that they ultimately must be attentive to the proper reasons for the use of power. Giving affected persons a fair hearing does contribute to this objective. But non-arbitrariness points to something deeper—a fair hearing is ultimately a means to the end of ensuring that public bodies are

[54] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 [67].

attentive to the proper reasons for decisions. If non-arbitrariness is a preferable foundation for the non-fettering rule, the standard proposed here gives more direct effect to this foundation.

I turn now to the second issue: are there exceptions to the rule, such that public bodies can apply their policies rigidly if certain conditions are met? As a starting point, non-arbitrariness suggests that the non-fettering rule should not absolutely prevent a public body from applying its policy rigidly. Suppose that a transportation authority has a policy of granting taxi licences to all drivers who have scored above 80 marks for a qualification examination. It is clear that there are good reasons to apply such a policy rigidly—such a policy makes decision-making consistent and ensures that a uniform standard is met. A policy like this also contributes to efficient administration in view of the volume of applications involved. Forcing the authority to avoid applying this policy rigidly would ironically itself facilitate arbitrariness, since this may encourage the authority to start making arbitrary distinctions between applicants.

This means that the non-fettering rule should not absolutely prohibit blanket applications of policies. The question then is when a public body can permissibly apply its policy in a blanket manner. I argue that the exception to the rule can be framed as follows: a public body can apply its policy rigidly if there is good reason to do so.

There is authority for this understanding of the rule. In *R (Nicholds) v Security Industry Authority*, the Security Industry Authority had adopted a policy determining how

a licence should be granted to allow someone to work as a door supervisor.[55] It provided that someone who had committed a relevant serious or significant offence was automatically barred from obtaining this licence until a certain time had passed from the date of becoming free of the effects of conviction. This policy was applied to refuse the licence applications of the three applicants. The applicants challenged this refusal on several grounds, one of which was that the automatic bar was unlawful as a fetter on the authority's discretion.

The court rejected this ground of challenge. It began by observing that public bodies were entitled to have rigid policies if Parliament had expressly conferred rule-making power on them. This was the case here. In such circumstances, the only possible grounds of challenge to the public bodies' policies were *ultra vires*, unreasonableness, or lack of proportionality.[56] The non-fettering rule would apply only in the absence of such expressly conferred rule-making power.

This reasoning was based on the court's understanding of the scope of the non-fettering rule. As I discussed in the previous section, I think reasoning of this type is problematic. But in any case, the court's subsequent reasoning is my focus here. The court went on to suggest that the non-fettering rule does not apply in a blanket fashion even where there is no expressly conferred rule-making power. In the court's view, a rigid policy can be justified in certain situations where 'to allow exceptions would substantially undermine an important legislative aim which underpins the grant of discretionary power

[55] *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 (QB).

[56] *Ibid* [60].

to the authority.'[57] In support, the court referred to several authorities where the courts had upheld rigid licensing rules for taxis.[58]

In other words, the court in *Nicholds* thought that a policy could be applied rigidly in situations where doing so was justifiable by reference to the purpose for which power was granted to a public body by law. It is interesting to observe that this reasoning coheres precisely with exercise non-arbitrariness. Non-arbitrariness requires public bodies to be attentive to the proper reasons for the use of power. The statutory purpose is a paradigm example of such proper reasons. Accordingly, non-arbitrariness explains the reasoning in *Nicholds*.

Non-arbitrariness suggests that the reasoning in *Nicholds* can be generalised further. Indeed, the statutory purpose, important as it is, is just one of the proper reasons that a public body should be attentive to in its use of power. The court's focus on the statutory purpose could have been shaped by its understanding of the non-fettering rule as applying only to statutory powers. Accordingly, non-arbitrariness could be more directly expressed if the reasoning in *Nicholds* is framed as a more general rule: a public body may apply a rigid policy, as an exception to the non-fettering rule, if there is a good reason for doing so.

In sum, non-arbitrariness explains the content of the non-fettering rule. The rule requires public bodies to be willing to consider whether there are good reasons for departing from their policies. Non-arbitrariness also explains why there should be an

[57] *Ibid* [61].

[58] See *R v Manchester City Justices, ex p McHugh* [1989] RTR 285 and *R v Wirral Metropolitan Borough Council, ex p Wirral Licensed Taxi Owners Association* [1983] 3 CMLR 150, referenced in *R (Nicholds) v Security Industry Authority* [2007] 1 WLR 2067 (QB) [61].

exception to the non-fettering rule and how it should be framed: the non-fettering rule itself can be departed from to allow a public body to apply a rigid policy if there is good reason for doing so.

5.3 Conclusion

In this chapter, I have demonstrated that non-arbitrariness provides a valuable interpretive theory of the law on the duty to comply and the non-fettering rule. It explains the duty to comply: why there is a legal duty to comply with policies and why this duty is subject to a 'good reasons' standard. It also explains why the law requires public bodies to apply their policies flexibly. Further, it provides insights into a range of questions raised by both areas of law. I have discussed the implications of this interpretive theory on normative questions such as whether legal duties should attach to a change of policies, taxonomical questions such as whether the duty belongs to the legitimate expectations doctrine, and doctrinal questions such as the circumstances under which the duty to comply arises and the legal requirements of the non-fettering rule.

In the next chapter, I will proceed to demonstrate that this interpretive theory is similarly fruitful for the other two established doctrines in the law of policies: the law on the interpretation of policies and on policies authorising unlawful conduct.

Chapter 6 Interpreting and drafting policies

I have discussed two of the established doctrines in the law on policies: the duty to comply and the non-fettering rule. In this chapter, I move to consider the other two established doctrines: the law on the interpretation of policies and on policies authorising unlawful conduct. These doctrines concern the content of policies. The law on the interpretation of policies governs how the meaning of a policy is determined. The law on policies authorising unlawful conduct is concerned about whether a policy guides public bodies to make unlawful decisions.

The structure of this chapter will be similar to the previous one. I will first discuss the law on the interpretation of policies, and then move to discuss the law on policies authorising unlawful conduct. For each doctrine, I will begin by demonstrating how this thesis's claims can explain the law. I will then explore how they can shed light on the questions raised in each area of law.

6.1 The law on interpretation of policies

As I mentioned in Chapter 2, the courts have set limits on the permissible interpretations of policies. They have taken the position that policy interpretations can be reviewed on the basis of correctness. For example, in *Tesco Stores Ltd v Dundee City Council*, Lord Reed held that exercises of planning judgment—in other words, the application of a policy—rested within the discretion of public bodies.[1] The application of a policy would be

[1] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13.

reviewable only on the basis of unreasonableness. But an application of a policy had to be based on a correct understanding of the relevant policies, and the courts had the authority to decide what the policies meant. This meant that policy interpretation is subject to correctness review, while policy application is subject only to reasonableness review.

The courts have also suggested that correctness review is not appropriate for all policy interpretations. In *Suffolk Coastal District Council v Hopkins Homes Ltd*, Lord Carnwath drew a distinction between policies which are 'relatively specific' and those which are 'expressed in much broader terms'.[2] Specific policies were amenable to legal interpretation, while broad policies were not. Broad policies created more room for the exercise of judgment, and courts ought to be wary of overstepping their authority and intervening too robustly in matters where they lacked the expertise to review the exercise of specialist judgment. This distinction was applied in the Supreme Court decision of *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council*.[3] The court concluded that the policy provision at issue was an example of a 'broad policy concept' which was not amenable to correctness review.[4] Accordingly, this distinction means that broad policies are subject only to reasonableness review, while specific policies are subject to correctness review.

6.1.1 Why should courts review policy interpretations at all?

[2] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 [24].

[3] *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 [22].

[4] *Ibid*.

In explaining this area of law, the first and most fundamental question to be addressed is why courts should introduce any boundaries to permissible policy interpretations at all. Should policy interpretation be left wholly to the discretion of public bodies instead? After all, policies are adopted by public bodies to aid them in the exercise of their discretion. They are not rules of law. If so, why should courts have any role to play in their interpretation?

Non-arbitrariness helps to address this question. To recall, exercise non-arbitrariness is the principle that an exercise of power is non-arbitrary if a power-holder is attentive to the proper reasons for the use of power. Power non-arbitrariness provides that a power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable justification. It also accepts that arbitrary power is reduced if a power-holder is accountable to an external party.

The courts' ability to set boundaries on policy interpretation is supported by both exercise and power non-arbitrariness. Suppose that a public body has a policy governing visa applications. A paragraph of the policy says that applications will be approved if an applicant is considered 'suitable'. The next paragraph lists criteria for suitability which all revolve around financial conditions. The public body applies the policy to reject an applicant because of his lack of family connection to the UK. It concludes that this means the applicant is not 'suitable' within the meaning of its policy. The applicant challenges the public body's interpretation of its policy on the basis that 'suitable' refers to financial criteria. In response, the public body argues that the meaning of 'suitable' includes non-financial considerations.

If policy interpretation were left entirely to the discretion of public bodies, then this raises an issue of power arbitrariness. It would increase the scope of arbitrary power that public bodies have in applying their policies. This runs counter to the rule of law. Lord Reed in *Tesco Stores Ltd* was obviously concerned about the prospect of giving public bodies such power. As he held, 'planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.'[5] This means that a legal rule providing that courts can introduce boundaries of permissible interpretation furthers the interest of power non-arbitrariness. Such a rule would provide an element of control over how public bodies apply their policies.

Giving public bodies total discretion over policy interpretation would also run counter to exercise non-arbitrariness. A public body would have no incentive to adopt a consistent meaning for its policies. It would be free to adopt different meanings of its policies as it makes decisions, resulting in greater opportunity for the arbitrary exercise of power. As Lord Reed held in *Tesco Stores Ltd*, preserving the court's authority to interpret policies is important to ensure that policies actually serve the function of achieving consistency in how decisions are made.[6]

6.1.2 What is correctness review of policy interpretation?

So the courts should have authority to review policy interpretations. This leads to a more challenging question. English courts have repeatedly claimed the right to review policy

[5] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [19].

[6] *Ibid* [18].

interpretations for correctness. Should they have this right? Or should courts review policy interpretations only for reasonableness?

To answer this question, it is important to first understand what are correctness and reasonableness review. In this section, I will first address how the correctness of a policy interpretation should be determined. To be clear, this does not mean that I am arguing that policies should be interpreted for correctness and not reasonableness. Whichever approach is preferred, it is meaningful to be clear about what the standard of correctness is. This is because the courts have affirmed, as a matter of authority, that they can review policy interpretations for correctness. Also, there remains uncertainty about what exactly correctness means. The courts have merely said that policies should not be interpreted like contracts or statutes—Mills describes this as the 'negative instruction'[7]—and that policies should not be interpreted in an over-legalistic manner.[8] As I mentioned in Chapter 2, Mills has observed that these two principles do not offer much guidance.[9] They tell us little about how courts should determine whether an interpretation is correct. Having explained correctness review, I will then explain what reasonableness review is in the context of policy interpretation. With a clearer understanding of each type of review, I will turn to discuss which should be preferred.

What then is a correct interpretation of a policy? I argue that a productive starting point to answer this question is to take reference from the law's approach to statutory

[7] Alistair Mills, 'The interpretation of policies in administrative law: the significance of audience' (2024) 44(2) LS 295.

[8] *Ibid*.

[9] *Ibid*.

interpretation. There is certainly a difference between policy and statutory interpretation—for one, the lawfulness of a policy interpretation is shaped by the boundaries on discretion set by the empowering statute. Nevertheless, if courts have accepted that an incorrect policy interpretation is unlawful, then it stands to reason that it can be useful to refer to a set of established rules telling us what exactly correctness in interpretation means. There is indeed ongoing debate over the topic of statutory interpretation—for example, over the importance of Parliament's intent.[10] But it is nevertheless true that courts agree on the general approach to be taken. As Lord Burrows affirmed extra-judicially, '[i]t is now clear from several cases in the House of Lords or Supreme Court that the modern approach to statutory interpretation is contextual and purposive.'[11] Accordingly, the rules of statutory interpretation provide an obvious resource for any reflection on the proper approach to correctly interpret a text. Modifications can then be made from this starting point to take into account the differing context of policy interpretation.

As the Supreme Court held in *R (O) v Secretary of State for the Home Department*, '[s]tatutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered.'[12] Accordingly, in interpreting statutes, the courts take a purposive approach. The primary objective of interpretation is to give effect to the purpose of an enactment. As Lord Bingham held in *R (Quintavalle) v Secretary of State for Health*, '[t]he court's task, within the permissible bounds of interpretation, is to give effect to

[10] See, for example, Lord Burrows, 'Statutory Interpretation in the Courts Today' (Sir Christopher Staughton Memorial Lecture, University of Hertfordshire, 24 March 2022); Lord Sales, 'Purpose in Law and in Interpretation' (F.A. Mann Lecture, Herbert Smith Freehills, 19 November 2024).

[11] Lord Burrows (n 10) 4-5.

[12] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3 [31].

Parliament's purpose.'[13] The text of a statute is the starting point, and the courts will first have regard to the ordinary linguistic meaning of the words used.[14] Yet, the courts will not take a literal approach to interpretation. They will interpret the text in context to give effect to legislative intent.[15] As Allan argued, 'we best conform to legislative intention when we acknowledge the context in which the text was approved, understanding the "mischief" it was sought to remedy and avoiding constructions having absurd (and presumably unintended) consequences.'[16] This does not mean that an interpreter can resort to purpose to justify interpreting an enactment in a manner that departs from its textual meaning.[17] That would amount to an interpreter acting as a legislator.

It is important to clarify that legislative intent does not refer to the subjective intent of lawmakers. Rather, it refers to 'an objective search for the intention that must be imputed to the legislature by reference to the meaning of the words used and the context in which they are used'.[18] As Lord Nicholls held in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd*, while the court's task is to 'ascertain the intention of Parliament expressed in the language under consideration', this is 'the intention which the court reasonably imputes to Parliament', and not the subjective intent of

[13] *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13.

[14] David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) ch 10.

[15] *Ibid* ch 11.

[16] TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63(3) CLJ 685, 688.

[17] David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) ch 12.

[18] *McNutt v Transport for London* [2019] EWHC 365.

Members of Parliament.[19] Sometimes, courts do refer to the specific statements of Members of Parliament in parliamentary proceedings to determine what legislative intent is, such as in *Pepper v Hart*.[20] But such reference should not be understood to suggest that the subjective intent of lawmakers is conclusive of legislative intent. Rather, specific statements of Members of Parliament are relevant because they form 'part of the context in which a legislative text is approved (and may therefore be relevant to a proper understanding of that text).'[21]

As a starting point, I suggest that the purposive approach should be applicable also to policy interpretations. While policies are not legal rules, some of the main justifications for the purposive approach in the statutory context apply also in the policy context. The first type of justification is conceptual in nature. Proponents of the purposive approach in the statutory context argue that it is justified because this is simply how we figure out the meaning of texts. We discover the meaning of a text precisely by understanding its purpose. For example, as Ekins argued, '[l]egislative intent is not … one more source of evidence for the meaning of the statute, but is instead the basic object of interpretive reflection.'[22] Similarly, Goldsworthy argued that '[t]exts cannot meaningfully be said to take anything for granted, at least not when their meaning is confined to literal meaning, severed from

[19] *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349.

[20] *Pepper v Hart* [1993] AC 593.

[21] David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 402.

[22] Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 13.

their authors' intentions.'[23] Such arguments are not limited to legal rules. They apply to any type of general textual rule. Accordingly, they extend also to policies and similarly justify a purposive approach to their interpretation.

The second type of justification is instrumental in nature. The purposive approach in the statutory context has been justified on the basis of the values of certainty and the rule of law.[24] It promotes these values by ensuring that persons can reasonably plan their affairs on the basis of an objective understanding of the text of the written law. In addition, it promotes the interest of effectiveness by placing central emphasis on giving effect to the purpose of enactments.[25] While policies are not legal rules, such justifications for the purposive approach apply to them as well. People make plans on the basis of policies. They are also adopted by public bodies to achieve certain objectives and aid them in their exercise of discretion. If we accept that it is important for public bodies to be able to accomplish their purposes, this will be better achieved if policies are interpreted in a way that allows them to fulfil their purposes. Interpreting policies through the purposive approach also supports the rule of law by facilitating accountability. To promote accountability, it is important for the law to require public bodies to adopt interpretations of policies that people can reasonably be expected to understand. This will allow people to know when and how a policy interpretation can be challenged. To be clear, I am not claiming that the purposive approach is the only one that can promote these values. But the

[23] Jeffrey Goldsworthy, 'Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, "Constitutional Reasoning in Constitutional Courts—A European Perspective."' (2013) 14(8) *German Law Journal* 1279.

[24] David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) ch 14.

[25] *Ibid* chs 10, 11.

fact that it has been adopted for statutory interpretation, coupled with the applicability of the same justifications to policy interpretation, suggests that the purposive approach is at least plausible for the context of policies.

I have thus far argued that the purposive approach should be adopted as the standard for a correct policy interpretation as a starting point. I turn now to discuss how the purposive approach should be adapted for the context of policy interpretation. Even if the purposive approach is adopted, modifications should be made to adapt it for policy interpretation. For example, in the context of statutory interpretation, the courts adopt a presumption that legislation has been correctly drafted.[26] This means that courts should be very slow to attribute to Parliament errors or oversights in interpretation.[27] Courts have suggested that if this presumption is based on the idea that Parliament is 'all-knowing and infallible', it should apply with less force to the interpretation of delegated legislation.[28] After all, delegated legislation is not drafted by Parliament but by public bodies. This reasoning applies also to the policy context. The presumption of correct drafting should apply with less force, if at all, to the interpretation of policies.

In addition, in statutory interpretation, statutes are assumed to be 'always speaking'. As Kelly has observed, there are several ways to understand what the 'always speaking' metaphor means.[29] For present purposes, my focus is on what Kelly calls the 'meaning

[26] *Ibid*.

[27] *R (N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 [65].

[28] *R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534 [61].

[29] Martin David Kelly, 'Applying Laws Across Time: Disentangling the "Always Speaking" Principles' (2024) 44(3) OJLS 563.

issue': by reference to which time do we determine the meaning of a law? The courts have held that Parliament should be taken to have intended that the meaning of statutes can evolve over time to make allowances for changes since the passing of an Act.[30] The justification for this rule is that statutes can endure over a considerable period of time. The passage of time may result in changes in technology or society that affect their meaning. Since Parliament may not have the capacity to address all such changes, it is permissible for the courts to interpret statutes in a way that would give effect to their current meaning.[31]

The question is whether this 'always speaking' rule should also apply to policies. Mills has questioned whether it should, since policies may not generally be as enduring as statutes.[32] I agree. The justification for the rule does not hold where policies are concerned. While it is true that some policies—such as the Immigration Rules—can endure for as long as statutes, it is also surely true that most policies are less long-lived than statutes and are intended to address more specific situations. When situations change, new policies are adopted to address them. Further, the more fundamental point is that policies are not as difficult to amend as statutes. This means that there is much less of a justification for courts to step in to help update policies.

I turn now to address possible objections to adopting the purposive approach as the standard of correctness for policy interpretation. First, as I mentioned earlier, the courts have held that policies should not be interpreted like statutes or contracts, and that an overly

[30] See, for example, *R v Ireland* [1998] 1 AC 147, 158.

[31] David Feldman, Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) ch 14.

[32] Mills (n 7).

technical or legalistic approach should be avoided.[33] Accordingly, one might be concerned that applying purposive interpretation to policies would run counter to this. Second, it might be argued that policies should be interpreted by reference to subjective intent. If a policy is seen as an expression of how a decision-maker intends to make decisions in the future, then a reference to the subjective intent of the drafter will give direct effect to the meaning of a policy. Such arguments have been raised in the context of statutory interpretation. For example, Ekins argued that the meaning of a communication is what the writer subjectively intended to communicate.[34] The courts have also interpreted policies on such a basis before. For example, in *Re McFarland*, the majority of the House of Lords referred to the Home Secretary's subjective intent to interpret a policy governing compensation to be granted to prisoners whose convictions had been quashed.[35] Lord Steyn, in dissent, thought that the policy should have been interpreted objectively.[36]

In response to the first objection, I argue that adopting a purposive approach for policy interpretation does not necessarily mean that policy interpretation will become identical to statutory interpretation. I have argued in this section for several modifications to the purposive approach to better suit it for the context of policy interpretation. This means that even if correctness review is adopted for review of policy interpretations, it will not be identical to the approach taken to statutory interpretation. As for the second objection, it is worth noting that even though Ekins defended the idea that the meaning of a

[33] See, for example, *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2017] EWHC 442 (Admin) [58]; *R v Criminal Injuries Compensation Board, ex p K* [1998] 1 WLR 1458, 1461.

[34] Ekins (n 22); Jeffrey Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33(4) OJLS 821.

[35] *Re McFarland* [2004] UKHL 17; Mills (n 7).

[36] *Re McFarland* [2004] UKHL 17 [24].

communication depends on the subjective intent of the communicator, he could be said to have adopted an objective theory of legislative intent. As Goldsworthy pointed out, Ekins suggested that the legislature's subjective intent is to be inferred from publicly available evidence of it.[37] Accordingly, even if we suppose that the true meaning of a text depends on subjective intent, a purposive approach based on objective intent is a justifiable method of interpretation for texts such as legal rules and policies. In addition, using subjective intent to interpret policies raises the risk of undermining certainty and the rule of law. Using subjective intent would reduce people's ability to reasonably understand the meaning of a policy and make plans on its basis. Members of the public may not have ready insight into the subjective intent of policy-drafters. This would detract from the interests of certainty and the rule of law. As the Court of Appeal held in *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government*, the policy in question 'means what it says, and not what the Secretary of State would like it to mean'.[38]

There is another possible challenge to the purposive approach, based on an approach to policy interpretation recently proposed by Mills. Let me first set out Mills' approach and then explain why purposive interpretation should still be preferred. According to Mills, policy interpretations should be reviewed for correctness, and correctness should be determined by the 'least expert reader' principle. This means that the meaning of a policy is that which the least expert reader falling within the audience of the policy would ascribe to it.[39] This principle would require the court to first understand what

[37] Goldsworthy (n 34).

[38] *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386.

[39] Mills (n 7).

the ‘apparent audience’ of a policy is, and to then interpret the policy in a manner by which the ‘least expert’ member of that audience would understand.[40] A reader’s level of ‘expertise’ seems, in Mills’ view, to be determined by his technical knowledge.[41] Contrary to the purposive approach, Mills argued that intention should not be relevant at all in how policies are interpreted. If a policy is to be a guide to conduct, it will not serve this function well if its meaning depends on knowledge that may not be available to other readers of a policy. Even if intention is discerned on an objective basis, a reference to intention risks ‘blurring the distinction between objectivity and subjectivity’.[42]

I suggest that Mills’ concerns about the use of intention apply primarily to subjective intent. As I mentioned earlier, the purposive approach would also reject the use of subjective intent. But objective intent, which is what the purposive approach is actually about, is not vulnerable to Mills’ argument. And if the concern is about ensuring that policies mean what they actually say and can be interpreted on the basis of generally available information, this can be addressed by prioritising the actual text of a policy in interpretation and being judicious about the materials which can be relied on as evidence of intention.[43] The concern does not require a rejection of intention entirely in interpreting a policy. In addition, purposive interpretation has the advantage of being a well-established approach that courts are already used to applying.

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[40] *Ibid*.

[41] *Ibid*.

[42] *Ibid*.

[43] See, for example, *R (The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3.

In sum, I have argued that a purposive approach should be taken to determine whether a policy interpretation is correct. Yet, this approach should be modified for the context of policy interpretation. For example, well-known principles of statutory interpretation such as the 'always speaking' rule ought not to apply in the policy context, and the presumption of correct drafting should apply with less force, if at all.

6.1.3 What is reasonableness review of policy interpretation?

Having explained correctness review, I now turn to explain reasonableness review of policy interpretation. The starting point for any discussion of reasonableness review is the standard of *Wednesbury* unreasonableness. A decision is *Wednesbury* unreasonable and hence unlawful if it is so unreasonable that no reasonable decision-maker would have made the same decision.[44]

While this statement of principle is uncontroversial, the precise nature of reasonableness review has been the subject of considerable debate. As Perry observed, the courts' statements about reasonableness review have been 'brief, cryptic, and divergent'.[45] One possible way to understand reasonableness review is by reference to correctness review. On this view, reasonableness review would require a court to consider whether a public body's degree of departure from a correct decision is so serious as to lead to unlawfulness. This approach to understanding reasonableness review can derive some support from how courts sometimes describe the standard of reasonableness—courts

[44] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[45] Adam Perry, 'Wednesbury unreasonableness' (2023) 82(3) CLJ 483, 485.

sometimes do so in language that suggests a connection to correctness.[46] For example, courts have suggested that a decision that 'lacks logic' or is 'certainly wrong' falls short of the standard of reasonableness.[47] A decision is unreasonable if it is 'beyond the range of reasonable decisions', or beyond what a 'sensible person' would do.[48] Applying this to policy interpretation, this would mean that a court could review a policy interpretation for reasonableness by asking whether it is so plainly wrong that no other public body would have arrived at the same interpretation.

But it is important to observe that there are many other views on reasonableness review that would not require any connection to correctness. For example, Craig has argued that reasonableness review requires a court to review the 'weight and balance' that a public body has accorded to relevant considerations.[49] Dindjer has argued in favour of a standard of 'relativised justification'—in his view, 'reasonableness review asks whether a decision is justified by the reasons for which it was taken, while deferring, as context demands, as to the weights of the reasons for and against the decision.' [50] Perry's account of reasonableness review is based on the idea of 'demonstrable wrongness.' A decision is demonstrably wrong 'when a reviewing court would be entitled to believe (conclude, consider etc.) that it is wrong, based on all the evidence before it.'[51] What all of these views

[46] *Ibid* for a detailed compilation of how the courts have described the standard of reasonableness.

[47] *R (A) v Liverpool City Council* [2007] EWHC 1477 (Admin) [39]; *R v Devon County Council, ex p George* [1989] AC 573, 583.

[48] *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778, [2020] PTSR 1872; *HMB Holdings Ltd v Antigua and Barbuda* [2007] UKPC 37 [31].

[49] Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 CLP 131, 132.

[50] Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84(2) MLR 265, 267.

[51] Perry (n 45) 492-493.

have in common is that they focus on evaluating the reasons a decision-maker had for making a decision, without requiring a court to come to its own conclusion about what a correct decision is. Accordingly, if such views are adopted, correctness review would not be related to reasonableness review.

Even if one takes the view that reasonableness review bears no connection to correctness, the discussion of correctness review in the previous section remains meaningful. After all, as a matter of authority, the courts have affirmed the availability of correctness review in policy interpretation. This means that it is still meaningful to contribute to clarity about just what such review means, even if the argument later will be in favour of reasonableness review. But what does this uncertainty over the nature of reasonableness review mean for the present discussion? It is true that the meaning of reasonableness review in policy interpretation will be affected by the debate over the nature of reasonableness review. I suggest, however, that it is not necessary for the purposes of this thesis to resolve the debate over reasonableness review. We can still arrive at a meaningful understanding of reasonableness review of policy interpretation on the basis of commonly-accepted propositions about reasonableness review.

What then can we say about reasonableness review of policy interpretation? First, reasonableness review will involve evaluating the reasons that a public body had for arriving at a policy interpretation. Several kinds of reasons can be identified. The first kind concerns the textual meaning of the policy. This would include the decision-maker's understanding of the text, its context, and the purpose of the policy. The second kind concerns the systemic coherence of the interpretation. For example, does it square with prior administrative precedents on how the policy has been interpreted? Has the statutory

context been taken into account? A third kind concerns the reasoning quality of the interpretation. Is the interpretation internally logical and supported by evidence? Does the interpretation reasonably meet the goals of the decision-maker? Accordingly, in applying reasonableness review, the overall question the court would ask is whether there is anything unreasonable about the weight and balance accorded to these reasons.

Second, the standard of reasonableness review can vary in intensity.[52] As the Supreme Court affirmed in *Kennedy v Charity Commission*, the courts would apply a lower standard of review where the issue in question concerns matters of political judgment or economic policy.[53] In contrast, they would apply a higher standard of review where fundamental rights are concerned. A key factor in deciding the appropriate standard of review is the expertise of the court. A court would be better suited to apply a higher standard of review if an issue lies more clearly within its expertise. For instance, a court would have greater expertise in assessing the fairness of procedures as compared to decisions involving political judgment. In *Pham v Secretary of State for the Home Department*, Lord Sumption preferred to think of the variable standards of reasonableness review in terms of a 'sliding scale'.[54] Instead of distinguishing categorically between ordinary and fundamental rights in order to determine the applicable approach, his Lordship suggested that 'the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference'.[55]

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[52] See also *Nottinghamshire County Council v Secretary of State for the Environment, Transport and the Regions* [1986] AC 240; *R v Secretary of State, ex p Bugdaycay* [1987] AC 514; *R v Ministry of Defence, ex p Smith* [1996] QB 517.

[53] *Kennedy v Charity Commission* [2014] UKSC 20 [51]-[56].

[54] *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [106].

[55] *Ibid*.

The idea of variable standards of review applies easily also to policy interpretation. As Lord Carnwath noted, courts can be naturally limited in their understanding of the administrative context within which policies have been formulated.[56] In such circumstances, deference to a public body in its assessments of reasonableness is justifiable. Accordingly, in applying reasonableness review to policy interpretations, the courts should pay attention to the degree to which they should defer to a public body. The courts should defer more in situations where they lack expertise relative to a public body—for example, where the subject matter is highly technical. In contrast, they should be less willing to defer where they are more well-equipped to make decisions.[57] I will discuss this point on variability in more detail in the next section.

6.1.4 What is the proper approach to review of policy interpretation?

I have so far explained what it is to review policy interpretations for correctness or reasonableness. I turn now to discuss which type of review should be preferred. I argue that there are three reasons to favour reasonableness review: expertise, the nature of policy interpretation, and variability.

6.1.4.1 Expertise

I begin with expertise. This refers to the relative expertise of a public body to the court in performing a task. Expertise should be assessed on an issue-specific basis. What matters is

[56] Lord Carnwath, 'Planning Policy and the Law' (2023) 35 JEL 133.

[57] See Perry (n 45) for an account of expertise-based deference.

a public body's expertise in performing a specific task, such as the interpretation of a particular term in a policy.

It is useful to be specific about what exactly expertise means. In speaking about expertise, I refer to what makes a body an expert at answering a question or making a decision. As Lord Neuberger held in *R (Carlile) v Secretary of State for the Home Department*, there are several factors that affect the relative expertise of courts in making decisions as compared to public bodies: evidence, experience, knowledge, and institutional legitimacy.[58] Building on this, I can identify several dimensions of expertise. The first and most obvious is technical or scientific competence. A second is institutional experience. A public body may be better equipped to answer a question if it has answered similar questions many times before, building up a body of precedents that can guide its decision. A third is procedural advantage. A public body may have the benefit of stronger processes that can help it to make better decisions. For example, some public bodies may have stronger information-gathering capacity than courts as a result of the ability to commission studies and convene expert advisory panels before making decisions. A fourth is regulatory knowledge. A public body can have specific knowledge about the stakeholders and interests that have to be managed, and also how to do so. This makes it better able to understand the full implications of a decision on the coherence of an entire regulatory field.

Given this understanding of expertise, it should be clear that it is relevant to policy interpretation. The expertise of a public body can make it better-placed than a court to resolve interpretive issues in situations of ambiguity. For example, the technical expertise

[58] *R (Carlile) v Secretary of State for the Home Department* [2014] UKSC 60 [68].

of a public body makes it better-placed than a court to interpret policies which govern technical and complex subjects. It is useful to observe that in other contexts, courts have also affirmed the relevance of expertise in making carve-outs from correctness review. For example, in *Jones (by Caldwell) v First-tier Tribunal*, Lord Hope suggested that the expertise of tribunals should be taken into account in determining what the dividing line between law and fact is—which would in turn determine whether correctness or reasonableness review applied.[59]

The argument from expertise for reasonableness review can be stated more precisely by distinguishing two kinds of interpretive tasks. Following Goldsworthy, I will call the first clarifying interpretation. This 'involves revealing or clarifying the meaning of a legal text, a meaning that despite being previously obscured was possessed by the text all along.'[60] It can accordingly also be characterised as interpretation *per se*.[61] The second kind of interpretive task, as Goldsworthy termed it, is creative interpretation (or construction).[62] This involves 'constructing the meaning of a text by adding new meanings that it did not previously possess, or by changing it in other ways.'[63] One kind of creative interpretation involves supplementing the existing text to resolve vagueness, self-contradiction, or gaps. Another more controversial type involves changing the meaning of text to improve it.

[59] *Jones (by Caldwell) v First-tier Tribunal* [2013] UKSC 19 [16].

[60] Goldsworthy (n 23).

[61] Solum characterises this as interpretation *per se*, as opposed to construction—see Lawrence B. Solum, 'The Interpretation-Construction Distinction' (2010) 27 Constitutional Commentary 95.

[62] Solum would call this 'construction'. See *ibid*.

[63] Goldsworthy (n 23).

Returning to the relevance of expertise, that an authority has expertise is obviously useful for creative interpretation. If the meaning of a policy is not resolved by its semantic meaning, then it will be necessary to perform creative interpretation and construct a new meaning for the text that it did not previously possess. For example, consider a policy which applies whenever 'a previously approved moiety is connected to lysine through a non-ester covalent bond.'[64] Suppose that a question is raised about whether this policy includes a situation where a moiety is covalently bonded to a lysine derivative, not lysine itself. This raises a question of interpretation: what does 'connected to lysine' mean? The semantic meaning of the policy does not supply the answer. Does it only refer to lysine in its free, unmodified form? Or does it also include any molecular structure that contains a lysine residue, even if chemically altered? This means that an interpreter will have to perform creative interpretation to answer this question. And expertise will certainly be helpful in this task: specifically, technical expertise and regulatory knowledge may be particularly relevant. Accordingly, the argument from expertise in favour of reasonableness review is strongest where creative interpretation is concerned.

One might argue that even in such situations, public bodies could simply explain the meaning of policies, with the benefit of their expertise, and it could then be for the courts to decide whether to accept their interpretation. The issue, however, is that correctness review requires courts to decide whether that interpretation is correct. If a court lacks the expertise to make such judgments, as compared to a public body, it is likely to defer in such circumstances to the public body's explanation. If so, then this deference is

[64] *Kisor v. Wilkie*, 588 US ___ (2019), 9-10.

more candidly and directly reflected through the framework of reasonableness review, as I will explain later in the section on variability.

Turning to clarifying interpretation, the relevance of expertise becomes more complicated. One might think that courts always have more expertise than public bodies in clarifying the semantic meaning of textual rules. Courts are experts at interpretation. They regularly interpret textual rules such as statutes. Since policies are also textual rules, it might therefore be argued that courts are experts at interpreting policies too.

I suggest, however, that courts are not always more expert at clarifying interpretations. Courts are not necessarily experts at clarifying all textual rules simply by virtue of their legal training. The specialised expertise of public bodies can be helpful sometimes. The background knowledge that a public body has can put it in a better position to clarify the semantic meaning of certain policies. For example, the semantic meaning of a policy which provides that '[a]gencies should ensure that sensitive values to be protected are combined with a secret value, called the salt, before applying a cryptographic hashing function to generate a hashed value that cannot be reversed with current computing resources' is likely to be better understood by a specialised agency than a court.[65] As Bedford pointed out, many policies are not written in a way that lend themselves to legal rules of interpretation which are aimed at discovering the semantic meaning of a text.[66]

[65] Clause 40, Government Data Security Policies <https://file.go.gov.sg/government-data-security-policies.pdf>.

[66] Michael Bedford, 'Tesco Stores Ltd v Dundee CC: a form of non-statutory fiction' [2017] JPL 914.

But there will be some situations where a public body does not possess an obvious advantage over a court in performing clarifying interpretation. Suppose that the Home Office has interpreted a provision of the Immigration Rules and has applied this interpretation to make a decision on a visa application. The affected person contests this interpretation, arguing that it is not supported by the text. The Home Office argues that it is. Assume that this interpretive dispute depends entirely on a textual analysis of the rules. It is purely a matter of language. While the Home Office has more operational expertise than a court, the advantage of the Home Office's expertise in resolving this specific interpretive dispute becomes less clear. In this situation, a court might be at least as capable of performing a clarifying interpretation.

6.1.4.2 The nature of policy interpretation

There are two possible approaches I can take from here. The first is to say that in circumstances where a court is at least as capable as a public body of performing a clarifying interpretation, correctness review ought to be the proper standard, since the argument from expertise would no longer favour reasonableness review. As I will explain in the next section, I am not in favour of such an approach.

A second approach would be to raise another rationale for reasonableness review which would extend also to such situations. I argue that there is one—namely, the nature of policy interpretation. The adoption of a policy is an exercise of discretion. Exercises of discretion are generally reviewed on the basis of reasonableness. Courts do not review the substance of a public body's exercises of discretion for correctness. This would contravene the legality-merits distinction in administrative law. Accordingly, if a public body has the

discretionary power to make policies, then as Endicott suggested, there is 'no good reason' why it 'cannot lawfully act on its own interpretation (within reason) of the policies it makes.'[67] Indeed, the interpretation of a policy is a natural extension of its adoption. A policy does not speak for itself. Adoption creates rules, but interpretation gives them meaning, scope, and force. This suggests that policy interpretation should similarly be reviewed on the basis of reasonableness. As the Court of Appeal recently held in *R (RA) v Secretary of State for Foreign, Commonwealth and Development Affairs*, '[w]here the court is called upon to identify whether a policy is lawful, it may do so, but it does not write policy itself because the task of formulating policy belongs to the executive and not to the court.'[68]

An analogy will help to make this point. Suppose that a public body wishes to change its policy. It is clear that it is within the discretion of public bodies to change their policies. If a public body's decision to change its policy is challenged through judicial review, and if the principle of consistency is applied to govern such a challenge, the decision will be assessed on the basis of reasonableness and not correctness.[69] Returning to policy interpretation, there is an analogy between a public body supposedly mistakenly interpreting its policy and trying to change its policy. In both situations, the public body is

[67] Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 355.

[68] *R (RA) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2026] EWCA Civ 3 [58].

[69] See, for example, *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59. Note that if the courts decide to apply the legitimate expectations doctrine to govern this situation, the courts have sometimes applied proportionality as the relevant standard of review: see, for example, *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363. But the applicability of legitimate expectations to such situations has been criticised: see, for example, Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) CLJ 93.

trying to change the meaning of its policy. It stands to reason then that the same approach should be applied to both situations—that is, reasonableness review.

The nature of policy interpretation also suggests that one of the reasons for reviewing interpretations of statutes for correctness does not apply to policy interpretation. Correctness review is normally applied to a public body's interpretations of statutes. If a public body acts under an incorrect interpretation of a legal rule, it has exceeded the scope of its power. Parliament has granted a public body a certain scope of legal power, and a public body has to act correctly within this scope. A court would therefore be justified in applying correctness review to make sure that public bodies act within the correct scope of legal power. But policies are not legal rules. A policy does not, in itself, define the scope of a public body's legal powers. Accordingly, this reason for reviewing interpretations of statutes for correctness does not apply to policies.

This rationale for reasonableness review is independent of the point on expertise. It relies on the nature of policy interpretation. As such, even in a situation where an ambiguity in a policy is purely semantic and a clarifying interpretation would not benefit from expertise, this rationale suggests that reasonableness review ought to apply nevertheless.

6.1.4.3 Variability

I have thus far raised two reasons for reviewing policy interpretations for reasonableness: expertise and the nature of policy interpretation. At this point, one might suggest that we do not necessarily have to choose between correctness and reasonableness. Perhaps

correctness review should be preferred in some situations, and reasonableness review in others.

This is essentially an argument for a variable approach. One might argue that there are many kinds of policies. For example, some are very technical in nature, while some are less so. This means that there may be situations where the case for reasonableness review I have made here has less force. In these situations, correctness review ought to apply.

In response, I should first point out that there are two kinds of variable approaches. The first is to apply a different standard depending on the policy in question. The second is to apply the same standard in varying ways depending on the interpretive question at issue. I will argue against the first and in favour of the second.

Applying a different standard depending on the policy in question is precisely the approach that the courts have taken thus far. I argue, however, that the courts' experience in applying this approach suggests that it is difficult to implement well. For instance, as I mentioned earlier, the law has distinguished broad and specific policies. But this distinction is not very helpful. What exactly is a 'broad' and 'specific' policy? As Ruiz-Tagle noted, the courts have not provided a concrete answer.[70] The courts have found it difficult to set out a clear and simple way to determine which standard should apply to different policies. This suggests that an approach which is less ambiguous, and is yet at the same time able to address concerns about the relative expertise of courts and public bodies in interpreting policies, will have much to commend it.

[70] Samuel Ruiz-Tagle, 'Samuel Smith and Judicial Review of Policy Interpretation: A Middle Way in the Law and Policy Divide' (2020) 32 JEL 577, 582-583.

I argue that reasonableness review is up to the task. It provides the second kind of variable approach—it can be applied in varying ways depending on the interpretive question at issue. As I explained earlier, in performing reasonableness review, the courts can defer more in situations where they have to address questions in which they lack expertise relative to a public body, and less so where they are more well-equipped to do so.[71] This means that reasonableness review is able to address variability in policies. At the same time, it is superior to the distinction that the court has drawn between 'broad' and 'specific' policies. For one, courts are used to thinking about deference in the context of reasonableness review. Relying on reasonableness review to address variability therefore has the advantage of allowing courts to rely on skills and techniques that they are already used to applying, as compared to having to come up with new rules to determine what are 'broad' and 'specific' policies. In addition, reasonableness review allows courts to express more directly the concerns that actually underlie the existing distinction that the court has relied on. The distinction between 'broad' and 'specific' policies itself reflects a concern about expertise. 'Broad' policies leave more room for judgment by a public body, which therefore means that a public body has more expertise to interpret them than a court. Since deference in reasonableness review is about expertise, reasonableness review allows courts to directly reflect this concern rather than through the lens of an ambiguous distinction between 'broad' and 'specific' policies. It shifts a court's focus from the nature of the policy and allows it to consider directly whether it has the expertise to answer a specific question of interpretation. This has the advantage of candour in legal reasoning.

[71] See Perry (n 45) for an account of expertise-based deference.

Notably, the manner by which courts have decided on the proper approach to review of policy interpretation already in substance reflects this idea of deference. Starting with *Samuel Smith*, as I mentioned in Chapter 2, the key issue was whether the local planning authority had correctly understood the requirement of 'openness' in relation to Green Belt policy and preventing urban sprawl in the National Planning Policy Framework. Would a proposed development preserve the openness of the Green Belt? The specific interpretation question that had to be addressed was what 'openness' in the Green Belt policy meant: did it legally require visual impact to be taken into account or was visual impact so material as to require direct consideration? As I mentioned earlier, the court justified its adoption of reasonableness review over correctness review on the basis of a distinction between broad and specific policies. It held that reasonableness review was appropriate in this context, since 'openness' was a broad policy concept.

I suggest that this decision can be more directly explained by reference to the concept of deference. The court had less expertise than the public body in relation to the specific interpretive question being raised. The interpretive issue raised here could not be resolved by the semantic meaning of the policy. Indeed, an answer to this question required creative interpretation. Any answer to the question of whether openness included 'visual impact' would require a court to come to a conclusion about the importance of visual impact to Green Belt policy, and what forms of development would preserve openness. Components of expertise like institutional experience and regulatory knowledge would be useful in answering this question—a public body would know better the implications of interpretation across the planning domain and would have expertise in how it had previously understood the term 'openness'. Accordingly, as the court itself recognised, the assessment of what exactly was relevant to 'openness' was a matter of planning judgment

rather than law, and deference therefore required that the public body's decision would be reviewed only on the basis of reasonableness.[72]

The idea of deference also explains the outcome in *Tesco Stores Ltd*. The policy here was a planning one, like the one in *Samuel Smith*. Yet, the court adopted the standard of correctness review. As I have argued, I do not think that correctness review should be adopted, but I do think that it was justifiable for the court to adopt a stricter standard of review here than in *Samuel Smith*. The difference between *Tesco Stores Ltd* and *Samuel Smith* did not rest in the nature of the policy in question but rather in the nature of the specific interpretation issue the court had to answer. In *Tesco Stores Ltd*, the interpretation question at hand raised two possible meanings of the word 'suitable' in a local planning policy document.[73] The local council argued that it referred to the suitability of a site for a proposed development. Tesco argued that it referred to the suitability of a proposed development for meeting deficiencies in retail provision in the area.

This is a classic question of clarifying interpretation: what is the semantic meaning of the word 'suitable' when faced with two possible interpretations of the word? The policy's text contained the answer to the question. The policy in question stated that proposals for new or expanded out of centre retail developments would be acceptable only if certain conditions were met, one of which was that 'no suitable site is available' in a sequentially preferable location. The court observed that a natural reading of this policy clearly pointed to the word 'suitable' being about the suitability of a site for the proposed development—the proposed development would only be acceptable at an out of centre

[72] *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 [39]-[41].

[73] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [24].

location if no suitable site is available more centrally.[74] Since the semantic meaning of the policy contained the answer to the interpretation question, the court simply had to clarify it. It had the expertise to perform such a task. A stricter standard of review was therefore justified in this case. Indeed, the issue before the court was not a matter of the kinds of considerations that public bodies should take into account to determine the 'suitability' of a development. Such an issue would have been more similar to the issue raised in *Samuel Smith* and would have been a matter more within the expertise of public bodies. Rather, the issue at hand in *Tesco Stores Ltd* was a textual one requiring the court to have regard to the terms of the policy to determine the meaning of the word 'suitable'.[75] Addressing such an issue was more clearly within the courts' expertise.

Accordingly, the idea of deference within reasonableness review serves as a more direct and candid explanation of the different approaches to interpretation in *Tesco Stores Ltd* and *Samuel Smith*. Before moving on, I will clarify here that the basis for variability and deference that I have focused on here is expertise. One might suggest that another possible basis for deference generally is democratic legitimacy. For several reasons, I will not be including this in an assessment of deference here. First of all, I think, in agreement with Perry, that democratic legitimacy should not be a direct basis for deference.[76] Democratic legitimacy in itself does not provide a reason to think that the judgments of a body possessing better democratic credentials are more reliable. One might argue in response that even if this were the case, at a systemic level, policy-laden interpretive choices involving value judgments should be made by bodies with democratic credentials.

[74] *Ibid* [25].

[75] *Ibid*.

[76] Perry (n 45) 495-496.

But I think this concern is better taken into account through the rubric of expertise. The expertise of public bodies extends to procedural advantages and regulatory knowledge, which encompasses information gathering capacity and systemic judgment. This qualifies public bodies to deal with value-laden issues. And courts should rightly defer in such circumstances. This is a more precise way to take this concern into account, as compared to a broad reference to the democratic credentials of the public body. Relying on the democratic credentials of a public body might risk being overinclusive as an argument. It would suggest that courts should defer to public bodies on any value-laden question simply because of the status of the public body, even if their legal expertise qualifies them to make decisions on the specific question at hand. Another way of making the argument about the relevance of democratic legitimacy is to say that Parliament has specifically assigned interpretive authority to this body, which means that a court should defer to Parliament's choices. But I think this too breaks down into an argument on expertise: delegation to specialised bodies is itself usually best explained by Parliament wanting decisions made by people with relevant expertise. If so, then an account of deference based on expertise can reflect this concern.

6.1.5 Addressing arguments against reasonableness review

I have thus far argued that expertise, the nature of policy interpretation, and variability favour reasonableness review. I turn now to address the arguments that can be raised in support of correctness review.

6.1.5.1 Consistency

The first is about consistency. One might argue that consistency requires correctness review. Otherwise, a public body might be able to adopt differing interpretations of its policies when applied to different individuals. This would threaten good administration. Mills also raised a related argument from consistency in support of correctness review. He argued that if reasonableness review were the only form of review available for policy interpretations, this would result in multiple acceptable interpretations of a policy.[77] This would weaken a policy's ability to guide behaviour between multiple public bodies.

I agree that consistency in policy interpretation is important. But I am doubtful about whether correctness review is necessary to achieve this goal. There are two kinds of consistency that should be distinguished. The first concerns consistency in how the same public body interprets its policy in different cases across time. I argue that reasonableness review can promote this sense of consistency. Suppose that a public body interprets the word 'suitable' in a policy governing visa applications to include considerations of financial independence in one case, and then interprets the same word to exclude such considerations in another case. Such conduct would likely be problematic even by the standards of reasonableness review. As Perry has pointed out, the courts have recognised that inconsistency is a marker of unreasonableness.[78] This means that reasonableness review can address this first kind of consistency.

The second kind of consistency concerns how different public bodies interpret the same policy. In such situations, the author of the policy is often different from the public

[77] Alistair Mills, 'The Interpretation of Planning Policy: The Role of the Court' (2022) 34 JEL 419, 431.

[78] Perry (n 45), citing *R (Middlebrook Mushrooms Ltd) v Agricultural Wages Board* [2004] EWHC 1447 (Admin) [74]; *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25; [2019] AC 96 [26] (Lord Carnwath).

body applying it. Consider the National Planning Policy Framework (NPPF). Planning authorities across England interpret it as they make decisions on planning permission. Can reasonableness review promote consistency across how different local planning authorities interpret the NPPF? I argue that it can. In reviewing a policy interpretation for reasonableness, a court would be justified in taking into account how other planning authorities have interpreted the same policy. A failure of the interpreting public body to interpret the NPPF consistently with its accepted meaning is likely to fall foul of reasonableness review. This helps to secure the second kind of consistency too. Indeed, Lord Carnwath has observed that securing consistency in this sense does not necessarily require judges to perform correctness review: '[i]t is difficult to quarrel with the principle, as expressed in *Tesco Stores Ltd*, that planning policies should be interpreted objectively and consistently, rather than left to the whim of individual authorities or inspectors. But does it follow that the task should be left to judges?'[79]

6.1.5.2 Incentive to adopt vague policies

A second argument in favour of correctness review relates to a supposed consequence of adopting reasonableness review. The fear would be that the adoption of reasonableness review would incentivise public bodies to adopt vague policies. After all, the more vague a policy is, the wider the range of possible reasonable interpretations would be. This would detract from the ability of policies to consistently and predictably guide decisions of public bodies.

[79] Lord Carnwath (n 56).

This is an empirical claim and it is difficult to offer a conclusive response to this without being able to study the actual consequences of adopting reasonableness review. But a perspective from another jurisdiction can be helpful in thinking about this argument. In *Kisor v. Wilkie*, the US Supreme Court addressed a dispute over a policy adopted by the Department of Veterans' Affairs governing the issuance of disability benefits.[80] The Board of Veterans' Appeals, which was part of the same department, made a decision to grant benefits only from the date of the applicant's motion to reopen the claim, and not from the date of his first application. This decision was based on the Board's interpretation of the policy governing these claims. A key question that arose in this case was how the court should perform review of a public body's policy interpretation. The governing rule in US law for such issues was a doctrine called *Auer* deference, which had been developed in the US Supreme Court decision in *Auer v. Robbins*.[81] This doctrine required the court to defer to an agency's reasonable interpretation of an ambiguous policy. In *Kisor*, the Supreme Court was asked to overrule *Auer* and end its approach of deference to public bodies' policy interpretations.

To try to persuade the court to overrule *Auer* deference, counsel for the applicant argued that such deference would incentivise public bodies to adopt vague policies. But the court rejected this argument. It drew from studies of how public bodies in the US have responded to the standard of *Auer* deference. In sum, there was no evidence that *Auer* deference had led public bodies to design their policies vaguely.[82] The court also drew support from the incentives for the behaviour of public bodies. It observed that for public

[80] *Kisor v. Wilkie*, 588 US ___ (2019).

[81] *Auer v. Robbins*, 519 US 452 (1997).

[82] *Kisor v. Wilkie*, 588 US ___ (2019), 24-25.

bodies to accomplish their tasks, people had to know what they had to do. This would incentivise public bodies to be clear and precise in their policies, serving as an internal check against the widespread adoption of vague policies.

One may raise doubts about *Kisor*'s continued precedential value, given that the US Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* suggests a fundamental re-examination of the courts' attitude of deference to public bodies.[83] In *Loper Bright*, the Supreme Court overruled the long-standing rule of *Chevron* deference, moving closer to correctness review of public bodies' interpretations of statutes.[84] It is important to observe that the court did not address *Auer* deference. And on closer inspection, its reasoning does not undermine *Auer* deference as well.[85] The Supreme Court's decision in *Loper Bright* rested primarily on its understanding of the requirements of the US Administrative Procedure Act 1946. It thought that *Chevron* deference ran contrary to the Act's requirement for the courts to exercise their independent judgment in the review of public bodies' decisions. The court's reasoning in *Loper Bright* can therefore be characterised as unique to the US statutory context. Accordingly, the substance of the court's reasoning in *Kisor* remains useful for present purposes.

6.1.5.3 <u>The scope of power of public bodies</u>

[83] Evan J Criddle, 'Chevron's Consensus' (2008) 88 Boston University Law Review 1271; *Loper Bright Enterprises v. Raimondo*, 603 US ___ (2024).

[84] *Loper Bright Enterprises v. Raimondo*, 603 US ___ (2024).

[85] See Cary Coglianese and Daniel E Walters, 'The Great Unsettling: Administrative Governance after *Loper Bright*' (2025) 77 Administrative Law Review 1 for more discussion on this point.

A third possible argument for correctness review is based on the scope of power of public bodies. One might argue that correctness review is necessary to control the power of public bodies in their application of policies and ensure that they 'do not live in the world of Humpty Dumpty.'[86] The concern would be that in the absence of correctness review, public bodies would be able to justify any action by reference to a policy. They would be able to interpret policies in any way that they wish to support their decisions. This would raise a rule of law concern—in addition to the value of consistency discussed earlier, the rule of law would also be concerned about public bodies having an uncontrolled scope of discretionary power.

Once again, I am doubtful about the relevance of this argument for correctness review of policy interpretation. The scope of power concern obviously holds with great force where a public body has interpreted a statute. Correctness review in such a context would be justifiable to ensure that public bodies act within the proper scope of their legal power. But why should an incorrect understanding of a policy lead to the same outcome? Policies are not law. Interpretations of policy do not go to the jurisdiction of a public body. There is accordingly no scope of power concern of public bodies being able to unilaterally expand their legal powers through their interpretation of policies.

Also, if the scope of power concern is with ensuring that the courts do have authority over how public bodies interpret their policies, this does not necessarily require correctness review. Reasonableness review allows courts to have a robust role in supervising how public bodies interpret their policies. As Endicott pointed out, while it is

[86] *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [19].

undesirable for public bodies to be able to make a policy mean whatever they want it to mean, courts can 'stand against that by review on a ground of reasonableness.'[87] The reasoning in *Kisor* also lends support to this idea. In *Kisor*, one of the arguments raised against *Auer* deference was precisely that the courts ought to have a robust role in supervising public bodies in their interpretation of policies, in order for the principle of separation of powers to be upheld. Otherwise, public bodies would usurp the interpretive role of the courts. The US Supreme Court rejected this argument. It held that reasonableness review through *Auer* deference allows the courts to 'retain a firm grip on the interpretive function'.[88] Reasonableness review would be sufficient to ensure that public bodies would not be able to make their policies mean whatever they would like them to mean.

6.1.5.4 Doctrinal coherence

A fourth argument against reasonableness review is about doctrinal coherence. One might argue that reasonableness review results in an inconsistency with the duty to comply with policies in *Mandalia v Secretary of State for the Home Department*.[89] If a public body's interpretation of a policy is subject only to reasonableness review, then it can depart from its policy even if the *Mandalia* standard is not met. Suppose that a public body interprets a policy wrongly, but that its interpretation does meet the standard of reasonableness. The public body's interpretation is therefore lawful. One might argue that this means that the public body has effectively been allowed to depart from its policy even though it has not

[87] Endicott (n 67) 355.

[88] *Kisor v. Wilkie*, 588 US ___ (2019), 25.

[89] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

met the legal requirement of the duty to comply; that is, to show good reason for departing.[90] This leads to an inconsistency in the law.

This is an important issue to address. I think the answer lies in how we understand when the *Mandalia* duty arises. There would be inconsistency with reasonableness review if it arises whenever a public body has actually departed from its policy, correctly understood. It is understandable that this would be the default understanding of when the duty arises, since *Mandalia* assumed that correctness review was the law. But if reasonableness review is adopted, as I argue for here, then the *Mandalia* duty should be triggered only when a public body has departed from its policy, lawfully understood. In other words, the duty would only arise when a public body has adopted an unreasonable interpretation of its policy. Public bodies will be given a margin of appreciation in deciding what a policy means. If their interpretation is reasonable, then they would have complied with their policy. If not, then a court would have to assess whether they had offered good reasons for departing from their policy. On this view, there would be no inconsistency between the rule for policy interpretation and the *Mandalia* duty.

It is useful to observe that this is consistent with how the Divisional Court and Court of Appeal reasoned in *R (Ammori) v Secretary of State for the Home Department* and *Secretary of State for the Home Department v Ammori* respectively.[91] In these cases, one of the issues that had to be addressed was whether the Home Secretary had complied with her policy in deciding to proscribe Palestine Action as a terrorist organisation under the

[90] For a statement of the 'good reason' test, see *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

[91] *R (Ammori) v Secretary of State for the Home Department* [2026] EWHC 292 (Admin); *Secretary of State for the Home Department v Ammori* [2026] EWCA Civ 721.

Terrorism Act 2000. Her policy required her to consider, in addition to proportionality, 'other factors' including the nature of the organisation's activities, the specific threat it poses to the UK, and so on. In assessing these 'other factors', the Home Secretary had taken into account how the consequences of proscription would be advantageous in disrupting the activities of Palestine Action.

The Divisional Court held that such considerations did not fall within the meaning of the term 'other factors' in the policy. It held that the Home Secretary's interpretation of the policy must meet the standard of reasonableness: '[t]he Home Secretary's power to choose which matters are 'other factors' must be used consistently with the usual *Wednesbury* principles, including that such 'other factors' as are chosen must be consistent with the purpose of the policy.'[92] This standard was not met. The purpose of the policy was to limit the discretionary power to proscribe, and any consideration of 'other factors' had to explain a particular need to proscribe an organisation under the Act going above and beyond the belief that an organisation was concerned in terrorism.[93] Yet, the Home Secretary's consideration of the advantageous consequences of proscription would be applicable to any organisation that meets the requirement of being concerned in terrorism.[94] Accordingly, the Home Secretary had not complied with her policy. Neither had she expressly departed from her policy and given sufficient reason for it.[95] This meant that her decision was unlawful on the ground of failure to comply with her policy.

[92] *R (Ammori) v Secretary of State for the Home Department* [2026] EWHC 292 (Admin) [90].

[93] *Ibid* [91].

[94] *Ibid* [94].

[95] *Ibid* [93].

On appeal, the Court of Appeal came to a different conclusion on the Home Secretary's interpretation of the policy. It first suggested that it should accord a margin of discretion to the Home Secretary in reviewing her policy interpretation, given that courts should be wary of applying sophisticated legal analysis to broad policies and that the specific provision in question here was 'brief, unsophisticated and open-textured in its language.'[96] Unlike the Divisional Court, the Court of Appeal held that there was nothing in the wording of the policy that suggested that its purpose was 'to limit or constrain the factors to be considered.'[97] In any case, even if the policy's purpose was to constrain decision, the kinds of operational factors that the Home Secretary had considered were capable of reducing the scope of discretion too.[98] In certain cases, they would weigh against proscription. Accordingly, there was nothing unlawful about considering these factors and the Home Secretary had acted lawfully.

These decisions illustrate the relationship between interpretation and the duty to comply proposed earlier. In the Divisional Court decision, what essentially happened was that the court first considered that the Home Secretary's interpretation of her policy did not meet the requirement of reasonableness. This meant that she had not complied with her policy. If she had given good reasons for departing from her policy, this non-compliance could yet be lawful. But she had not. As for the Court of Appeal, its starting point was hesitance in applying correctness review strictly to the Home Secretary's interpretation. This suggested that the court was applying reasonableness review. It then found that the Home Secretary's interpretation was reasonable. This meant that there was no further issue

[96] *Secretary of State for the Home Department v Ammori* [2026] EWCA Civ 721 [81]-[82].

[97] *Ibid* [83].

[98] *Ibid* [84]-[90].

of whether she had complied with her policy. Accordingly, these cases usefully illustrate that reviewing policy interpretations for reasonableness can be consistent with the *Mandalia* duty to comply.

6.1.5.5 Non-arbitrariness

A final possible argument against reasonableness review comes from what is perhaps an unexpected angle: the value of non-arbitrariness. I explained earlier that non-arbitrariness affirms that courts should review policy interpretation. But how courts should do so is a separate issue.

One might initially think that non-arbitrariness favours correctness review. For example, power non-arbitrariness appears to favour correctness review because allowing only reasonableness review of policy interpretation would increase the arbitrary power that people are subject to. Reasonableness review allows for a variety of permissible interpretations of a policy. Interpretations are permissible as long as they are reasonable. This grants public bodies a wider scope of power in how they interpret their policies.

On the contrary, I do not think that non-arbitrariness favours correctness review. I offer two reasons for this. The first and most fundamental one is that, as I explained in Chapter 4, arbitrariness is different from wrongness. This means that an approach to review that requires a court to enter into an assessment of correctness would go beyond what non-arbitrariness requires. The correctness of a decision is not what non-arbitrariness is concerned about. Rather, its concern is limited to ensuring that public bodies exercise and

structure their powers in ways that remain responsive to proper reasons and open to appropriate justification.

Second, I argue that with a proper understanding of both aspects of non-arbitrariness, reasonableness review is at least as capable as correctness review of achieving them. From the perspective of exercise non-arbitrariness, to recall, it requires a public body to be attentive to the proper reasons for the use of power. It is worth observing that reasonableness review gives direct expression to this requirement. It encourages public bodies to be concerned about the reasons for policy interpretations, since courts would be reviewing whether such interpretations are reasonable.

As for power non-arbitrariness, it is important to be clear about what power non-arbitrariness is actually about. Power non-arbitrariness is not opposed to any kind of broad discretion. Rather, what is problematic under power non-arbitrariness is for power to be deliberatively isolated, such that a power-holder is not accountable for how power is exercised. An example will help to illustrate. Suppose that a local authority adopts a housing allocation policy stating: 'Priority may be given to applicants with exceptional medical or welfare needs.' A housing officer refuses priority status to an applicant. If the housing officer is able to decide on this at her whim without giving any reasons to any party whatsoever, this would trigger a concern of power non-arbitrariness. But if the housing officer has to give reasons for her decision, and if these reasons can be reviewed by a court, her arbitrary power will be reduced. In both situations, the housing officer does have discretion. What is problematic about the first situation is not the existence of discretion *per se*. Rather, it is that the decision is deliberatively isolated. The housing officer still has discretion in the second situation, but her power gives rise to much less of a concern

of power non-arbitrariness because her decision is no longer exercised in deliberative isolation.

Once power non-arbitrariness is properly understood, it becomes clear that reasonableness review also directly furthers it. Reasonableness review makes public bodies accountable to courts for how they have exercised their power to interpret policies. This means that reasonableness review addresses the crux of what power non-arbitrariness is concerned about by reducing the scope of power that can be exercised in deliberative isolation. Reasonableness review then is at least as capable as correctness review in achieving power non-arbitrariness.

Accordingly, non-arbitrariness requires courts to review policy interpretations, but does not go further to favour correctness review. Given then the other reasons favouring reasonableness review that I presented in section 6.1.4—expertise, the nature of policies, and variability—the weight of argument in the final analysis leans in favour of reasonableness review.

In sum, I have argued in favour of reasonableness review of policy interpretations. I raised three reasons in support: expertise, the nature of policy interpretation, and variability. I then considered five possible arguments in favour of correctness review: consistency, a concern about vague policies, the scope of power of public bodies, doctrinal coherence, and non-arbitrariness. I suggested that none of these arguments provide sufficient support for correctness review to be adopted as the standard for review of policy interpretation. Reasonableness review remains the more justifiable standard.

The courts in *Samuel Smith* and *Hopkins Homes* have already been moving in the direction of limiting the scope of correctness review. Adopting reasonableness review for all policy interpretations would be a step in the same direction. Perhaps more importantly, however, a move to reasonableness review would finally mark a return to the proper boundaries of judicial intervention. Doing so would result in a distinction between how courts review a public body's interpretations of policies, as compared to statutes. Interpretations of statutes are subject to correctness review. But this distinction should be maintained, since policies are different in kind from statutes. Interpretations of policies should be treated differently from interpretations of statutes. A move towards reviewing policy interpretations for reasonableness would achieve this aim.

6.2 The law on policies authorising unlawful conduct

I turn now to discuss the final well-established doctrine in the law on policies: the law on policies authorising unlawful conduct. As I described in Chapter 2, it is widely accepted that a policy is unlawful if it authorises unlawful conduct. This doctrine serves as a limit on how policies are drafted.

Two tests have been used in the case law to determine whether a policy is unlawful on this basis. The first is the approach applied by the Supreme Court in *R (UNISON) v Lord Chancellor*.[99] Applying this approach, a policy would be unlawful if it leads to a real risk of unlawfulness. Statistical evidence of the impact of a policy can be relevant in evaluating the risk of unlawfulness.[100] The second approach was set out in the Supreme Court decision

[99] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

[100] *Ibid* [93].

of *R (A) v Secretary of State for the Home Department*.[101] This requires a court to consider whether a policy authorises or approves unlawful conduct. A court's task is to compare 'normative statements in the law and in the policy, as objectively construed', and not to conduct a statistical analysis of the risk of unlawfulness.[102]

6.2.1 Why review policies for their content?

While it is well-established that policies authorising unlawful conduct are unlawful, it is less clear why this is the case. After all, why should courts be concerned about the content of policies? Policies are not legal rules and do not directly affect any legal rights and obligations. Rights and obligations are only affected when a policy is applied to make a decision. If so, it would seem to make sense for courts to be concerned only with unlawful decisions, instead of unlawful policies.

One possible way of answering this question is as follows: the courts should be concerned about the content of policies because they have given policies legal effect, even though they are not legal rules. For example, courts have required public bodies to comply with policies unless they have good reason to the contrary. If public bodies are under a duty to comply with policies, then the law should be concerned about what exactly such compliance entails. This leads naturally to a concern about the content of policies.

This does provide a possible answer. But it is insufficient. Suppose that the only reason for the courts to review the content of policies is that they have given policies legal

[101] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

[102] *Ibid* [41].

effect. Yet, this is possibly circular. If this is the only reason for courts to review the content of policies, then one might suggest that courts should therefore not give policies legal effect, in view of the concern that this creates a situation where policies are treated as legal rules when they are in fact not. A better approach would be to understand why courts have given policies legal effect, in order to arrive at a deeper explanation for reviewing the content of policies.

As I argued in Chapter 5, rules according policies legal effect, such as the duty to comply, can be explained by the value of non-arbitrariness. It is interesting to observe that the same value that explains why courts have given policies legal effect also explains why courts should review the content of policies. Both principles of non-arbitrariness can be drawn upon. Exercise non-arbitrariness requires public bodies to be attentive to the proper reasons for the use of power. And these reasons are those which the law makes relevant, as I argued in Chapter 4. If so, then exercise non-arbitrariness would be promoted by policies which help public bodies to be attentive to the requirements of the law. Similarly, power non-arbitrariness favours allowing review of the content of policies. If the law does not allow such review, public bodies would effectively have an uncontrolled discretion in how they draft policies. There would be no legal control on the content of policies. Public bodies would be free to adopt policies authorising unlawful conduct without any control by affected persons. This would increase the arbitrary power that persons are subjected to.

Could the law further the same objective of non-arbitrariness simply by allowing courts to review unlawful decisions? One might argue that even if courts could only review unlawful decisions and not the content of policies, this would be sufficient to address the concern of exercise non-arbitrariness. After all, if the concern of exercise non-arbitrariness

is with the possibility of public bodies making unlawful decisions, it seems like this could be addressed by review of unlawful decisions alone. However, this would not address the concern of power non-arbitrariness. Public bodies would still possess an uncontrolled power over the content of their policies. This has important implications especially when one notes that not all policies lead to decisions that can be reviewed by courts. Indeed, public guidance does not guide the conduct of public bodies at all. Accordingly, allowing courts to only review unlawful decisions would not address the arbitrary power that public bodies would possess over the content of policies like public guidance.

6.2.2 What is the proper approach to such review?

If the courts should be able to review whether policies authorise unlawful conduct, this gives rise to a further question: which approach should be adopted for such review? As I mentioned earlier, two approaches have been offered in the case law. Should the *UNISON* or *A* approach be preferred? Or is a new approach preferable?

Does the *UNISON* or *A* approach better promote the interest of non-arbitrariness? Starting with the approach in *A*, it is too permissive of policies which authorise unlawful conduct. Suppose that it is unlawful for hospitals to allow doctors to make the final decision on a patient's end-of-life treatment options. A hospital authority adopts a policy instructing doctors that only persons 'best-placed' to decide on treatment options should have the authority to do so. Doctors following this policy do make the final decisions on end-of-life treatment options in the majority of cases.

This policy does not actually contain a normative statement contrary to the law. This means that the policy would be lawful under the approach in *A*. But when the policy is applied, it does lead to doctors making decisions about treatment options. It is also foreseeable that the terms of the policy would lead to such an outcome. Yet, the approach in *A* would be unable to address such policies. If policies which authorise unlawful conduct are an issue for non-arbitrariness, *A* does not do much to prevent public bodies from drafting such policies. The approach in *A* fails to recognise that a high probability of leading to unlawful outcomes as a matter of fact might point towards an inherent problem with the policy.

The *UNISON* approach is better-placed to address such policies. The risk of unlawful outcomes would be relevant in how a court reviews a policy. Such policies are more likely to be rendered unlawful under the *UNISON* approach. But there is a problem with it. As the Supreme Court held in *A*, it is not the courts' task to perform statistical analysis of the likelihood of unlawfulness.[103] This does not fall within the courts' expertise. The approach in *A* accords better with the courts' expertise, since it ultimately rests in an interpretation of a policy and the relevant law.

This means that there are issues with both existing approaches in the law. The *A* approach does not do enough to promote the interest of non-arbitrariness. The *UNISON* approach risks the courts exceeding their expertise. If both existing approaches are unsatisfactory, how then should a court review policies authorising unlawful conduct?

[103] *Ibid*.

I think that the ordinary principles of administrative law provide a solution to this issue. Simply put, a policy is unlawful if its content is unreasonable. And a policy's content is unreasonable if it so clearly authorises unlawful conduct that no reasonable decision-maker would have drafted the policy. In answering this question, it is important to compare normative statements in the law and the policy, as the Supreme Court in *A* held. At the same time, it would also be important to consider the likelihood that a policy would lead to unlawful outcomes, as the approach in *UNISON* requires. Both considerations would be relevant under an unreasonableness analysis.

An approach based on unreasonableness would directly further the interest of non-arbitrariness. Public bodies would be encouraged to ensure that the content of their policies does not clearly authorise unlawful conduct. The test of unreasonableness requires public bodies to have a justification for how their policies are drafted. This promotes exercise non-arbitrariness by reducing the likelihood of policies authorising unlawful conduct.

This approach would better facilitate non-arbitrariness as compared to the approach in *A*, since it would capture policies which may not contain a normative statement contrary to the law, but would yet clearly lead to unlawful outcomes as a matter of fact. And compared to the approach in *UNISON*, an unreasonableness test falls better within the courts' expertise and has the advantage of preventing judges from entering deeply into the merits of policy decisions. It is well-established that unreasonableness is pitched at a high standard to prevent courts from substituting their judgments of reasonableness for those of a decision-maker. As such, under an unreasonableness approach, the courts would only be concerned about the likelihood of unlawfulness if it is so high that the policy is manifestly unreasonable. Accordingly, a test based on unreasonableness captures a concern about the

likelihood of unlawfulness and yet allows the courts to remain within their proper domain in the separation of powers.

An unreasonableness analysis also can explain the outcomes of the decisions in *UNISON* and *A*. To recall, in *UNISON*, the Lord Chancellor had introduced an order that fees must be paid before claims and appeals in the employment tribunals could commence. This order to introduce fees was challenged on various grounds, one of which was that it interfered with the common law right of access to justice. The court concluded that the fees order resulted in a real risk of preventing access to justice. This was due to statistical evidence on the impact of the fees order on the bringing of claims. The court thought that the impact of the fees order should not be assessed as a theoretical matter, but that it should consider the likely effect of the imposition of fees in the real world.[104] And the fall in the number of claims was so substantial that the court thought it was clear that the fees order resulted in a real risk of preventing access to justice.[105] An approach based on unreasonableness would have captured the same considerations about risk that the court took into account, and would also have led to the same outcome. But it would have framed the issue differently. Applying unreasonableness, a court would have asked whether the fees order was one that no reasonable decision-maker would have made, in view of the possibility of a negative impact on the right to access to justice. Given the evidence available to the decision-maker, it was clear that there was a very high likelihood that the fees order would have such a negative impact. The policy would have met the high threshold of unreasonableness on this basis.

[104] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [93].

[105] *Ibid* [91].

In *A*, the Secretary of State had issued a policy to police authorities to govern the disclosure of child sex offender convictions.[106] This policy was challenged on the basis that it did not sufficiently provide for the police to consult an offender before disclosing his offences to members of the public. The applicant argued that this rendered the policy unlawful. The Supreme Court concluded that the policy was lawful, since it did not give a misleading or unlawful direction. It simply informed decision-makers that before making disclosures, they should consider whether to seek representations from the subject. An unreasonableness analysis can also explain the decision in *A*. The content of the policy did not so clearly authorise unlawful conduct such that no reasonable decision-maker would have drafted it. The policy's effect was to grant the police the discretion to decide whether to consult an offender. The grant of such discretion could not be unreasonable *per se*, unless the law unconditionally required the police to consult an offender in all circumstances. But this was not the case. In addition, the policy itself encouraged decision-makers to have regard to an offender's relevant legal rights. This would make it challenging to argue that the policy authorised unlawful conduct. Accordingly, the policy on its face would not have been unlawful even under an unreasonableness test.

As such, the proper test for policies authorising unlawful conduct should be based on unreasonableness. This test better promotes the interest of non-arbitrariness than the *A* approach, and sits more easily with the judicial function than the *UNISON* approach. It is also capable of explaining the outcomes in both cases.

6.3 Conclusion

[106] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

In this chapter, I have demonstrated that the interpretive theory in this thesis can explain the law on policy interpretation and policies authorising unlawful conduct. I have also shown that it can provide meaningful insights on the various open questions remaining in these doctrines. Indeed, the principles of non-arbitrariness can shed light on issues such as what the proper approach should be to review of policy interpretation and policies authorising unlawful conduct.

This concludes my discussion of the established doctrines in the law on policies. In the next chapter, I will turn to the less-established doctrines and unestablished areas in the law. Where these parts of the law are concerned, there is much less existing law for the interpretive theory to explain. But the theory can provide interesting insights on how the law should develop.

Chapter 7 Charting new ground

In the previous two chapters, I discussed the four established doctrines in the law on policies: the duty to comply, the non-fettering rule, the rules on review of policy interpretation, and the rule against policies authorising unlawful conduct. I demonstrated how non-arbitrariness can explain the law and shed light on open questions.

In this chapter, I will turn to discuss the less-established doctrines and unestablished areas in the law on policies. As I described in Chapter 2, the degree to which a doctrine is established is a function of two factors: type of precedential support and certainty of support from the cases. The former concerns the court level of supporting authorities and whether this support is part of the *ratio* of the relevant cases or stated merely in *obiter*. The latter is about whether the cases form a clear and consistent line of authority for the content of the doctrine. Accordingly, less-established doctrines have the support of more limited authority than the established ones, typically in the form of *obiter dicta* of appellate courts or from the lower courts. Also, a body of case law has not yet sufficiently developed to confirm their existence and clarify their content. This means that less-established doctrines give rise to fundamental questions about whether they do and should exist, in contrast to established doctrines. Unestablished areas of law have even less support in case law. In these areas, there is no legal doctrine at all or substantial uncertainty about the doctrines that exist.

These doctrines and areas of law present an opportunity for the interpretive theory proposed in this thesis. I argue that non-arbitrariness can provide useful insights on how these parts of the law on policies should be developed. In this chapter, I will explore

whether less-established doctrines such as the duties to adopt policies, publish policies, or consult in the making of policies should be accepted in law. I will also study how open questions in these doctrines can be addressed. I will then consider how the unestablished areas of law— the law on public guidance and responses to unlawful policies—should be developed.

Since the parts of the law on policies being discussed in this chapter are much less well-established than those in the previous two chapters, this chapter will necessarily be different from them. The conclusions here will be more tentative and speculative. This is unavoidable. Nevertheless, non-arbitrariness does guide how the law should develop in a way that will bring coherence to the law on policies.

7.1 Duty to adopt a policy

I will begin with the duty to adopt a policy. To recall, there is no general common law duty to adopt a policy. The courts have imposed such a duty only in exceptional circumstances. For instance, courts have suggested that in certain situations involving the exercise of complex statutory duties, it may be unreasonable for a public body not to adopt a policy.[1] Also, in *R (Purdy) v Director of Public Prosecutions*, the House of Lords held that the Director of Public Prosecutions had to adopt a policy to govern his decisions to prosecute in cases of assisted suicide in order for these decisions to meet the required clarity to be lawful under Article 8 of the ECHR.[2]

[1] *R v North West Lancashire Health Authority, ex p A* [2000] 1 WLR 977, CA, 991 per Auld LJ.

[2] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

It is useful to begin by asking whether adopting a policy can facilitate non-arbitrariness. The answer is yes. It can contribute to exercise non-arbitrariness. Consider an immigration authority which has to decide thousands of visa applications a year and which has a broad statutory discretion to do so. In these circumstances, the adoption of a policy to guide caseworkers can surely help them to pay attention to the right considerations across a large volume of applications. Indeed, the lack of a policy in circumstances involving large volumes of decisions without a clear guide on how discretion should be exercised leads to a risk of arbitrary decision-making. Adopting a policy also can contribute to power non-arbitrariness. *Purdy* provides a useful illustration. In *Purdy*, the House of Lords' concern with the Crown Prosecutors' lack of a policy can be understood as ultimately about the arbitrary power that they would wield as a consequence. The Code of Crown Prosecutors was so vague that in situations where a person aided a suicide, prosecutors would have an overly-wide discretionary power in deciding whether to prosecute. This was a concern about the nature of the power that Crown Prosecutors would have. Having a policy by which the Crown Prosecutors could be held accountable for decisions would reduce their arbitrary power.

This means that the adoption of a policy can contribute to both power and exercise non-arbitrariness. This suggests that there should be some form of legal duty to adopt. If so, the next question that arises is the scope of such a duty. In other words, when should the duty apply?

One possibility is for the courts to impose a general legal duty to adopt a policy. But there are two grounds on which one might disagree with this approach. The first is to say that a legal duty to adopt a policy contributes little to non-arbitrariness if caseworkers

do not actually follow it when making decisions. Neither will such a duty contribute to non-arbitrariness if following the policy would result in decision-makers acting unlawfully. In other words, a legal duty to adopt a policy appears insufficient to achieve non-arbitrariness.

This ground of disagreement can be addressed easily. One can readily agree that a legal duty to adopt a policy by itself is insufficient to achieve non-arbitrariness. But given that the law already provides for a duty to comply with policies and also for policies authorising unlawful conduct to be unlawful, this addresses the concerns in the previous paragraph.

Another ground of disagreement, however, presents a more serious objection to a general legal duty to adopt a policy. There are circumstances which might cause one to question whether a general legal duty to adopt a policy is the best way to promote non-arbitrariness. For example, where a public body has been conferred a very specific grant of power under a statute, the adoption of a policy may contribute little to non-arbitrariness. Suppose that a statute allows a public body to provide financial assistance to students as long as their family's total household income falls below a certain fixed quantum. The statute's requirements are already so clear that it would be easy for the public body to be consistent in how it awards financial assistance. The public body would also easily be held accountable for its decisions even in the absence of any policy. Requiring a public body to adopt a policy in this situation would place an additional administrative burden on it without a meaningful pay-off.

This means that a general legal duty to adopt a policy may not always be an appropriate means of promoting non-arbitrariness. This should not mean, however, that there should never be a legal duty to adopt a policy. Rather, drawing the points in this discussion together, this suggests that to best promote non-arbitrariness, a legal duty to adopt a policy should only apply in certain specific circumstances. The adoption of a policy contributes most to non-arbitrariness where a public body has a very broad and uncontrolled discretionary power that can be usefully guided by a policy. In such circumstances, the adoption of a policy can help constrain decision-making and facilitate consistency, especially where large volumes of decisions have to be made.

If these are the circumstances which should give rise to a legal duty to adopt a policy, then the next question that arises is the doctrinal basis for this duty. One option is to base the duty on the House of Lords' decision in *Purdy*. This would mean that the duty arises only where there is a breach of Article 8 of the ECHR. The problem with this doctrinal basis for the duty, however, is that it would have a very narrow scope. It would only arise in contexts where there are breaches of human rights. But it is clear that non-arbitrariness can obtain apart from a breach of the ECHR.

Another possible doctrinal approach is *Wednesbury* unreasonableness. On this approach, a public body would have a duty to adopt a policy if it is unreasonable not to do so. Such circumstances may arise where the lack of a policy leads to a public body having a very wide scope of arbitrary discretion, such as in *Purdy*. This approach would result in the duty having a broader scope than if it were based on the decision in *Purdy*. It is therefore preferable to the previous option and is a plausible approach to take. Yet, unreasonableness does not directly express the value of non-arbitrariness underlying the duty to adopt. While

unreasonableness is a workable option, if there is a legal doctrine which can give effect to the value of non-arbitrariness even more directly, it would be preferable.

I argue that what the courts have called the duty of prescription is the preferred doctrinal basis for the duty to adopt. To recall, the duty of prescription has thus far been applied by the lower courts in two important decisions: *R (Northumbrian Water Ltd) v Water Services Regulation Authority* and *R (ZLL) v Secretary of State for Housing, Communities and Local Government*.[3] In these cases, the courts referred to the Supreme Court decision in *Lumba v Secretary of State for the Home Department*, which had held that persons should be able to make informed representations about decisions made against them, and that it was therefore important for persons to know the basis of these decisions.[4] The courts developed this idea into a duty on public bodies at common law to provide prescriptive policy guidance in certain contexts.[5] The duty would apply 'where there are broad discretionary powers needing a statement of criteria, in order to secure appropriate consistency, to protect against arbitrariness, to allow informed representations and to facilitate informed challenge'.[6] If the duty applied, it would require a public body to provide prescriptive policy guidance. It should be noted that it is unclear from these cases whether the duty is an absolute or defeasible one, but I would suggest that the duty ought to be defeasible—even if a public body does have a broad discretionary power, it is conceivable that there can be circumstances where the situations under which a policy

[3] *R (Northumbrian Water Ltd) v Water Services Regulation Authority* [2023] EWHC 2410; *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin).

[4] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [34]-[38].

[5] *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin).

[6] *R (Northumbrian Water Ltd) v Water Services Regulation Authority* [2023] EWHC 2410 [96].

would be used are so varied that it would be difficult to articulate a policy governing the exercise of discretion. Accordingly, even if the duty arises, a public body ought to be able to meet the duty's requirements by offering a reasonable justification for not adopting a policy.

The duty of prescription, as described in these cases, is closely aligned with non-arbitrariness. Indeed, the rationales for this duty are synonymous with the concerns of both exercise and power non-arbitrariness—ensuring consistency, preventing arbitrariness, and giving affected persons control over how power is exercised against them. The conditions for the duty to apply ensure that the duty to adopt a policy only arises in circumstances where it facilitates non-arbitrariness. The duty of prescription would therefore not apply to decisions made under very specific statutory provisions, since this would not be a situation where there are 'broad discretionary powers needing a statement of criteria'. But it would apply where a public body has a wide and unspecified discretion. Adopting a policy would be particularly important to avoid arbitrariness in such a situation, especially where a public body has to make a large volume of decisions.

Stated thus, the duty of prescription is a better doctrinal basis for the duty to adopt than *Purdy* or unreasonableness. It would address the problem of *Purdy* providing for an overly-narrow scope for the duty, since the duty of prescription is not limited to the human rights context. It would also be superior to unreasonableness by giving direct effect to the value of non-arbitrariness. The conditions for the duty to apply match precisely with the concern that non-arbitrariness raises about the lack of a policy—the existence of broad and uncontrolled discretionary power. The structure of the duty of prescription, as I have proposed, also facilitates non-arbitrariness more robustly than unreasonableness, since it

would place a burden on public bodies to provide a justification for their failure to adopt a policy once the duty arises. In contrast, unreasonableness would place the burden on an affected person to prove that a public body had acted unreasonably in not adopting a policy.

Accordingly, the duty of prescription serves as a fitting candidate for the doctrinal basis of a legal duty to adopt a policy. While the duty of prescription has thus far only been applied by the lower courts, it is aligned with Supreme Court authority. Indeed, it is consistent with the Supreme Court's suggestion in *Nzolameso v Westminster City Council* that a public body's obligation to ensure that decisions are 'properly evidenced and properly explained' required it to have a policy governing how temporary accommodation is procured and allocated to persons.[7]

Grounding the duty to adopt a policy in the duty of prescription would mean that adopting a policy is closely related to the requirement of procedural fairness. Requiring a public body to adopt a policy allows affected persons to make informed representations in relation to decisions made against them. This is consistent with Weeks' argument that the duty to adopt a policy should rest in procedural fairness, since affected persons have a right to know the basis on which decisions have been made about them.[8]

In summary, non-arbitrariness suggests that the duty of prescription should serve as the doctrinal basis for a duty to adopt a policy. This means that it would arise only where there are broad discretionary powers needing a statement of criteria, in order to secure

[7] *Nzolameso v Westminster City Council* [2015] UKSC 22 [38]-[42]; Aileen McHarg, 'Administrative Discretion, Administrative Rule-making, and Judicial Review' (2017) 70(1) CLP 267, 290.

[8] Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016) ch 5.

consistency and protect against arbitrariness. In these circumstances, a public body would have a duty to adopt a policy.

7.2 Duty to publish a policy

I move now to consider a possible legal duty to publish policies. To recall, similar to the position on the duty to adopt, there is no general common law duty to publish policies. However, the courts have suggested that a public body has a duty to publish its policy under certain specific circumstances. For instance, the Supreme Court in *Lumba* suggested that public bodies might have a duty to publish their policies if doing so is necessary in order for persons to be able to make informed representations to a decision-maker—in other words, if doing so would be necessary for a person to receive a fair hearing.[9]

It is useful to begin a discussion of the duty to publish by observing that there is a close link between it and the duty to adopt. Building on the discussion in the previous section, if the conditions are met for the duty of prescription to arise, a public body should be required to both adopt and publish its policy. If the duty of prescription is about ensuring that persons are able to make informed challenges to exercises of power, then this certainly requires policies to be both adopted and published. This fits well with how the Supreme Court in *Lumba* rationalised the duty to publish a policy. In *Lumba*, the reason that the court gave for the requirement to publish a policy was that affected persons should know what the existing policies are in order to be able to make representations in relation to it.[10]

[9] *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 [34]-[38].

[10] *Ibid*.

This essentially is what the duty of prescription is about. Accordingly, a duty to publish fits naturally with the duty of prescription.

This means that the duty of prescription should include a duty to adopt and publish a policy. A question that arises, however, is whether a duty to publish could be imposed in situations where a duty of prescription does not arise. Consider a government minister who has exercised a power to declare war. This is a broad discretionary power. But such a decision is unlikely to give rise to any right to informed representation. If the duty of prescription is closely linked to the requirement of procedural fairness, then it is unlikely that it would arise here. Yet the minister may voluntarily adopt a policy on when to declare war even if he is under no legal duty to do so. If he applies this policy to make a decision, does he have to publish it?

A useful way of answering this question is to consider whether there is another possible basis for a duty to publish a policy, aside from the right to informed representation. I suggest that there is. Non-arbitrariness is concerned about more than just the right to informed representation. Suppose that a public body adopts a policy voluntarily but is not obliged to publish it. The courts would subject it to a duty to comply with the policy even if it was unknown to the applicant.[11] As I argued in Chapter 5, such a duty can be explained by non-arbitrariness: public bodies would have arbitrary power if they had policies but were not required to comply with them. If so, requiring public bodies to publish their policies would facilitate the enforcement of the duty to comply and better promote non-arbitrariness: it would enable applicants to actually bring applications to enforce the duty.

[11] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 [29]; see also *R (Nadarajah and Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

A duty to publish a policy can therefore be explained by non-arbitrariness through its ability to facilitate the duty to comply.

This suggests that the duty to publish should move beyond being based on procedural fairness. At present, the law draws a close connection between both. As I mentioned earlier, the Supreme Court's understanding in *Lumba* of a duty to publish is very much rooted in the idea of procedural fairness. Yet, if it is correct that the duty to publish promotes non-arbitrariness by facilitating the duty to comply and reducing the scope of arbitrary power, then the duty should have an independent foundation beyond the right to make informed representations. This means therefore that while the duty of prescription should include a duty to adopt and publish a policy, a duty to publish should be an independent legal rule. If a public body has adopted a policy, whether or not it was under a duty to do so, it should come under a duty to publish it.

7.3 Duty to consult

I have thus far argued that there is good reason to accept a legal duty to adopt and publish policies. Should the law also include a legal duty to consult in the making of policies?

To answer this question, it is important to first observe that there is a general body of law on consultation. To recall, the common law does not recognise a general duty to consult. The Court of Appeal in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* expressed concern about the burden that such a duty would place upon public bodies and observed that Parliament was better-placed to articulate the details about the

content of the duty in each specific context.[12] But a duty to consult can arise in specific situations. For example, if a person has a legitimate expectation of being consulted, such expectations can be legally binding on public bodies. These legitimate expectations can arise through an express promise or an established practice of a public body.[13] In addition, a duty to consult can arise if a failure to do so would lead to 'conspicuous unfairness'—for example, where vulnerable persons would have been very adversely affected by a decision and were nevertheless not consulted before it was made.[14] If a public body consults pursuant to a duty to consult, or is under no such duty but consults anyway, the law will require the consultation to be legally adequate.[15]

Consultation can contribute to non-arbitrariness. It would give persons affected by public power a measure of control over the content of policies, thereby furthering power non-arbitrariness. Consulting the relevant stakeholders could also help to facilitate exercise non-arbitrariness by raising relevant considerations to public bodies, making it less likely that exercises of power will be indifferent to the proper reasons for the exercise of power.

Although there are good reasons for consultation, I argue that the common law's reluctance to impose a general duty to consult on public bodies is justifiable. Even if

[12] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; see also *R (Liberty) v SSHD* [2025] EWCA Civ 571 [65]; *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947.

[13] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 [39] and [43]; *R (Moseley) v Haringey LBC* [2014] UKSC 56.

[14] *R (Liberty) v SSHD* [2025] EWCA Civ 571 [64]-[65]; *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577; [2021] PTSR 696 [85].

[15] *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947: 'First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'.

consultation may promote non-arbitrariness, there are sound practical reasons for not adopting a general legal rule that public bodies have to consult in making decisions. In *BAPIO Action Ltd*, the Court of Appeal held that the introduction of such a duty would result in 'a host of litigable issues'—for example, when consultation should arise, who is entitled to be consulted, whether there are interests that ought not to be consulted, *inter alia*.[16] This would lead to 'defensive forms of public administration'.[17] In other words, even though consultation does result in some benefits, imposing a general legal duty to consult on decision-makers would bring unacceptable costs that would overall be to the detriment of good public administration. This led the court in *BAPIO Action Ltd* to hold that Parliament would be better-placed to address such costs and decide if the duty to consult is nevertheless worth the price.[18]

Returning to the context of policies, the issue then is whether this context provides any special reason for the law to depart from the general law on consultation, such that the courts should impose a general duty to consult in the making of policies. One might argue that there is. For example, there may be unique benefits to consultation in the context of policies that would justify a different approach for the policy context. Policies are general rules that apply to an indeterminate class of situations and persons.[19] There are therefore higher stakes involved where policy-making is concerned. It is even more important for public bodies to take into account all relevant considerations and hear the viewpoints of stakeholders. After all, a bad policy could result in many bad decisions down the road. This

[16] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 [44].

[17] *Ibid*.

[18] *Ibid* [45].

[19] John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) ch 8.

suggests then that the benefits to consultation in the policy context are greater, thereby countering the costs of imposing a duty to consult and making a stronger case for a general duty to consult in this context.

In response, however, I argue that this does not provide a sufficient reason for the law on policies to depart from the general law on consultation. As a starting point, the concerns raised in *BAPIO Action Ltd* about adopting a general legal duty to consult would apply equally to the context of policies. The same problems would result if public bodies were under a general legal duty to consult in the making of any policy. Now, even if one grants that there is a greater benefit to consultation in the policy context, it is still uncertain that the benefits of consultation will outweigh the costs of imposing such a duty. The benefits may outweigh the costs, or they may not. It is difficult to ascertain whether the benefits will be greater than the costs in this context because the costs remain significant. Consider a possible doctrinal means by which the courts could impose a general duty to consult: a public body has a duty to consult in the adoption of policies unless it can reasonably justify non-consultation. A general duty framed in such terms would mean that public bodies would have to justify decisions not to consult, placing an additional litigation burden on them. There would be a clear risk of 'defensive public administration', as the Court of Appeal in *BAPIO Action Ltd* warned.[20] If it is uncertain that the benefits of consultation will outweigh the costs of a general legal duty to consult, then it would be more appropriate for a decision to impose the duty to be made by Parliament rather than the courts. Parliament is better-placed to weigh up such costs and benefits. Indeed, it is instructive to note that the mandatory notice-and-comment requirement for rule-making in

[20] *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 [44].

US administrative law, which is analogous to a general duty to consult, was instituted by Congress through the Administrative Procedure Act 1946, rather than the courts.[21]

Taking another tack, one might argue that one possible way ahead for the courts would be to impose a general duty to consult, but to leave the actual specification of the requirements of consultation to public bodies, subject only to reasonableness review. An analogy could be made to the *Tameside* duty of inquiry. This duty requires a public body to take reasonable steps to be acquainted with the relevant information to enable it to answer the right question.[22] A public body has a duty to inquire, but the 'manner and intensity of inquiry' are up to it to decide, subject only to reasonableness review.[23] One might argue that this would be a sensible way to introduce a duty to consult: courts would not have to specify the minutiae of the duty's content and room for discretion would be accorded to decision-makers, subject to reasonableness review. In response, this would be a workable solution if the concern underlying the courts' refusal to impose a general duty is a relative lack of expertise compared to public bodies. But if the concern is about opening up 'a host of litigable issues' and placing a heavy burden on public bodies, taking this approach would give rise precisely to this concern. Public bodies would become susceptible to frequent challenges to the reasonableness of their consultations.

As such, even if a duty to consult may contribute to non-arbitrariness, it is less clear that the courts are best-placed to impose a general duty to consult on public bodies. But

[21] Section 553, Administrative Procedure Act 1946 (US).

[22] *Secretary of State for Education and Science Appellant v Tameside Metropolitan Borough Council Respondents* [1977] AC 1014; [1976] 3 WLR 641.

[23] *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin).

this does not mean that the courts have no role to play. The courts can contribute to non-arbitrariness by introducing a more limited duty to consult in situations where doing so would contribute to consistency in exercises of power. As I mentioned earlier, the courts have imposed a duty to consult in situations where there is a legitimate expectation of being consulted, arising from an express promise or an established practice. Requiring public bodies to justify departures from their promises or established practices promotes consistency, thereby furthering exercise non-arbitrariness. A court-imposed duty to consult, framed in this manner, is much more limited and less likely to place an overly-heavy burden on public bodies. Similarly, allowing the courts to impose a duty to consult where a failure to consult would result in conspicuous unfairness is justifiable on the basis that it is limited to extreme situations where the lack of a consultation would result in an arbitrary decision amounting to an abuse of power.

The upshot of this discussion is that the law on the duty to consult in the context of policies should not depart from the general law of consultation. The proposal here runs counter to McHarg's suggestion that a general duty to consult should be adopted. She argued that the nature of rule-making can justify a general duty to consult.[24] In her view, a duty to consult would arguably allow rule-making to better fulfil its function of improving the quality of decisions. This meant that 'a duty to consult should not be dismissed out of hand.'[25] McHarg's argument can be characterised as being ultimately about the quality of decision-making. But even if we accept that a duty to consult will lead to such an outcome, it is less clear that this argument succeeds as a justification for a general duty to consult. As I have argued in this section, a general legal duty to consult imposes a heavy burden on

[24] McHarg (n 7).

[25] *Ibid*.

public administration that might be detrimental to its effectiveness. And Parliament would be better-placed than the courts to make such a consequential decision.

7.4 The law on public guidance

Thus far, I have discussed the less-established doctrines in the law on policies: the duties to adopt and publish policies, and to consult in the making of policies. In the rest of this chapter, I turn to unestablished areas in the law. The first is the law on public guidance.

To recall, there is authority in English law for the claim that public guidance can be reviewed. For example, the court in *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* held that a leaflet explaining poll tax obligations could be reviewed if it misstated the law, or if it contained guidance or advice that was manifestly inaccurate or misleading.[26] The leaflet was an informative document intended to explain the law to the public. It did not guide any decisions of public bodies. In other words, the leaflet was a clear example of public guidance. Accordingly, this case illustrates that public guidance is reviewable.

But aside from the claim that public guidance is reviewable, there is very little else that can be said about the law on public guidance. The law in this area is sparse, presumably because public guidance does not guide decision-making and therefore gives rise to fewer opportunities for a judicial review challenge. The rules on standing for judicial review serve to restrict challenges to public guidance as well. Accordingly, the law on public guidance

[26] *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

remains an undeveloped area of the law on policies. It is not clear what doctrines exist in this area at all.

I turn now to consider how non-arbitrariness can shed light on this area. The most fundamental question that public guidance raises is whether it should be reviewable at all. If public guidance is not law and does not shape the decisions of public bodies, it is not immediately clear why it should be subject to judicial review. It is worth noting that, as I mentioned in Chapter 2, courts in other common law jurisdictions have taken the position that public guidance is not reviewable. The Singapore High Court decision in *Han Hui Hui v Attorney-General* is one example.[27]

It is useful to consider what non-arbitrariness would suggest about the reviewability of public guidance. Both exercise and power non-arbitrariness weigh in favour of the courts reviewing public guidance. Starting with the former, an initial question to address is whether exercise non-arbitrariness is relevant at all, since public guidance is not legal in nature and does not shape the exercise of power by public bodies. The answer is yes. Exercise non-arbitrariness is concerned about any exercise of power of public bodies. There is no requirement that the power has to be legal in nature, or that the power must result in legal consequences. And the publication of public guidance is surely itself an important exercise of power. When public bodies issue them, affected persons will take them seriously and adjust their plans accordingly. Indeed, public guidance is an important means by which public bodies regulate the behaviour of the public. The guidance on social distancing during the Covid-19 pandemic is an obvious example.

[27] *Han Hui Hui v Attorney-General* [2022] SGHC 141.

This means that exercise non-arbitrariness is relevant to public guidance. So does a public body's issuance of public guidance raise concerns of arbitrary exercises of power? The answer again is yes. Non-arbitrariness would require the law to encourage public bodies to issue public guidance while being attentive to the proper reasons for the use of power. If public guidance that is inconsistent with the law or that is unreasonable can be held to be unlawful, this encourages public bodies to be attentive to these reasons. Power non-arbitrariness points in the same direction. Once it is accepted that the publication of public guidance is a kind of power that public bodies have to regulate the lives of people, then it is in the interest of power non-arbitrariness for this power not to be deliberatively isolated. Accordingly, power non-arbitrariness would suggest that allowing public guidance to be subject to judicial review would reduce the deliberative isolation of public bodies by requiring public bodies to account for the content of their public guidance. This reduces their arbitrary power.

Accordingly, non-arbitrariness suggests that the English courts have moved in the right direction by allowing public guidance to be subject to judicial review. In contrast, the Singapore High Court in *Han Hui Hui v Attorney-General* ought not to have dismissed the challenge to the guidance on the ground that the guidance did not have legal effect and therefore was not susceptible to judicial review.[28] The guidance in this case advised employers on how they should deal with unvaccinated employees who could not be physically present at the workplace under the prevailing Covid-19 restrictions. It is a clear example of how the adoption of public guidance is an exercise of power that can have real

[28] *Ibid* [58]-[59].

and concrete effects on affected persons. Yet, with the Singapore High Court having decided that public guidance is not reviewable, it has set a precedent which increases the arbitrary power of public bodies. An alternative and preferable way of deciding the case would have been to accept that the guidance was reviewable, but to hold that it was ultimately lawful because it was not irrational.

If public guidance should be reviewable, the next question that arises is what grounds of review should be available in relation to it. I will suggest here several possible grounds of review which cohere with the principles of non-arbitrariness. The first is when public guidance purports to give the public advice on the prevailing legal position. In such circumstances, it will be unlawful if it misstates the law. The decision in *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* lends support to this rule. In that case, the court held that public guidance could be reviewed if it misstated the law.[29] The justification for this ground of review is straightforward—if the law provides proper reasons for the use of power, then this ground encourages public bodies to be not indifferent to these reasons when issuing public guidance.

The same justification applies to the second possible ground of review: if public guidance guides members of the public towards performing unlawful acts, it should also be unlawful. As I discussed in the previous chapter, there is already an established body of law on policies which authorise unlawful conduct. For example, in *R (A) v Secretary of State for the Home Department*, the court held that it had to compare 'normative statements

[29] *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530.

in the law and in the policy, as objectively construed', and consider if the policy guided decision-makers towards unlawful conduct.[30]

In the context of public guidance, the unlawful conduct in question would not be that of public bodies but rather of private persons. Nevertheless, the same principle that I argued for in Chapter 6 ought to apply equally to public guidance: it is unlawful if it so clearly authorises unlawful conduct that no reasonable decision-maker would have drafted the policy. The recent Court of Appeal decision in *R (British Medical Association) v General Medical Council* provides support for this claim.[31] The court held that the rule on policies authorising unlawful conduct applied to a policy which provided guidance to both medical professionals and the public in general.[32] This suggests that the rule is capable of extending to public guidance.

Such a rule would capture situations which are not captured by the first suggested ground on misstatement of the law. Suppose that a health authority publishes guidance stating that large social gatherings do not pose any health risks despite an ongoing pandemic. Yet, a legal rule prevents persons from gathering in groups of more than four. The guidance has not purported to state the legal position and cannot be said to be a misstatement of the law. But it will lead people to gather in groups, which would be at odds with the law. This guidance would be captured by the rule on guiding members of the public towards unlawful conduct.

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[30] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 [41].

[31] *R (British Medical Association) v General Medical Council* [2025] EWHC 960 (Admin).

[32] *Ibid* [102]-[107].

A third possible ground of review is unreasonableness. This concerns unreasonableness in both the process and substance of guidance and flows easily from the principles of non-arbitrariness. For example, public guidance suggesting that persons with red hair should be subject to enhanced social distancing measures in a pandemic was likely to have been published with an indifference to the proper reasons for the exercise of power. The same can be said about guidance published without regard to relevant considerations and the proper purposes for the use of power. While the connection between unreasonableness and rules such as the relevancy and proper purposes rule remains a contested area of law, discussing this contention is beyond the focus of this chapter.[33] It suffices for present purposes to state that such rules should be applicable to review of public guidance. If the law is concerned about discouraging arbitrary exercises of power, reviewing the content of public guidance on such grounds is justifiable.

7.5 Responses to unlawful policies

The final area to discuss in this chapter is the law on responses to unlawful policies. This is another unestablished area of law where there is no legal doctrine at all or substantial uncertainty about the doctrines that exist.

There are several basic questions that remain unanswered in this area. The first is a question that Bell has raised: if a policy provision is found to be unlawful, are decisions made under that provision also automatically unlawful?[34] The idea of exercise non-

[33] See, for example, Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 CLP 131; Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84(2) MLR 265.

[34] Joanna Bell, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] PL 200, 218-219.

arbitrariness provides a useful insight to this issue. The starting point is to recall that exercise non-arbitrariness is not about the correctness of decisions, as I argued in Chapter 4. Rather, it is concerned about indifference to the proper reasons for the use of power. What matters is a decision-maker's state of mind, instead of whether the decision objectively meets a certain standard of justification. For example, suppose that a decision-maker is concerned about acting for the proper reasons, but makes a mistake in understanding these reasons and ends up arriving at a wrong decision. In this situation, he may have acted wrongly. But he has not acted arbitrarily in doing so.

Applying non-arbitrariness to the question at hand, the issue is whether a public body has exercised power arbitrarily if it makes a decision by reference to an unlawful policy. I think the answer is no. The public body may have made an incorrect decision in doing so. But it has not necessarily acted arbitrarily, if it believed the policy to be lawful and took it into account.

Accordingly, decisions made under policies which are unlawful ought not to also become automatically unlawful. This makes sense from the perspective of the nature of policies as well. Policies are not legal rules. Even when a public body makes a decision by applying a policy, the source of legal power for the decision does not come from the policy. This means that the unlawfulness of a policy should not immediately call into question the lawfulness of decisions made under a policy, unlike a situation where a decision was made under an unlawful statute.

The question then is when the unlawfulness of a policy should affect the lawfulness of a decision made under it. One straightforward possibility is when the reason for a

policy's unlawfulness applies equally to a decision under the policy. For example, suppose that a policy is unlawful because it requires hospital authorities to obtain parental consent before certain medical procedures are performed. The law in fact does not require parental consent as a condition. If a hospital authority applies the policy to refuse to perform a procedure because there was no parental consent, this decision would be unlawful for the same reason that the policy is unlawful.

Another possibility is if a public body is aware that the policy is unlawful and has made a decision under it anyway. There is a good argument that such a decision should be unlawful. Non-arbitrariness would require the law to discourage such behaviour—if a public body knows that the policy is unlawful and acts in line with it anyway, it has exercised its power with an indifference to the proper reasons for the use of power, i.e. the law. Such a decision would also attract the application of grounds of review such as unreasonableness, bad faith, or a failure to take into account relevant considerations.

This position strikes a balance between consistency and certainty in public administration and the interest in acting in accordance with the law. Persons affected by a public body's decision would not automatically have the rug pulled out from under them due to a subsequent judicial decision on a policy's unlawfulness. At the same time, public bodies would be encouraged to be attentive to the lawfulness of policies which they apply.

What if a public body decides to depart from an unlawful policy? If a public body does not necessarily act arbitrarily when applying an unlawful policy, one might think that this suggests that a public body can act arbitrarily by departing from an unlawful policy. This might strike one as odd on its face. But the reasoning is not as odd as it may initially

appear. The issue that this raises is closely related to the duty to comply. When does a public body act arbitrarily in failing to comply with its policy? As I argued in Chapter 5, it depends on the public body's reasons for departing. If a public body's reason for departing from its policy is precisely that it is unlawful, this would suffice as a good reason to justify departure and there is no arbitrary exercise of power. However, if the public body's reason for departing is simply that it did not care about the existence of its policy, it would have acted arbitrarily even though its policy was unlawful. Such exercises of power ought to be unlawful. Indeed, grounds of review that could be applicable in such a situation would be unreasonableness or the relevancy rule.

I turn then to consider another question in this area of law which Bell also raises: what should be the legal status of policy provisions identical to one that has been held to be unlawful, but which have not yet been challenged? This is a practically relevant issue since public bodies may replicate policy provisions. Yet, the courts have not yet addressed this issue.

From the perspective of non-arbitrariness, I suggest that the unlawfulness of a policy provision should not necessarily translate into the automatic unlawfulness of all other identical policy provisions. What matters is the reason for the policy's unlawfulness. The reason for one policy's unlawfulness may not necessarily apply to other identical policy provisions. Suppose that all local planning authorities in a region adopt the same policy requiring developers to make a 30% affordable housing contribution on all new residential developments. One authority is challenged, with the court eventually finding that its policy is unlawful. What then is the legal status of the identical policies of the other authorities? Suppose the policy is found to be *Wednesbury* unreasonable because in that

authority's area, land values are so low that the requirement makes development economically unviable, defeating the policy's own purpose. This reason for the policy's unlawfulness is specific to that authority's circumstances. Another authority in a high-value area may face no such problem. The same policy may operate reasonably in its hands. The reason for unlawfulness in the first case does not carry over automatically. As such, a court facing a challenge to another authority's policy must ask whether that reason actually applies to the authority before it. Non-arbitrariness is sensitive to the particular circumstances of each decision-maker. Identical provisions can be lawful for one authority and unlawful for another. Accordingly, the unlawfulness of a policy provision should not automatically render all identical policy provisions unlawful as well. What matters is the reason for the policy's unlawfulness.

The final question to briefly consider in this chapter concerns the remedies that ought to be possible for unlawful policies. Specifically, should quashing orders or declarations of unlawfulness be the appropriate remedy for unlawful policies? As I mentioned in Chapter 2, the courts have not been consistent about the remedy for unlawful policies.

This is an issue on which non-arbitrariness may not have much to say. As long as there is a remedy for unlawful policies, non-arbitrariness may have little to say about the specific remedy that ought to be granted. Accordingly, I will limit myself to a brief comment. As a matter of principle, a quashing order appears to be an odd remedy for an unlawful policy. If a quashing order is about negating legal effect, a policy does not have any direct legal effect. As I argued in Chapter 3, a policy's legal effect is at most indirect in nature. It does not directly affect any legal rights or obligations on its own. Accordingly,

there is no direct legal effect for a quashing order to negate. An analogy can be made to a promise by a public body. A promise can be given legal effect through the legitimate expectations doctrine, such that a public body may act unlawfully if it departs from the promise. But on its own, the promise does not have direct legal effect. It would make sense to quash a decision to depart from a promise. But it would be odd to quash the promise itself. The same logic appears to apply to policies as well.

If this is correct, this means that quashing orders ought not to be the preferred remedy for unlawful policies. This does not mean that nothing can be done about an unlawful policy. The law of judicial review provides other remedies which have the same effect, such as a declaration of unlawfulness, a prohibiting order against the application of the policy, or perhaps a mandatory order requiring a change of policy. These remedies are a more appropriate way of addressing an unlawful policy, as compared to a quashing order.

7.6 Conclusion

In this chapter, I have applied non-arbitrariness to the less-established doctrines and unestablished areas of the law on policies. Non-arbitrariness helps to answer fundamental questions about the less-established doctrines, such as whether they should exist and how they should be developed. It also helps to suggest what doctrines should exist in the unestablished areas of the law. While non-arbitrariness may not answer all the questions in these areas of law, it does provide meaningful guidance on how the law should be developed.

Chapter 8 Conclusion

This thesis began with the objective of offering a systematic and comprehensive explanation of the law on policies which would also be able to address the open questions in the law. It is time to take stock of the ground that has been covered thus far.

I began in Chapter 2 by describing the legal rules on policies. I identified four established doctrines which have been widely accepted by judges and lawyers: the duty to comply, the non-fettering rule, the rules on interpretation of policies, and the rule against policies authorising unlawful conduct. I went on to identify the open questions that remain in these doctrines. For example, while the duty to comply is clearly a well-established doctrine, there remain open questions about the circumstances in which the duty applies and about its standard of review. I then moved on to identify three less-established doctrines in the law: the duty to adopt a policy, the duty to publish, and the duty to consult in the making of a policy. While there is some limited support for these doctrines, there remain many open questions about their existence and content. Finally, I discussed unestablished areas in the law: the law on public guidance and on responses to unlawful policies. I demonstrated that there is little to no legal doctrine in these areas and substantial uncertainty about the doctrines that exist.

As such, Chapter 2 identified the distinctive legal rules on policies. But this raised a question: what is distinctive about policies as compared to other types of government action, such that they would merit distinctive legal treatment? Chapter 3 sought to answer this question. Here, I studied how the law understands what policies are. I argued that policies are non-legal practice-independent general guides to conduct created by public

bodies. This explains why policies are a distinct legal concept, which in turn explains why the law on policies is a distinct legal category that deserves to be studied. I also argued that while all policies necessarily share certain common features, several types of policies can be identified and categorised: self-directing policies, coordinating policies, and public guidance. I pointed out that the law treats different types of policies differently, and that this raises additional open questions in the law on policies. This provided a more comprehensive understanding of the law.

Having established a deeper understanding of the law on policies, the rest of the thesis argued that non-arbitrariness provides the best explanation for it. I began in Chapter 4 by discussing the nature of non-arbitrariness. Drawing from literature in legal philosophy and civic republicanism, I distilled two principles of non-arbitrariness: exercise non-arbitrariness provides that an exercise of power is non-arbitrary if a power-holder is attentive to the proper reasons for the use of power, while power non-arbitrariness provides that a power is non-arbitrary if a power-holder is accountable to persons subject to power who can ensure that exercises of power have reasonable justification. I then argued that non-arbitrariness is a *prima facie* plausible explanation of the law on policies.

The subsequent chapters went on to prove that non-arbitrariness is the best explanation for the law on policies, and that it provides meaningful answers for the open questions in the law. In Chapter 5, I discussed in detail the duty to comply and the non-fettering rule. I argued that non-arbitrariness explains why the law has placed upon public bodies a duty to comply with policies. Doing so allows the courts to hold public bodies to account for their application of policies. This reduces arbitrary power. Similarly, non-arbitrariness explains the non-fettering rule: the rigid application of a policy risks a

decision-maker becoming indifferent to reasons that he should have taken into account, thereby risking exercise arbitrariness. The non-fettering rule discourages this from happening. In addition to explaining the legal rules, I also applied the value to answer open questions in the law. For example, non-arbitrariness suggests that the duty to comply attaches to internal policies only where they affect power exercised over private persons or entities, and that the law should allow an exception to the non-fettering rule if a public body has good reason to adhere strictly to a policy.

In Chapter 6, I turned to discuss the law on the interpretation of policies and the rule against policies authorising unlawful conduct. On interpretation, I argued that non-arbitrariness explains why courts have the authority to review public bodies' interpretations of policies. Such authority reduces the scope of arbitrary power. I went on to discuss what correctness and reasonableness review are in the context of policy interpretations. I argued that contrary to the accepted position in English law, policy interpretations should only be reviewed for reasonableness. As for the rule against policies authorising unlawful conduct, I demonstrated how non-arbitrariness explains it: the presence of such a rule helps to encourage public bodies to be attentive to the requirements of the law in the content of their policies. I argued further that reasonableness should be adopted as the doctrinal basis for this rule.

Finally, in Chapter 7, I discussed the contributions of non-arbitrariness to how the less-established and unestablished areas of the law on policies ought to develop. For instance, I argued that there should be a duty to adopt policies where public bodies possess very broad and uncontrolled discretionary power, since there is a risk of power being exercised arbitrarily in such circumstances. I argued further that what the English courts

have called the duty of prescription should be the doctrinal basis for the duty to adopt, since it directly expresses the value of non-arbitrariness. In addition, I argued in this chapter that non-arbitrariness would favour consultation in the making of policies, but that there are sound practical reasons for not adopting a general legal rule that public bodies have to consult in making policies. Rather, the courts can contribute to non-arbitrariness by introducing a more limited duty to consult—for example, in situations where a legitimate expectation of consultation has arisen.

8.1 The contribution of this thesis

Overall, this thesis has offered a systematic study of the law on judicial review of policies. In so doing, it has made three main claims. The first concerns how the law understands policies. Policies are non-legal practice-independent general guides to conduct created by public bodies. This explains how policies form a distinct legal category attracting different treatment as compared to other types of government action. The second concerns the nature of non-arbitrariness. I argued that non-arbitrariness has two aspects: it is concerned both with how power is exercised and with the nature of the power that public bodies possess. The third concerns how the law on policies should be explained. I argued that non-arbitrariness provides the best explanation for this body of law. It provides a coherent account of the existing doctrines while also supplying principled guidance on how the law should develop.

As such, this thesis fills an important gap in the literature on a practically significant topic. As I observed in Chapter 1, while there is a substantial body of excellent scholarship on the law relating to policies, a comprehensive explanation capable of providing unity

across its disparate doctrines has remained absent. This thesis argues that non-arbitrariness supplies that explanation. It provides both a unified account of the existing law on policies and a principled basis for its continued development. In doing so, it also clarifies the distinctive nature of policies as a category of government action and offers a comprehensive account of the law governing them. The contribution of this thesis therefore lies in offering a new framework for understanding both the existing law on administrative policies and its future development.

Explaining the law on policies through non-arbitrariness also contributes to ensuring that courts do not overstep their boundaries in performing judicial review. Non-arbitrariness explains why legal control over policies is sometimes justified, but it does not follow that courts should review policies intensively in all circumstances. First of all, the institutional competence of courts remains relevant to the doctrinal form that legal control should take. This is why, for example, the thesis has argued for reasonableness rather than correctness review in relation to policy interpretation, and why it has rejected a general duty to consult in the making of all policies. In addition, non-arbitrariness contains a built-in limitation on judicial intervention: as I argued in Chapter 4, arbitrariness is distinct from wrongness. This means that non-arbitrariness would not require courts to inquire into the correctness of public bodies' decisions. Its concern is more precise and limited than that: it requires public bodies to exercise and structure their powers in ways that remain responsive to proper reasons and open to appropriate justification. Non-arbitrariness therefore supports judicial control where such control is necessary, but also helps to identify its limits.

8.2 Alternative explanations

A final question remains. Why should non-arbitrariness be preferred to other values that might equally claim to explain the law on policies? These include consistency, fairness, equality, the rule of law, reasonableness, and good administration. They recur throughout the authorities and have featured in the literature. Nevertheless, this thesis argues that non-arbitrariness is the best explanation. There are five reasons supporting this conclusion: it explains more of the law than its competitors; it explains the law more concretely; it provides deeper insight into what the law is ultimately concerned to achieve; it explains the law more directly; and it generates principled answers to questions that the law has yet to resolve in a manner that presents the law as a unified whole. I will explain each in turn.

First, non-arbitrariness explains more of the law than its competitors. Consistency and equality account well for the duty to comply with policies. It is easy to see how the duty to comply promotes consistency in decision-making and equal treatment between similarly situated persons. But consistency and equality have less to say about the non-fettering rule, which is concerned not with consistency across cases but with the quality of a decision-maker's engagement with the individual before it. Fairness fares better in explaining the non-fettering rule. However, it struggles in turn to explain the law on policy interpretation, where the concern is not primarily with how decision-makers treat affected individuals but with the integrity of a public body's reasoning process. Non-arbitrariness, by contrast, explains each of these doctrines and therefore provides a genuinely unified account of the law on policies.

Second, non-arbitrariness explains the law more concretely. Good administration is too vague to do real explanatory work. To say that the law on policies reflects a concern for good administration is to raise a further question rather than answer one: what, precisely,

does good administration require in this context, and why? Non-arbitrariness provides a more precise answer. It identifies the specific features of power that the law is concerned to regulate—its exercise and its scope—and explains why the doctrines take the shape that they do by reference to those features.

Third, non-arbitrariness provides deeper insights into the law than the alternatives. The rule of law is perhaps the strongest competing candidate. It explains many features of the law on policies, particularly the law's concern with certainty and predictability. But non-arbitrariness can do so at an even deeper level. As Raz observed, the concern with arbitrary power is broader than the rule of law. It is not enough, on the non-arbitrariness account, that power is exercised within legal limits, through proper procedures, and with sufficient predictability. What matters also is the perspective of the decision-maker: whether those exercising public power are attentive to the proper reasons for its use. This helps explain why the attentiveness of decision-makers to proper reasons lies at the heart of so many of the doctrines examined in this thesis. The rule of law does not capture this insight, which causes it to form an incomplete explanation of the law on policies. For example, the rule of law does not fully explain one of the central features of this body of law: why public bodies must normally comply with their policies, but may depart from them where there is good reason to do so. The rule of law interest in certainty can explain the duty to comply, but by itself struggles to explain why the duty can be discharged if there is good reason to depart. Similarly, the rule of law struggles to explain why public bodies have to be flexible in their application of policies. Predictability, rather than flexibility, is what the rule of law is concerned about. In contrast, as I argued in Chapter 5, non-arbitrariness is able to explain the existence of the duty to comply, the circumstances in which that duty may properly be displaced, and the non-fettering rule. Non-arbitrariness

therefore captures important aspects of the law on policies that the rule of law does not bring fully into view.

Fourth, non-arbitrariness explains the law more directly than the alternatives. Reasonableness is another strong competing candidate as the best explanation of the law on policies. One might argue that the relevant doctrines are concerned with whether public bodies act reasonably in their use and adoption of policies. Reasonableness can indeed explain, at a general level, why public bodies should not adhere rigidly to policies, depart from them without justification, or adopt policies that authorise unlawful conduct. But the advantage of non-arbitrariness is that it identifies more precisely the vice to which the law on policies responds. Reasonableness asks whether a public body's conduct falls within the bounds of acceptable justification. Non-arbitrariness asks whether public power is exercised with attention to the proper reasons for the use of power—and crucially, also whether it is structured so that those subject to it are not left dependent on the unconstrained will of the power-holder. This captures several aspects of the law on policies more directly than reasonableness does. For example, it explains features of the law such as the court's concern with an excessive scope of power in *R (Purdy) v Director of Public Prosecutions*.[1] As I explained in Chapter 4, power non-arbitrariness directly reflects this concern through its focus on a public body's scope of power. Reasonableness is less capable of doing so. It is more concerned about the justifications for power than its scope and accountability. Also, non-arbitrariness provides a direct answer to the question of why courts should have the authority to review policy interpretation. As I argued in Chapter 6, the courts' authority

[1] *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45.

reflects a concern about the scope of power and the accountability of public bodies. Again, non-arbitrariness reflects this concern more directly than reasonableness does.

Fifth, non-arbitrariness does more than explain the existing law. It explains the law as a unified whole and also provides principled guidance for how the law on policies can develop as a coherent body of law. Throughout Chapters 5 to 7, the theory was applied to answer unresolved questions, including the circumstances in which the duty to comply should arise, the legal requirements of the non-fettering rule, the standard of review applicable to policy interpretation, and the recognition of duties to adopt policies or consult in their making. In so doing, non-arbitrariness drew deeper connections between the different legal rules and helped to present the law as a unified whole. For example, it suggested that the law should impose on public bodies a duty to publish policies in order to facilitate enforcement of the duty to comply and thereby better promote non-arbitrariness. Doing so allows persons to bring applications to enforce the duty to comply in circumstances where policies had been applied to make decisions. It also provided an explanation for the review of the content of policies that rested not merely on the fact that courts have given policies legal effect, but on the value that explains why courts have done so in the first place—the value of non-arbitrariness. An interpretive theory is valuable not merely because it explains existing doctrine, but because it provides judges with principled guidance for the coherent development of the law. In this respect, non-arbitrariness demonstrates a capacity to guide the future development of the law on policies as a coherent category that competing accounts do not possess.

This is not to say that these competing values are not valuable and therefore should be rejected. On the contrary, this thesis suggests that they are better understood as different

manifestations of a deeper concern with non-arbitrariness. Consistency matters because it reduces arbitrary exercises of power. Fairness matters because arbitrary exercises of power fail to respond appropriately to the interests of those affected by decisions. The rule of law values of certainty and predictability matter because they reduce the scope for arbitrary exercises of public power. Similarly, the courts' emphasis on reasonableness and good administration ultimately reflects a concern that public power should be exercised according to reasons capable of justification rather than according to mere preference or whim. These values therefore explain important aspects of the law. But each captures only part of the underlying concern. Non-arbitrariness provides the most comprehensive account because it explains why these values matter, how they relate to one another, and why they are reflected in the doctrines governing administrative policies.

Bibliography

Ahmed F, 'Arbitrary Power: Caricature and Concept' (2024) 43 Law and Philosophy 641

Ahmed F and Perry A, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73(1) Cambridge Law Journal 61

Ahmed F and Perry A, 'Interpretive Theory in Public Law' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar 2023)

Allan TRS, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP 1994)

Allan TRS, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63(3) Cambridge Law Journal 685

Arnold S and Harris JR, 'What is arbitrary power?' (2017) 10(1) Journal of Political Power 55

Auburn J, Moffett J and Sharland A, *Judicial Review: Principles and Procedure* (OUP 2013)

Austin J, *The Province of Jurisprudence Determined* (John Murray 1832)

Baldwin R, *Rules and Government* (Clarendon Press 1995)

Bedford M, '*Tesco Stores Ltd v Dundee CC*: a form of non-statutory fiction' [2017] Journal of Planning and Environmental Law 914

Beever A and Rickett C, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68(2) Modern Law Review 320

Bell J, 'The doctrine of legitimate expectations: power-constraining or right-conferring legal standard?' [2016] Public Law 437

Bell J, 'Remedies in judicial review: confronting an intellectual blindspot' [2022] Public Law 200

Bell J and Fisher E, 'Exploring a year of administrative law adjudication in the Administrative Court' [2021] Public Law 505

Bell J and Fisher E, 'The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication' (2023) 86(1) Modern Law Review 226

Bratman M, 'Intention and Personal Policies' (1989) 3 Philosophical Perspectives 443

Bratman M, *Intention, Plans, and Practical Reason* (CSLI Publications 1999)

Bratman M, 'The Interplay of Intention and Reason' (2013) 123 Ethics 657

Bratman M, *Shared and Institutional Agency* (OUP 2022)

Brennan G and others, *Explaining Norms* (OUP 2013)

Burrows, Lord, 'Statutory Interpretation in the Courts Today' (Sir Christopher Staughton Memorial Lecture, University of Hertfordshire, 24 March 2022)

Carnwath, Lord, 'Planning Policy and the Law' (2023) 35 Journal of Environmental Law 133

Clayton R, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62(1) Cambridge Law Journal 93

Coglianese C and Walters DE, 'The Great Unsettling: Administrative Governance after *Loper Bright*' (2025) 77 Administrative Law Review 1

Collins S, *Group Duties: Their Existence and Their Implications for Individuals* (OUP 2019)

Craig P, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131

Criddle EJ, '*Chevron*'s Consensus' (2008) 88 Boston University Law Review 1271

Daly P, 'Deference on Questions of Law' (2011) 74(5) Modern Law Review 694

Daly P, 'Firming up judicial review of soft law?' (2022) 81(1) Cambridge Law Journal 8

Daly P, 'The Scope and Meaning of Reasonableness Review after *Vavilov*' (2025) 63(1) Alberta Law Review 1

Daly P, 'The Supreme Court of Canada's administrative law trilogy' [2020] Public Law 408

Daly P, 'Unresolved Issues after *Vavilov*' (2022) 85 Saskatchewan Law Review 89

Daly P, 'The *Vavilov* Framework and the Future of Canadian Administrative Law' (2020) 33 Canadian Journal of Administrative Law & Practice 111

Daly S, 'The Rule of (Soft) Law' (2021) 32(1) King's Law Journal 3

Daly S, *Tax Authority Advice and the Public* (Bloomsbury Publishing 2020)

Dindjer H, 'What Makes an Administrative Decision Unreasonable?' (2021) 84(2) Modern Law Review 265

Dotan Y, 'Why Administrators should be Bound by their Policies' (1997) 17(1) Oxford Journal of Legal Studies 23

Dworkin R, *Law's Empire* (Harvard University Press 1986)

Dworkin R, ‘The Model of Rules’ (1967) 35(1) University of Chicago Law Review 14

Dyzenhaus D, ‘Constitutionalism in an Old Key: Legality and Constituent Power’ (2012) 1 Global Constitutionalism 229

Ekins R, *The Nature of Legislative Intent* (OUP 2012)

Elliott M, ‘Legitimate Expectations: Procedure, Substance, Policy and Proportionality’ (2006) 65(2) Cambridge Law Journal 254

Elliott M and Varuhas J, *Administrative Law: Text and Materials* (5th edn, OUP 2017)

Endicott T, *Administrative Law* (5th edn, OUP 2021)

Endicott T, ‘Arbitrariness’ (2014) 27(1) Canadian Journal of Law and Jurisprudence 49

Enoch D, ‘Reason-Giving and the Law’ in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (OUP 2011)

Feldman D, ‘Declaring that extra-statutory guidance violates Convention rights’ (2016) 75(2) Cambridge Law Journal 189

Feldman D, Bailey D and Norbury L, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020)

Feldman S, ‘Reasons, Motivating and Normative’ in Hugh LaFollette (ed), *The International Encyclopedia of Ethics* (Blackwell Publishing 2013)

Ferrero L, ‘Can I Only Intend My Own Actions?’ in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility* (OUP 2013)

Fisher E, ‘Why Doctrinal Administrative Lawyers Need to Think More About Policy’ (2023) 29(4) Australian Journal of Administrative Law 254

Fordham M, *Judicial Review Handbook* (8th edn, Hart Publishing 2025)

Forst R, ‘A Kantian Republican Conception of Justice as Nondomination’ in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013)

Forsyth C, ‘Legitimate Expectations Revisited’ (2011) 16 Judicial Review 429

Gardner J, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012)

Goldman AH, *Practical Rules: When We Need Them and When We Don't* (CUP 2001)

Goldsworthy J, ‘Clarifying, Creating, and Changing Meaning in Constitutional Interpretation: A Comment on András Jakab, “Constitutional Reasoning in

Constitutional Courts—A European Perspective"' (2013) 14(8) German Law Journal 1279

Goldsworthy J, 'Legislative Intention Vindicated?' (2013) 33(4) Oxford Journal of Legal Studies 821

Greasley K, '*R (Purdy) v DPP* and the Case for Wilful Blindness' (2010) 30(2) Oxford Journal of Legal Studies 301

Gvozdenovic M, 'Government Policy: Compulsory Consideration or Discretionary Decision' (2022) 29 Australian Journal of Administrative Law 7

Hare I, Donnelly C and Bell J, *De Smith's Judicial Review* (9th edn, Sweet & Maxwell 2024)

Hart HLA, *The Concept of Law* (2nd edn, OUP 1994)

Heuer U, 'Reasons for Actions and Desires' (2004) 121(1) Philosophical Studies 43

Hickman T and Poole T, 'Judicial review and guidance' (2024) 140 Law Quarterly Review 381

Hilson C, 'Judicial review, policies and the fettering of discretion' [2002] Public Law 111

Hilson C, 'Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place?' (2006) 11(4) Judicial Review 289

Houghton J and Baldwin R, 'Circular Arguments: the Status and Legitimacy of Administrative Rules' [1986] Public Law 239

Juratowitch B, *Retroactivity and the Common Law* (Hart Publishing 2008)

Kelly MD, 'Applying Laws Across Time: Disentangling the "Always Speaking" Principles' (2024) 44(3) Oxford Journal of Legal Studies 563

Lawford-Smith H, *Not In Their Name: Are Citizens Culpable For Their States' Actions?* (OUP 2019)

Lovett F, 'What counts as arbitrary power?' (2012) 5(1) Journal of Political Power 137

Lovett F and Pettit P, 'Preserving Republican Freedom: A Reply to Simpson' (2019) 46(4) Philosophy & Public Affairs 363

Marshall G, *Constitutional Conventions* (OUP 1987)

Mascott JL and Nachmany E, 'Answered by Text' (2025) 48 Harvard Journal of Law & Public Policy 33

Mashaw JL, *Reasoned Administration and Democratic Legitimacy* (CUP 2018)

McCabe P, ‘Failure to Adhere to Policy: A Category of Jurisdictional Error?’ (2019) 26(3) Australian Journal of Administrative Law 146

McCammon C, ‘Domination: A Rethinking’ (2015) 125 Ethics 1028

McHarg A, ‘Administrative Discretion, Administrative Rule-making, and Judicial Review’ (2017) 70(1) Current Legal Problems 267

McNaughton D and Rawling P, ‘Motivating Reasons and Normative Reasons’ in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (OUP 2018)

Metzger GE and Stack KM, ‘Internal Administrative Law’ (2017) 115 Michigan Law Review 1239

Michelon C, ‘The Inference to the Best Legal Explanation’ (2019) 39(4) Oxford Journal of Legal Studies 878

Mills A, ‘The Interpretation of Planning Policy: The Role of the Court’ (2022) 34 Journal of Environmental Law 419

Mills A, ‘The interpretation of policies in administrative law: the significance of audience’ (2024) 44(2) Legal Studies 295

Perry A, ‘The Crown’s Administrative Powers’ (2015) 131 Law Quarterly Review 652

Perry A, ‘The Flexibility Rule in Administrative Law’ (2017) 76(2) Cambridge Law Journal 375

Perry A, ‘Law’s Boundaries’ (2020) 26 Legal Theory 103

Perry A, ‘*Wednesbury* unreasonableness’ (2023) 82(3) Cambridge Law Journal 483

Perry A and Ryu A, ‘Judicial Review: Substance and Procedure’ (2026) 89(2) Modern Law Review 227

Pettit P, *On the People’s Terms: A Republican Theory and Model of Democracy* (CUP 2012)

Pettit P, *Republicanism: A Theory of Freedom and Government* (OUP 1997)

Postema G, *Law’s Rule* (OUP 2022)

Preston BJ, ‘The Interaction of Policy and Law in Environmental Governance’ (2023) 29(4) Australian Journal of Administrative Law 230

Rawls J, ‘Two Concepts of Rules’ (1955) 64(1) The Philosophical Review 3

Raz J, *The Authority of Law* (OUP 1979)

Raz J, ‘The Law’s Own Virtue’ (2019) 39(1) Oxford Journal of Legal Studies 1

Raz J, ‘Legal Principles and the Limits of Law’ (1972) 81(5) Yale Law Journal 823

Raz J, *The Morality of Freedom* (OUP 1988)

Raz J, *Practical Reason and Norms* (OUP 1999)

Richardson HS, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (OUP 2002)

Ruiz-Tagle S, ‘*Samuel Smith* and Judicial Review of Policy Interpretation: A Middle Way in the Law and Policy Divide’ (2020) 32 Journal of Environmental Law 577

Sales, Lord, ‘Purpose in Law and in Interpretation’ (FA Mann Lecture, Herbert Smith Freehills, 19 November 2024)

Schauer F, *Playing by the Rules* (OUP 1991)

Sedley S, *Ashes and Sparks: Essays on Law and Justice* (CUP 2011)

Shapiro SJ, ‘Authority’ in Jules L Coleman (ed), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004)

Shapiro SJ, *Legality* (Belknap Press 2013)

Simpson TW, ‘Freedom and Trust: A Rejoinder to Lovett and Pettit’ (2019) 47(4) Philosophy & Public Affairs 412

Simpson TW, ‘The Impossibility of Republican Freedom’ (2017) 45(1) Philosophy & Public Affairs 27

Smith SA, *Contract Theory* (OUP 2004)

Solum LB, ‘The Interpretation-Construction Distinction’ (2010) 27 Constitutional Commentary 95

Spencer JR, ‘Assisted Suicide and the Discretion to Prosecute’ (2009) 68(3) Cambridge Law Journal 493

Sunstein CR, ‘Administrative Law Goes to War’ (2005) 118(8) Harvard Law Review 2663

Tamir O, ‘Our Parochial Administrative Law’ (2024) 97 Southern California Law Review 801

Thomas R, ‘Agency rulemaking, rule-type, and immigration administration’ [2013] Public Law 135

Varuhas J, ‘In Search of a Doctrine: Mapping the Law of Legitimate Expectations’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017)

Waldron J, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016)

Weeks G, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing 2016)

Williams R, 'The multiple doctrines of legitimate expectations' (2016) 132 Law Quarterly Review 639

Wilson Stark S, 'Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing 2020)

Zaring D, 'Reasonable Agencies' (2010) 96(1) Virginia Law Review 135