Principles of Public Law

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GOVERNMENT AND ADMINISTRATION

8.1 Introduction

One of the purposes of a constitutional system is to provide means by which large scale societies may make collective decisions. The ideal of representative democracy is that important decisions are taken by our elected representatives (see above, 1.6.2). In practice, this is not possible. Parliamentary bodies are too large and fractious to be effective decision making organs. The role of such bodies is, therefore, often confined to scrutinising and passing legislative proposals initiated by a smaller executive committee of their members; and to calling members of that executive committee to account for their actions. As we have seen, the executive committees of the UK Parliament, the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales are known respectively as: the Cabinet (see above, 2.4.3); the Scottish Executive (see above, 2.5.2); the Northern Ireland Executive (see above, 2.6.2); and the Executive Committee of the National Assembly for Wales (see above, 2.7). The role of members of the executive committees ('ministers') is to decide what ought to be done. Ministers do usually set the policy agenda, based on the political manifesto their party issued before a parliamentary election (see above, 6.3).

Generally, ministers do not have the time or expertise to carry out the practical implementation of their policy choices. They do, occasionally, make decisions about the application of law and policy to individual people – for instance, ministers in the UK Government sometimes personally make decisions about whether a particular person should be allowed to enter or forced to leave the country, how long people convicted of serious crimes should serve in prison and whether government should intervene in one business's attempt to take over another enterprise. But most decisions about the implementation of policy and law are left to a staff of unelected, politically neutral officials. Without a large body of staff, government would simply not be able to carry out its functions of securing our safety and security (see above, 1.7).

This chapter examines how executive bodies, and their staffs of public officials, set the framework for implementing policy.

8.1.1 The constitutional status of public officials

The roles carried out by public officials vary greatly. Some are responsible for the very practical delivery of public services, such as issuing driving licences to people who have passed the test, which requires no difficult judgment.

Others are professionally qualified people who have to decide how law and policy are to be applied to particular individuals – for example, a member of the Crown Prosecution Service deciding whether a prosecution should proceed; a social worker deciding whether apparently neglected children should be taken into the care of the local authority; a scientist deciding whether a factory has breached pollution emission standards; an economist calculating whether a business is abusing a monopolistic position.

The legal status of public officials varies according to the level of government at which they are employed. Officials employed by the Government of the UK or the devolved executive institutions in Scotland, Northern Ireland and Wales continue to have their basic status determined largely by rules made under prerogative powers (see above, 2.4.3) rather than an Act of Parliament. Most such officials are in the service of 'Her Majesty's Home Civil Service'; staff of the Foreign and Commonwealth Office serve under different terms and conditions. Public officials with posts in local authorities (see above, 2.9.1) are generally known as 'local government officers' and their status is established by the Local Government Act 1972 and subordinate legislation. Staff of the European Union have their terms of employment determined by EC Regulations.

8.1.2 Political neutrality

An important constitutional principle is that public officials should be 'politically neutral'. In the UK, public officials in more senior posts in the UK Government, the devolved executive institutions, local authorities, and the institutions of the European Union, are banned by law from participating in party political activities or standing for election themselves – in order to maintain the distinction between elected representatives and salaried officials. Clearly, for some individuals, this amounts to a severe curtailment on their rights to freedom of expression (see below, Chapter 24) and association (see below, Chapter 25), but the European Court of Human Rights has held that these are legitimate restrictions (*Ahmed v UK* (1999) discussed below, 25.8). Some commentators and politicians have, however, questioned the whole notion of 'political neutrality', suggesting that senior civil servants, pursing their own agendas, control policy making in departments when ministers ought to be in the driving seat (see, for example, Benn, T, *Arguments for Democracy*, 1982, London: Penguin, Chapter 4).

8.2 Types of administrative bodies

We have seen that the work of government is divided between various departments staffed by civil servants who are accountable to the relevant Secretary of State (see above, 2.4.3). In addition, there are a wide range of institutions which have been established both by government and private

interests, which used to be called 'quasi-non-governmental organisations' or quangos, and are now more generally known as 'non-departmental public bodies' or NDPBs. It is difficult to devise any reliable system of categories for them, but they can be divided broadly into three main types: executive, advisory, and regulatory. Local authorities carry out a combination of these functions (see below, 8.2.4).

8.2.1 Executive agencies

Much of the day to day work of central government in the UK (see above, 2.4.3) is carried out by 'executive agencies': the Prison Services Agency, the Benefits Agency, the Highways Agency and the Vehicles Inspectorate, to name but a few. These agencies operate under 'framework agreements', which demarcate the boundaries of responsibility between the chief executive and the parent department (in other words, the responsible minister). Whilst the parent department is responsible for any unlawful decision or act by the agency responding to a ministerial policy, the chief executives of these agencies have considerable leeway in generating their own rules and regulations as to how they run the business of providing public services. The framework documents themselves are not legal instruments, merely means of delegating power down from departments into the agencies. (For a detailed account of the creation of Next Steps Agencies, see Greer, P, 'The Next Steps initiative: an examination of the agency framework document' 68 Public Administration 89; and Freedland, MR, 'Government by contract and public law' [1994] PL 86.) The degree of discretion handed down to the service providers is considerable, since the chief executives of these agencies have to behave like managers of commercial services, producing results. They are thus accountable for those *results* rather than for the *policies* behind the services.

8.2.2 Regulatory bodies

Regulation may be carried out directly, by government, or (as is more frequently the case) it can be delegated to outside agencies. The privatisation of public industries (see above, 4.3.4) has placed the supply of gas, water and telecommunications and other former State-owned corporations in the hands of private shareholders and directors. These industries are no longer subject to direct parliamentary control and accountability. The idea was that the forces of the market would be an efficient substitute, but this does not apply to some, such as the gas industry, where British Gas are effectively operating a monopoly. For this reason, regulatory bodies have been set up by Act of Parliament to monitor their activities; Ofgas, Oftel, Ofrail, Ofsted, and so on, have broad powers to regulate the relevant industries. They are overseen by Directors General, whose duties are set out in the founding statutes. Their existence has been referred to as 'reinvented government' (Harlow, C and Rawlings, R, *Law and Administration*, 2nd edn, 1997, London: Butterworths,

p 142), since their role is to act in the public interest, 'traditionally a government prerogative'.

8.2.3 Self-regulatory organisations

Supervision is no longer as hierarchical as it once was; rather, it is splintered across various different types of activities. Julia Black has observed that modern society is divided up into a number of different spheres, notably the spheres of the consumer and the market. One way of ensuring that there is some mediation between them is for the providers of goods and services to set up self-regulating agencies; these are 'mini legal systems' which are allowed to formulate and apply their own rules (see Black, J, 'Constitutionalising self-regulation' (1996) 59 MLR 24). Self-regulation has proved a popular vehicle for supervision and control, and much regulation in this country is conducted by the industry itself, based on an understanding that if self-regulation does not work, government will step in and legislate. Black distinguishes four categories of self-regulating agencies:

(a) *mandated* self-regulation, in which a collective group, an industry or a profession for example, is required by government to formulate and enforce norms in a framework enforced by government. An example of this is the Stock Exchange;

(b) *sanctioned* self-regulation, in which the collective group itself formulates the regulation which is subject to government approval, and, in return, the industry is exempted from other statutory requirements; for example, codes of practice produced by trade associations and approved by the Office of Fair Trading;

(c) *coerced* self-regulation, in which the industry itself formulates and imposes regulation, but in response to threats by the government that, if it does not, government will impose statutory regulation (the Press Complaints Commission is a good example of this);

(d) *voluntary* self-regulation, where there is no active State involvement; for example, sporting bodies, or bodies regulating the professions. Industry itself desires regulation and takes the initiative in the formation and operation of the system.

8.2.4 Advisory bodies

There is, in addition to the above forms of administration, a range of bodies which do not operate under direct government control, but perform a public function, such as the Countryside Commission, the Higher Education Funding Council and the Arts Council. These bodies are usually staffed by respected professional people with expertise in the relevant field; these people are appointed by the minister of the relevant department, not elected. Some of these bodies are created by statute, others by the exercise of the prerogative.

Some bodies are set up to advise the government; others are watchdog organisations established to act in the interests of certain sectors of society, such as the Mental Health Commission, which investigates complaints by patients compulsorily detained under the mental health legislation in this country. They are comparable to the institution of self-regulation, in the sense that many of these commissions and councils have been set up as an alternative to legislation; in the case of the Mental Health Commission, for example, the government opposed campaigns for increased statutory rights for patients, claiming that this would result in 'legalism' and bureaucratic problems for the psychiatric profession. The Commission's decisions, on the other hand, would be non-binding – soft law, in other words. Other types of advisory body include the National Consumer Council, the Medicines Commission and the Independent Television Commission. A sceptical explanation for their existence would be that they make it possible for government to hide behind some unpopular form of regulation by referring the complainant to the relevant NDPB. There are other justifications advanced for the creation of these NDPBs; some activities, it is said, need to be protected from political interference; such institutions avoid the known weaknesses of government departments and there are some areas of public administration which should be remitted to people with the relevant expertise.

8.2.5 Local authorities

Some issues relating to the role of local government have already been considered (see above, 2.9.1). Local authorities have largely become agents of central government, through processes such as rate-capping, compulsory competitive tendering and the transfer of other important responsibilities, such as housing, to the private sector. The real responsibility of local authorities now may be best described as overseeing service provision, purchasing rather than providing services.

The general services for which local authorities are responsible are the allocation of council houses, setting the rents and determining tenancy conditions and granting or refusing permission for the development of land. A range of other local matters are under their control, such as the enforcement of compliance with hygiene and sanitary standards, traffic flow and parking and the provision of care for children and the elderly. They have extensive licensing powers which determine whether certain films, plays or occupations are permitted in their area. A recent addition to local authorities' powers in the area of environmental regulation has come from Europe. Parliament has entrusted the primary task of environmental protection to the Environment Agency and to local authorities, who exercise duties and powers that derive from European Community directives. Under the Environmental Protection Act 1990 and the Water Resources Act 1991, the Agency and local authorities may take enforcement action in the form of criminal proceedings, prohibition,

abatement and remedial notices against industries that they deem to be responsible for polluting the area under their control.

In addition to these specific functions, s 235 of the Local Government Act 1972 grants local authorities the power to make bylaws for the 'good rule and government of the whole or any part of the district or borough, and for the prevention and suppression of nuisances therein'. These are subject to confirmation by the Secretary of State and bylaws may be challenged in judicial review proceedings (*Arlidge v Mayor etc of Islington* (1909): a requirement of regular cleansing of lodgings where access was not always available struck down as unreasonable).

8.2.6 Administration in the European Community

Under Art 211 (formerly 155) of the EC Treaty, the Commission (see above, 7.5.1) is given the task of applying the provisions of the treaty and exercising the powers conferred on it by the Council (see above, 7.5.3) to implement delegated legislation. It is, in other words, the main executive body of the Community. The Commission's discretion to formulate policy extends across a wide range of areas, particularly in agriculture, the customs tariff and the setting of technical standards for health, the environment and other matters. Because the Commission is given such a wide discretion under Art 211, the Council requires it to consult a management committee in the formulation of policy. These committees are made up of civil servants representing the particular subject area of the legislation. The committee members scrutinise a draft of the Commission's proposed measures and vote by a qualified majority to adopt or reject the measure. Since these committees have no legal basis in the treaty, the delegation of decision making to them has come under attack (Case C-25/70 *Einfuhr und Vorratsstelle Getreide v Koster* (1970)). The European Court of Justice held, however, that this was not an illegitimate delegation of power. Since that case, a decision was passed (Council Decision 87/373) setting out the structure for this so called 'comitology' procedure. The European Parliament has since challenged the existence of committees, arguing that they diminish Parliament's own power of control over the Commission; however, the Court rejected their application for annulment of Decision 87/373 on the basis that Parliament had no standing (*European Parliament v Council* (1988)).

Apart from ensuring the implementation of Community law, the Commission supplements the role of national bodies in supervising policy implementation in Member States. So while, for example, the Customs and Excise authorities will ensure that the import and export of goods complies with the free movement of goods provisions in the EC Treaty, the Commission supervises the role of the national agencies to ensure the uniform implementation of Community law. The Commission itself may take proceedings in the Court of Justice against defaulting Member States which

have not implemented Community directives, or are, in some other way, in breach of Community law, see below, 18.3.2. It also has the power to decide that Member States should abolish State aids (Art 88, formerly 93) and it can take action against individuals under the EC Treaty's competition rules (Arts 81 and 82; formerly 85 and 86). It has the power in all these circumstances to decide upon the level of fines for defaulting States. Although the ultimate decision on enforcement will rest with the European Court of Justice, the Commission's 'policing' powers in these areas give it significant scope for developing policy, allowing it to determine new strategy in relation to State aids and competition.

The Commission's executive role extends to other areas of Community organisation. It manages the Community budget for agricultural support (which accounts for 50% of the Community budget). The decisions it reaches in relation to this fund are overseen by a management committee. It also has some responsibility in relation to other important budgets within the Community, such as the European Social Fund and the European Regional Development Fund. Apart from these functions, the Commission determines and conducts the European Union's external trade relations, managing responsibilities in respect of the various external agreements which the European Union has with many third countries and international organisations.

8.3 Types of decision making

The discussion above demonstrates that a host of public actors, ranging from European Community officials and UK government ministers to a proliferating class of administrative bodies far removed from Westminster, have the power to make *ad hoc* decisions affecting the activities of individuals and the running of international commerce. On the whole, the only visible part of these decisions are those informal 'rules' which they themselves have generated. It will be remembered from the discussion on Dicey that wide discretionary powers exercised by government officials were anathema to Dicey's vision of a constitution based on the rule of law (see above, 5.3):

> ... the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers [Dicey, A, *Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, London: Macmillan, p 187].

However, it has to be acknowledged that, even in Dicey's time, these 'wide, arbitrary or discretionary powers' were already being invested in officials and boards responsible for implementing early legislative welfare reforms, and over the course of the last century the dictates of the modern Welfare State have brought about a system where discretionary power is routinely granted to ministers and public bodies. This is because there is a very wide gap between the very broad power imposed by welfare legislation and the

application of it, and this gap has to be filled by the individual discretion of the decision making body. The existence of this discretion obviously raises issues of accountability and control, which we will look at shortly (see below, 8.4). But before considering these issues in detail, it is worth considering to what extent administrative discretion is delimited by rules.

These rules, known as 'quasi-legislation', or 'soft law', are generated by the European institutions, ministers and public bodies. Thay range from codes of practice, circulars, directions, rules and regulations, to ministerial statements regarding policy changes, and positions taken in official departmental communications (see Ganz, G, *Quasi-legislation: Recent Developments in Secondary Legislation*, 1987, London: Sweet & Maxwell). On a national level, these rules may be promulgated to guide official interpretation of some policy or law; to regulate procedure; to set up voluntary standards of conduct or to impose managerial efficiency standards. Standard-setting rules apply to everybody, from MPs (see above, 6.7) to motorists (the Highway Code is a non-binding set of standards to be observed on roads). The fact that these rules are not legally binding does not mean that they do not have effect; if a newspaper, for example, disregards the provisions of the Press's voluntary code of practice, it may be required by the Press Complaints Commission to publish an apology.

8.3.1 Rules

Most of the rules which restrict this discretion are not legal rules as such, but non-binding general standards. Baldwin has identified eight types of rules (*Rules and Government*, 1996, Oxford: Clarendon):

(a) procedural rules (for example, the PACE codes of practice, governing the interrogation of suspects in police stations);

(b) interpretative guidance as to the policy behind some piece of legislation;

(c) instructions to officials in the department responsible for enforcing the law in its area of remit, such as Home Office Circulars to chief constables, or guidance circulars released by the Home Office to immigration officers exercising their discretion at ports of entry under the Immigration Act 1971;

(d) prescriptive rules made by regulators;

(e) evidential rules, such as the Highway Code, and, to the extent that they provide evidence of prejudicial interrogation of suspects in police stations, the PACE codes of practice;

(f) commendatory rules of good practice, such as the rules issued by the Health and Safety Executive on how to achieve safety standards;

(g) voluntary codes of practice;

(h) rules of practice for legal procedures; for example, the concessions made by the Inland Revenue to taxpayers if certain procedures are followed.

Many non-legislative rules, of course, belong to two or more of these categories. Three main groups may be identified.

Rules attached to legislation

It has been observed that hardly a statute is passed without a provision for a code of practice or guidance (see Cavadino, M, 'Commissions and codes: a case study', in Galligen, DJ (ed), *A Reader on Administrative Law*, 1996, Oxford: OUP, p 216). Such codes are useful to government not only because they offer a useful way to legislate on some difficult regulatory areas without resorting to the full legislative process, but also because codes provide a clue to judges as to the meaning of a statutory provision, thus giving judicial force to the executive's intention behind a particular policy. We have seen already (above, 8.2.2) that much quasi-legislation is developed by regulatory agencies, in their capacity as 'reinvented government'. But where do they get the raw material for the formulation of their regulations? Much of it comes from their founding statutes, which require them to regulate the industries in such a way as to ensure even service distribution, maintain sufficient financial resources, secure economy and efficiency, promote the interests of consumers and ensure competition. Increasingly, guidance for these rules is derived from the institutions of the European Union, which pass laws under the EC Treaty setting minimum standards and requirements for commerce, industry, services and the environment, amongst other things. The role of regulatory bodies in enforcing European law is often overlooked by the concentration on the manner in which Parliament promulgates European Community norms.

Evidential rules

Other codes are developed by public bodies to compel people to act in a certain way, so that even though breach of the code itself is not against the law (codes are non-binding) it is compelling evidence that the law has been broken. The evidentiary value of this kind of non-binding law in legal proceedings is comparable to the standards courts apply, for example, in assessing whether professional conduct has been negligent or not, by taking an accepted (but non-binding) professional standard as their guiding point. Breach of the Highway Code, for example, is not an offence of itself, but it is compelling evidence of civil or criminal liability. Disregard of the Department of Employment's picketing code – which provided that not more than six pickets should be allowed at the entrance to a workplace – provided compelling evidence during the 1984–85 mining dispute that the involvement of more than six pickets might amount to a civil nuisance or the offence of obstruction (DOE, Code of Practice on Picketing, 1980, para 31). This was in spite of the fact that the legislation under which the non-binding code was drafted made picketing lawful without any restrictions as to numbers. In addition, the contents of circulars often take on the status of relevant considerations in the process of determining whether a decision reached by an administrative body is '*Wednesbury* unreasonable'. The significance of

circulars in court proceedings was illustrated by the fate of Home Office guidance notes to immigration officers at ports of entry, referring them to Art 8 of the ECHR, which guarantees individuals a right to a family life (often jeopardised by refusal of entry to people wishing to join family members who are lawfully resident in this country). Although this looked good on paper, these circulars backfired when immigration officials were brought to book in the courts for disregarding the reference to the convention. Because this reference was set out in the circular, it was deemed to be a 'relevant consideration' for the purposes of judicial review. Once these were withdrawn, applicants could no longer attack the reasonableness of immigration officials' decisions on convention grounds, because it was not, until recently, part of national law (see *R v Secretary of State for the Home Department ex p Lye* (1994)).

Voluntary codes

We have seen (above, 8.2.3) that self-regulating agencies are set up to ensure compliance with codes of practice. These are, by their nature, not imposed from above, but are developed by an interest group threatened with legislation in order to ward off any more binding form of regulation. Examples of this are the code of practice developed by the press, or the code of standards for advertising monitored by the Advertising Standards Authority.

Codes may be found in the performance standards promulgated under the Citizen's Charter by executive agencies or departments (see above, 8.2.1). The setting of specific standards is at the discretion of the administrative bodies. Executive agencies were themselves created in the interests of speed, economy and efficiency (this being the reason for their replacing the unwieldy powers exercised by civil servants in large departments). These objectives are bound to influence their standard-setting rather more than the less pressing considerations of quality service. The failure by the service provider to meet these performance targets entitles the citizen to some redress, such as a refund or the payment of some compensatory sum, although neither of these is enforceable through a contractual action.

8.3.2 The 'rules' versus 'discretion' debate

Having considered the range of rules that delimit the scope of administrative discretion, it is worth asking at this point whether we should accept that rules are always a necessary and desirable thing. The theory of rules versus discretion has been much expounded in the academic literature (see, in particular, Jowell, J, 'The rule of law today', in Jowell, J and Oliver, D (eds), *The Changing Constitution*, 3rd edn, 1994, Oxford: Clarendon, pp 62–66) . Since this literature emanates from legal experts rather than politicians, rules have been generally held to be desirable. One of Dicey's requirements for a rule of law was that public bodies were not entrusted with arbitrary power, in other

words, unlimited discretion (see above, 5.3). But the formulation of rules by public bodies has an instrumental as well as a constitutional purpose. They promote legal certainty and encourage early consultation of and participation by interested parties. The Environment Agency, for example, has the discretion to decide on an *ad hoc* basis whether a particular industry is polluting the atmosphere or the ground water and therefore should be prosecuted. On the other hand, it could adopt a series of upper limits for emissions, specified in advance. These limits, in the form of rules, will enable the industries to take preventative action, which is what environmental regulation is designed to achieve (rather than clogging up the magistrates' courts with a series of criminal prosecutions). The formulation of consistent rules also enables the public body in question to make decisions more quickly and efficiently.

This is, in itself, uncontroversial. But, in many cases, such as the provision of benefits to individual applicants, rigid application of such rules may conflict with an individual's need to have their case determined on its particular merits. The ideal resolution to this conflict would be to allow administrative bodies to develop rules, but to apply those rules only after they have heard individual cases on the merits. Otherwise, the body would be unduly restricting its discretion granted by the power, which itself would be an unlawful act, challengeable by means of judicial review. This requirement that every new case is heard on its merits, and that the administrative body can then apply its policy with impunity, is, however, fraught with difficulties, as the following section on policy as a form of soft law will show.

8.3.3 Policies

As we have seen, it is difficult to draw a dividing line between some types of rule, which limit and guide the discretion of an administrative body, and policy, which often does the same thing. Policy as a form of soft law is different from policy which precedes most forms of legislation; this 'pure' type of policy is settled by departmental or cabinet committee and usually ends in legislative form. It is policy which has no legal basis (in the form of legislation or statutory instrument) that concerns us here. Provided certain statements of policy do not interfere with people's pre-existing rights, there is no need for the full legislative process to be seen through. Ministers may try to influence the direction of legislation by issuing non-binding guidance notes and circulars (a form of soft law) which expresses policy. Ministers' statements in Parliament often enunciate policy changes which are subsequently embedded in guidelines, rather than in legislation. The advantage of this form of 'soft law' is that it does not bind the executive, and subsequent events may necessitate a change in policy which can be effected without the need for new legislation. This is sometimes a source of hardship by those who have relied on some statement of ministerial policy. In the early 1980s, the Hong Kong

Government announced that it would afford all immigrants a personal interview and a chance to put their case before repatriating them to the mainland Chinese. After this policy statement was broadcast on national television, an applicant came forward, but was refused an interview. The Privy Council ruled that the government could not repatriate him without fulfilling their promise, in other words by letting him have an opportunity to present his case (*AG of Hong Kong v Ng Yuen Shiu* (1983)). In this instance, the courts are prepared to intervene to give the non-binding ministerial statement of policy legal effect. This means, sometimes, that the public body concerned cannot switch policies which have given rise to a legitimate expectation that the old policy will be continued without at least giving interested parties an opportunity to make representations (see below, Chapter 14). But as the discussion in that chapter also reveals, the courts are not always willing to come to the assistance of individuals who feel that they have been cheated by changes in government statements of policy.

Policy is not confined to ministerial statements. 'Low level' policy – positions adopted by government departments and executive agencies – may have considerable effects on people and business. A broadcasting authority may be refused a licence by the licensing body, or the Environment Agency might select one polluting industry rather than another for prosecution. An applicant for benefit may lose out in identical circumstances to another person who is successful in his or her claim.

> Low level policy choices of these kinds are nevertheless real policy choices upon which the treatment of people depends. They are policy choices which are often hard to identify, difficult to control, and without proper legal authority; they are the products of the moral and social attitudes of officials, which are in turn to a large degree the results of the social and organisational ethos of a department or agency [Galligan, DJ (ed), *A Reader in Administrative Law*, 1996, Oxford: OUP, p 40].

Sometimes, a minister is empowered by a statute to issue guidance, or directions, to a particular decision making body. Whilst the power itself is governed by statutory controls, the content of the guidance is not. In 1977, Freddie Laker, operator of a cut price air travel service known as Skytrain, challenged guidance issued by the Transport Minister to the Civil Aviation Authority to the effect that only one British airline could be allowed to serve the same route. Lord Denning MR ruled that the policy guidance cut right across the statutory objectives of the Civil Aviation Act 1971, which were designed to ensure that British Airways did not have a monopoly:

> Those provisions disclose so complete a reversal of policy that to my mind the White Paper cannot be regarded as giving 'guidance' at all. In marching terms it does not say 'right incline' or 'left incline'. It says 'right about turn'. That is not guidance, but the reverse of it.

> There is no doubt that the Secretary of State acted with the best of motives in formulating this new policy – and it may well have been the right policy – but I am afraid that he went about it in the wrong way. Seeing that the old policy had been laid down in an Act of Parliament, then, in order to reverse it, he should have introduced an amending Bill and got Parliament to sanction it. He was advised, apparently, that it was not necessary, and that it could be done by 'guidance'. That, I think, was a mistake.

The court therefore granted a declaration that the guidance was *ultra vires* (*Laker Airways Ltd v Department of Trade* (1977)).

The tension between rules and discretion has not been solved by judicial intervention, and it is impossible to say at any point whether a minister has violated the rules of natural justice by too rigidly adhering to a previous policy position and closing his or her mind to the individual merits of an application, or whether he or she has acted illegally by disregarding the policy behind an Act. One of the most important judicial dicta on this problem can be found in an early case involving a challenge by a company against a policy adopted by the Board of Trade (the predecessor to the DTI). Here, the Board was empowered by statute to make grants towards companies' capital expenditure on plant and machinery. No statutory criteria were provided. The Board adopted a policy of not making a grant in respect of machinery costing less than £25, and refused British Oxygen's application on these grounds. On review, the House of Lords upheld the Board's policy:

> The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears' to an application. There is no great difference between a policy and a rule ... a large authority may have had to deal already with many similar applications and then it will almost certainly have evolved a policy so precise that it could be called a rule. There is no objection to that, provided it is always ready to listen to a new argument [*British Oxygen v Board of Trade* (1971)].

8.3.4 Soft law in the European Community

It is enlightening to note the use made of 'soft law' by the institutions of the European Community, mainly the Commission. Community institutions are authorised by Art 249 of the Treaty to pass various forms of delegated legislation in areas covered by Community competence (see above, 7.6) including regulations and directives. Two other types of delegated legislation, however, are specifically stated by the Treaty to be non-binding: recommendations and opinions. In addition, decisions and agreements adopted by the representatives of Member States meeting in Council (see above, 7.5.3), as well as declarations, resolutions, communiqués and other positions taken by the institutions of the Community, all lack binding force. An example of this was the declaration on human rights adopted by the institutions on 5 April 1977, in which they stated that the exercise of their

powers and in the pursuance of the aims of the European Community, they would respect and continue to respect those rights (OJ C103, 27.4.77, p 1). Although this had no force in law, in 1979, the European Court of Justice was invited to consider that declaration in a reference from a German court asking whether a Council regulation prohibiting the planting of new vines could be in breach of the applicant's fundamental right to property under the German Constitution (Case C-44/79 *Hauer v Land Rheinland-Pfalz* (1979)). The Court referred to the declaration, and ruled that human rights such as those protected by the German Constitution formed part of the general principles of European Community law. Although the German wine farmer in question failed on the merits, this case demonstrates that non-binding declarations, amongst others, are capable of having legal effect in the Community. In a later case, Case C-322/88 *Salvatore Grimaldi v Fonds des Maladies Professionelles* (1989), the Court observed that:

> ... such measures in question [recommendations] cannot be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them.

Whilst it is open to the Community institutions to pass regulations or directives or decisions on any matter within an area of treaty competence, it is often more advantageous to opt for non-binding recommendations or resolutions. This is because, by extending such a piece of quasi-legislation to an area which is not obviously within Community competence, the Community thus acquires exclusive competence in that area for possible future legislative activity. This was confirmed in a decision of the European Court of Justice concerning the European Road Traffic Agreement, a dispute about Community versus Member State competence arising out of a non-binding Council resolution (Case C-122/94 *Commission v Council* (1996)). Here, the Court said that exclusive competence of the Community was established 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, lays down common rules whatever form these may take' (see Klabbers, J, 'Informal instruments before the European Court of Justice' (1994) 31 CML Rev 997, for a more detailed discussion of the use of informal instruments for extending Community competence).

Soft law at a Community level has other uses: because it is non-binding, it is less prone to legal attack. It should be noted that the Member States can always challenge the legality of a Community *legislative* measure through the annulment procedure (see above, 18.3.1). However, the European Court of Justice has no power to scrutinise the legality of a non-binding measure. Baldwin notes:

> Judicial review has limited potential to legitimate secondary and tertiary legislation. This is first, because the Court focuses on the legality rather than the merits or substance of the rules; second, because its interventions are

> sporadic and dependent on the actions of other institutions, Member States or individuals (who are subject to restrictions as to locus standi), and, third, because the breadth of legal discretion given to the Community institutions by the Treaty limits their liability to judicial review [*Rules and Government*, 1996, Oxford: Clarendon, p 282].

8.4 Accountability and control

Non-legislative rules, at whatever level they are generated, are, on their face, free of formal controls. Other forms of control need to be invented. The problems of redress that arise out of this system are discussed more fully in Part D of this book, but it is worth noting here that administrative law in this country has not yet caught up with these constitutional developments. As Rodney Austin observes:

> ... for the courts to intervene there must be some legally enforceable basis for or backing to the powers of the authority under review. Where power is conferred and limits are imposed by non legal means, the courts lack the necessary peg upon which to hang the exercise of their powers ['Administrative law's reaction to the changing concepts of public service', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone, p 28).

Other forms of control, such as parliamentary accountability, are also lacking in the informal development and application of soft law. We have seen, for example, that the work carried out by executive agencies to implement government legislation is at several removes from the relevant government department (see above, 8.2.1). Therefore, the traditional model of ministerial accountability which applies to government departments, where the minister is answerable to Parliament for the failings of the civil servants working at a departmental level – is not appropriate for executive agencies (see above, 6.8). The division between policy – for which the minister is answerable to Parliament – and operational matters – for which the chief executive of the executive agency is responsible – has led to the practice of MPs writing about their constituents' concerns to the chief executive rather than the minister, and the answers are then published in *Hansard*. However, the division between what is a policy matter, and what is operational, is never very clear, as was demonstrated in the controversy following the mass break out from Parkhurst Prison in January 1995. The Director General (that is, chief executive), of the Prison Services Agency, Derek Lewis, was forced to resign, although he refused to take responsibility for the security lapses and escapes, saying that these were the direct consequence of the then Home Office Minister's policy of allocating resources away from prison staffing levels and security measures. It was also pointed out that constant interventions by the Home Secretary in the day to day running of the prison service rather undermined his argument that he was responsible only for policy formulation (for a fuller account of this

episode, see Barker, A, 'Political responsibility for UK prison security: ministers escape again' (1995) Essex Papers in Politics and Government. Despite the problems of the policy/operational divide shown up by the Derek Lewis affair, the division still applies in relation to the functions of executive agencies.

The growth of regulatory agencies also presents problems of control. One of the drawbacks of the system of regulation discussed above, 8.2.2, is known as 'agency capture'. This means that, from the moment they are set up, they come under pressure from the industry they regulate to protect the interests of that industry rather than the interests of the public. Another problem is that the aims of some of the regulatory agencies may come into conflict with others. The Environment Agency, for example, has been set up to monitor and enforce compliance with environmental standards by industry, across the board. The level of effluent in the nation's waterways, for example, is a central concern of the Agency. Ofwat, on the other hand, is dedicated to monitoring competition and ensuring fair prices for consumers of water. Dedicating expenditure to the cleaning up of rivers drives up water prices. The Environment Agency and Ofwat, therefore, often find their aims in conflict.

The available controls over the activities of these regulatory agencies and redress for things that go wrong as a result of their decisions are few and far between. The National Audit Office reviews their efficiency annually, but does not question the merits of their policies. The Ombudsman may look into individual disputes concerning the agencies' activities, but his investigation is subject to severe constraints. Judicial review of their decisions is technically possible. In *R v Director of Passenger Rail Franchising ex p Save Our Railways* (1995), for example, a consumer's group managed to get a declaration that DPRF's decisions specifying minimum passenger service levels for prospective rail franchises were unlawful, since they departed too radically from existing service levels. But, in general, the courts are reluctant to intervene, except where procedural irregularities can be established. There is, significantly, no statutory duty on the Directors General to give reasons for their regulatory decisions, or, indeed, to publish the information on which they have based those decisions. To correct this deficit in accountability and justiciability, proposals have been made to reform the system of regulation in this country by bringing it under the umbrella of parliamentary scrutiny; for example, by establishing a Select Committee on Regulated Industries, and to introduce a common code of practice for all the regulators (see the summary of these proposals in Harlow, C and Rawlings, R, *Law and Administration*, 2nd edn, 1997, London: Butterworths, pp 337–39).

The spread of self-regulation (see above, 8.2.3) has also presented certain control problems, specifically by the courts. Not only is there a question over the justiciability of their decisions, but there are difficulties with the amenability of these quasi-private bodies to judicial review in the first place. Some of these difficulties were dealt with in the leading decision of *R v Panel of Take-overs and Mergers ex p Datafin* (1987) (see below, 17.6.2). The present

government has proposed a certain cutting back in self-regulation, particularly in the City, where it is intended to invest the Securities and Investments Board, a regulatory body based on statute, with more powers. This approach has been illustrated, too, in the proposals to set up a statutory agency to monitor food standards (proposed in 1997).

Advisory bodies, like executive agencies, also lack clear control mechanisms. Although ministers exercise some control over NDPBs, they are not accountable in Parliament for their activities, and it has been observed (notably in the First Report of the Committee on Standards in Public Life) that appointment to these bodies was not made on merit, but rather on party political grounds. Since the decisions and advice of these non-departmental bodies often carry considerable weight in the formulation of government policy and the introduction of legislation, there are concerns about the lack of transparency in their operations and their independence from the party in power.

The administrative activities of local authorities are, unlike all the preceding bodies, subject to several forms of effective control. Judicial control on the exercise of discretion by local authorities is a central area of judicial review, and will be explored more fully in Part D of this book. The restrictions imposed by the courts on local authorities' powers to govern, however, pale into insignificance when compared with the intensification of central control through restrictions on capital expenditure through council tax-capping or the withholding of central government grants and sanctions for loans. The system of audit of local government expenditure is also regulated by central government. The Audit Commission, set up under the Local Government Finance Act 1982, has the power to identify and to take legal action to prevent potentially wasteful expenditure by local authorities; whilst any resulting judgment will have the force of 'hard' law, the Commission also generates 'soft law' in the form of guidance issued to local authorities on management in pursuit of economic efficiency, public interest reports on the progress of local authorities, and the development of performance indicators for local government, which serve as the basis for league tables of performance. When the accounts of the local authority are up for audit and it appears to the auditor that an item of expenditure is unlawful, he may apply to the court for a declaration of unlawfulness and an order that the person who authorised that expenditure repay it (Pt III of the Local Government Finance Act 1982). It can be seen, then, that the system of audit and its consequences are as powerful a measure of legal control as judicial review.

Finally, a word must be said about control and accountability of the soft law generated by the European Community institutions, notably the Commission (see above, 7.5.1). In the wake of the mass resignation of the entire Commission in March 1999, following a damning report on corruption inside the Brussels executive, greater emphasis will have to be placed on transparency and justiciability of many of the Commission's decision making

powers. Although the allegations in the report of five independent 'wise persons' focused on mismanagement and nepotism, one of the most worrying features of the Commission identified by the report was the loss of control by the authorities over the administration they were supposed to be running. Part of the explanation for this loss of control can be laid at the door of what one critic called 'the nether world of comitology', (see above, 8.2.5). The chief criticism of comitology is that it exacerbates the democratic deficit in Community law making (see above, 7.4.2). The civil servants who sit on these committees are neither elected nor accountable, either to the European Parliament or to Member States, and yet their decisions, particularly on technical standard-setting, have a considerable influence in Community law. Comitology raises similar problems of accountability and transparency to those presented by the role of advisory committees in the formulation of government policy (see above, 8.2.4.

8.5 The advantages and disadvantages of administrative rules

The main focus of this chapter has been on forms of regulation that do not have the force of law. There are arguments against, and arguments in favour of these informal rules. The *disadvantage* of administrative rules is that they are inconsistent. They sometimes have legal effects, although not always. This means that individuals can never be sure whether to base their future conduct on them. And, when things go wrong, recourse to the courts is difficult, because these rules are often couched in non-justiciable language, if indeed they are published at all. Apart from the problems of redress that they present, there are arguments that the presence of administrative rules, or 'soft law', often has the effect of distorting the constitutional balance. It is said that it may influence judges to interpret statutes in accordance with the executive's intentions, not Parliament's. If ministers are aware that the details of any proposed policy are likely to be controversial, they may avoid parliamentary debate by leaving these details to be implemented by non-statutory codes and rules. And, finally, it is often the case that types of soft law, particularly guidance notes and codes, may emerge as a result of disproportionate lobby group pressure, without the balancing effect of parliamentary scrutiny.

In favour of soft law, it is argued that its flexibility is indispensable to modern administration. Statements of policy, performance targets and non-binding codes may be set aside in the interests of justice for individual cases; but the need to draw up these forms of soft law enhances accountability and transparency by informing the public of the way that official discretion is likely to be exercised, so that they can plan their conduct accordingly. Bureaucrats, in other words, are encouraged by these rules to be consistent, without being rigidly inflexible.

As we can see, the range of disadvantages is rather wider than the list of advantages. This may be because there is no constitutional place for informal rule making, and yet it has become one of the most prevalent parts of British and European Community constitutional practice.

GOVERNMENT AND ADMINISTRATION

A range of administrative bodies formulate and implement policy on a day to day level. This administrative activity affects our lives not only in the form of binding laws and regulations, but also by means of 'soft law'; rules, policy decisions, declarations, positions and codes that are not legally binding, but are persuasive and influential on administrative behaviour.

Function of soft law

(a) To guide official interpretation of policy.
(b) To regulate procedure.
(c) To set up voluntary standards of conduct.
(d) To impose managerial efficiency standards.

Types of administrative bodies

Administrative bodies that generate 'soft law' include the following:

Executive agencies

'Next Steps' executive agencies, service providers set up under framework agreements, are led by chief executives who have broad discretion as to the implementation of policy. These agencies have to meet performance targets imposed by the Citizen's Charter, but these are not legally binding.

Regulatory bodies

These monitor the activities of recently privatised industries such as British Rail. They have a broad mandate to regulate these industries by non-legislative means.

Self-regulatory organisations

A network of self-regulating organisations monitor the compliance by businesses and professions with codes of practice. Some of these agencies are judicially reviewable; others are not.

Advisory bodies

These bodies are set up to advise the government or to act in the interests of certain sectors of society. Their decisions are non-binding, but influential.

Local authorities

While the functions of local authorities have been greatly reduced through processes such as rate-capping, compulsory competitive tendering and the transfer of other important responsibilities, such as housing, to the private sector, there are important remaining functions on which local government makes rules and formulates policies: the allocation of council houses, setting the rents and determining tenancy conditions; production of development plans; a range of other local matters, such as the enforcement of compliance with hygiene and sanitary standards, traffic flow and parking and the provision of care for children and the elderly. Local authorities also share with the Environment Agency certain duties and powers for environmental protection that derive from Community directives. In addition to these specific powers, local authorities may, under s 235 of the Local Government Act 1972, make bylaws for the 'good rule and government of the whole or any part of the district or borough and for the prevention and suppression of nuisances therein'.

Types of quasi-legislation

(a) Policy statements by ministers that do not evolve into legislation.
(b) 'Low level' policy adopted by government departments and executive agencies.
(c) Policies or schemes operated by non-statutory bodies, such as the Criminal Injuries Compensation Board.
(d) Ministerial guidance to decision making bodies.
(e) Codes of Practice, such as the PACE rules.
(f) Evidential codes, such as the Highway Code.
(g) Voluntary codes of practice, such as the City code on takeovers and mergers.

Public audit

Central government, local authorities and a range of other administrative bodies are now subject to 'value for money' audits, carried out by the Public Accounts Committee, the National Audit Office and the Audit Commission. One of the functions of this type of audit is to monitor the progress of two of

the government's main financial programmes, the Next Steps programme and the Private Finance Initiative.

Soft law in the European Community

The institutions of the European Community act both in a legislative capacity and as administrators. As legislators, the Council and Commission produce non-binding legislation in the form of recommendations and opinions. In addition, decisions, agreements, declarations, resolutions, communiqués and common positions emanate from the Community institutions, which have no legal force, but may have legal effect because, for example, they give rise to the doctrine of legitimate expectation. The European Court of Justice has no jurisdiction to scrutinise the legality of these measures.

As an administrator, the Commission has the power under the EC Treaty to formulate policy and implement subordinate legislation. Such policy, particularly in the areas of agriculture, the customs tariff and technical standards, is subject to scrutiny and veto by management committees. This process is called 'comitology'. In addition to its policy forming role, the Commission also polices the implementation of Community law by Member States and it has the power under the EC Treaty to take infringement actions for breach of Community law, as well as enforcing the abolition of State aids and taking action against individuals who are found to be in breach of Community competition rules.

PART C

RESOLVING DISPUTES