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Introduction

1.1 Introduction

This book is about the judicial review of non-statutory executive powers – the jurisdiction asserted by judges to supervise executive officials (and, sometimes, other people) when they act without reliance on a statutory authorisation. It is the first book to focus on non-statutory executive powers and judicial review in English law.[1] It is also the first book to look at non-statutory executive powers in the first instance and draw conclusions about the law of judicial review *generally* from that perspective. These conclusions relate both to the doctrinal content and to the conceptual and normative basis of the public law supervisory jurisdiction.

The past decades have seen significant changes in the modalities of administration, including the privatisation and 'contracting out' of governmental services and non-statutory executive action in response to financial crises, the 'war on terror', and shifting geopolitical relations. They have also seen developments in the law of judicial review: the judicial practice of reviewing the actions of executive officials taken without reliance on a statutory authorisation is now clearly established. Provided due account is taken of their constitutional systems – particularly things like federation, written constitutions, entrenched rights, and statutory administrative tribunal regimes – similar observations could be made for the Anglo-Commonwealth jurisdictions (i.e., Canada, Australia, and New Zealand), to which I shall also refer to throughout this book.[2]

[1] See also Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press 2020).

[2] See Amanda Sapienza, 'Judicial Review of Administrative Action: Australia and the United Kingdom Reunited?' (2018) 43(2) *University of Western Australia Law Review* 67; Jennifer A. Klinck, 'Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada' (2017) 54(4) *Alberta Law Review* 998; David Mullan, 'Judicial Review of the Executive – Principled Exasperation' (2010) 8(2) *New Zealand Journal of Public and International Law* 145; Chris Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31(3) *Federal Law Review* 551.

The powers associated with the Royal Prerogative of the British Crown were traditionally immune from the supervisory jurisdiction. Since at least the time of the *Case of Proclamations*,[3] however, the existence and scope of a prerogative power has been recognised as a question of common law that lies prima facie within the province of the judges, even if the manner of its exercise was not. Over the second half of the twentieth century, the immunity of officials exercising the Crown's prerogative powers was diluted. The watershed moment is generally identified with *Council of Civil Service Unions* v. *Minister for the Civil Service*[4] in the mid-1980s. By the mid-1990s, judicial review could be said to be 'as applicable to decisions taken under prerogative powers as to decisions taken under statutory powers'.[5] This trajectory has continued. The House of Lords held in the late 2000s, in *R (Bancoult)* v. *Foreign Secretary*,[6] that primary legislation for a British Overseas Territory made under the Royal Prerogative was subject to the 'ordinary principles' of judicial review 'in the same way as any other executive action'.[7] A spate of cases in the late 2010s, including *R (Miller)* v. *Brexit Secretary*,[8] and *R (Miller)* v. *Prime Minister*,[9] marked a seismic shift in the review of the prerogative powers, cementing their reviewability and possibly replacing the traditional attitude of judicial deference with one of judicial scrutiny.[10]

It is thus absolutely clear *that* non-statutory executive powers are judicially reviewable, and even tolerably clear *how* they are reviewable. There are, of course, disagreements about the grounds of judicial review and the standards applied to a given ground. Non-statutory executive powers are often deployed in contexts in which judges are properly reticent to second-guess executive discretion. The reviewing court determines the intensity of judicial review through the combination of grounds and standards, as well as by reference to the concepts of

[3] (1611) 12 Co Rep 74.
[4] [1985] AC 374.
[5] *R (Fire Brigades Union)* v. *Home Secretary* [1995] 2 AC 513, 553 (Lord Browne-Wilkinson).
[6] [2009] 1 AC 453.
[7] *R (Bancoult)* v. *Foreign Secretary (No. 2)* [2009] 1 AC 453, 483 (Lord Hoffmann).
[8] [2017] UKSC 5.
[9] [2019] UKSC 41.
[10] Thomas Poole, 'The Strange Death of the Prerogative in England' (2019) 43(2) *University of Western Australia Law Review* 43; *Belhaj and Rahmatullah* v. *Straw* [2017] UKSC 3; *Al-Waheed and Serdar Mohamed* v. *Ministry of Defence* [2017] UKSC 2.

justiciability and deference.[11] But the direction of travel is clear, and it is towards the prima facie amenability of official action to judicial review. The difficulty is rather to articulate *why* this is the case.[12]

1.2 A Gap between Theory and Practice

Debates about amenability, grounds, and standards are hampered in the context of non-statutory powers by confusion surrounding the nature of the powers themselves, their source, and the justification of judicial review more generally. A major theme in this book is the idea of a gap between judicial practice and legal theory that has widened over recent decades. This has potentially enormous implications: the current doctrinal position of the law on the review of non-statutory executive powers suggests that the conventional theories about the law of judicial generally are wrong.

Judicial review is, at core, a process in which official repositories of power are kept within the ambit of the powers reposed in them. Determining the scope of an office's powers is relatively straightforward where they are granted in a written instrument; the court looks to the words of the statutory text, in the relevant context, and determines the scope of the authority granted expressly and by implication. How the scope of lawful authority is determined in the absence of a statutory text is a more complex exercise that requires theoretical groundwork. In my account, the cornerstone of that groundwork is the concept of *office*. As Janet McLean has argued, constitutional law has marginalised the figure of the official,[13] and the 'theoretical turn' taken by British administrative law scholarship since the 1990s has largely drawn on a body of theory unconcerned with the question how individuals act in a corporate capacity for the political community. That is a fundamental problem, because the supervisory jurisdiction is concerned precisely with the official mode of action.

[11] See Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press 2018); Margit Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58(3) *American Journal of Comparative Law* 583.

[12] See Sir Philip Sales, 'Crown Powers, the Royal Prerogative and Fundamental Rights' in Hannah Wilberg and Mark Elliott (eds.), *The Scope and Intensity of Substantive Review* (Hart 2015), 378.

[13] Janet McLean, 'The Authority of the Administration' in Elizabeth Fisher, Jeff King, and Alison Young (eds.), *The Foundations and Future of Public Law* (Oxford University Press 2020), 46.

Nowhere is the gap between theory and practice wider than in the context of non-statutory executive powers that are *not* part of the Royal Prerogative. Problems start with disagreement on the nature of non-statutory executive powers themselves. Without begging the question, it is clear that, besides powers classical 'prerogative powers' (such as making treaties), executive officials engage in a wide range of actions without reliance on any obvious statutory basis. These actions include leasing premises, employing staff, making *ex gratia* payments, collecting and disseminating information, and even keeping lists. Many of these actions are mundane, but even the mundane ones can assume critical importance in the right context – imagine reading one's name on a list of suspected terrorists. These powers are called by several names. One influential account has called them a 'third source' of governmental authority, that is, next to statutory powers and prerogative powers.[14] Without adopting the main ideas typically associated with that label, I will use the term because it is pithier than 'non-prerogative non-statutory executive powers'. As we shall see, it is a bone of contention whether third source powers are 'legal powers' at all, where they come from, and why it is the case that officials (high and low) wield them.

The standard explanations of judicial review can broadly be placed into two 'camps'. Both are incapable of explaining the supervisory jurisdiction over non-statutory executive powers satisfactorily. So-called 'ultra vires theories' ground the supervisory jurisdiction in legislative intention. This approach is clearly ill adapted to explain the reviewability of non-statutory executive powers, and as such non-statutory executive powers falsify their claim to being a general theory of judicial review.[15] More disappointing is the failure of the so-called 'common law theories' to explain the supervisory jurisdiction beyond statute. These theories approach non-statutory executive powers on their home turf, but often overlook the crucial questions of empowerment and action. They tend to approach judicial review as a set of common law constraints on governmental 'power' as an amorphous idea, distinct from the set of legal 'powers' implied by the concept of vires, and so ignore the role of the common law in *constituting* offices endowed with specific, *and therefore limited*, powers. Something of value is missed if we abandon the first step

[14] See Bruce V. Harris, 'The "Third Source" of Authority for Government Action' (1992) 108 *Law Quarterly Review* 626.

[15] Janet McLean, 'The Authority of the Administration' in Elizabeth Fisher, Jeff King, and Alison Young (eds.), *The Foundations and Future of Public Law* (Oxford University Press 2020), 46.

of identifying the rules that repose power in executive officials – whether those rules are found in statute or the common law – before turning to the rules that govern the conduct of officials when exercising the powers reposed in them.

1.2.1 *Winding Back the Clock*

The account of judicial review presented in this book is critical of developments in English public law in the twentieth century. These developments were generally progressive responses to the growth of the welfare state and the encroachment of governmental power into daily life. As Mark Freedland has observed, the traditional problem for English lawyers was less the demarcation of public law and private law than whether a distinct 'public law' existed.[16] Efforts culminated in the 1980s, particularly with the case *O'Reilly* v. *Mackman*,[17] to draw a bright line between judicial review and private law actions, thus relegating older modes of official accountability, which relied on private law, to the past. However, this achievement occurred on the cusp of an epochal shift in the modalities of administration, particularly the rise of outsourcing and privatisation of public functions. Thus, the 'new' public law got off on the wrong foot, and this fact has hampered our ability to understand the changing landscape.

If we look at the ultra vires debate, an 'ironical changing of places' occurred – politically progressive judges and academics had championed the distinctiveness of public law, but their success insulated hybrid modalities of governance from judicial supervision. In response, they came instead to emphasise the continuity between administrative law and the common law as a whole, thereby committing themselves to the 'inherently conservative', casuistic doctrine of the common law. The more politically conservative ultra vires camp, on the other hand, eventually committed itself to the distinctiveness of public law – despite the Diceyan allure of 'ordinary laws' and despite the fact that ultra vires is actually a common law doctrine that governs corporate directors and trustees as well as public officials.[18]

[16] Mark Freedland, 'The Evolving Approach to Public/Private Distinction in English Law' in Mark Freedland and Auby Jean-Bernard (eds.), *The Public Law/Private Law Divide: Une entente assez cordiale?* (Hart 2005), 97.
[17] [1983] 2 AC 237.
[18] Mark Freedland, 'The Evolving Approach to Public/Private Distinction in English Law' in Mark Freedland and Auby Jean-Bernard (eds.), *The Public Law/Private Law Divide: Une*

This book is a plea to consider these developments afresh, with the benefit of hindsight. Counter-intuitively, perhaps, it pleads for the reinstatement of some doctrinal fixtures that prevailing opinion would suggest we are better off without – for example, the traditional doctrine of jurisdictional error, and a more rigid conceptual approach to 'voidness' and 'voidability'.

1.2.2 The Purpose of This Book

This book has three closely related aims. First, it aims to provide a definitive conceptual and terminological clean-up, such that we can debate questions of amenability, grounds, and standards of review in the context of non-statutory executive powers without talking at cross purposes. This involves, first and foremost, deciding what the term 'non-statutory executive powers' means, and describing the relationship between the 'Royal Prerogative' and the 'third source'. Secondly, it aims to provide an explanation of how the ordinary mechanisms of judicial review apply to non-statutory executive powers of both types. Finally, it aims to explain the conceptual basis of the supervisory jurisdiction and to ground that jurisdiction in a plausible normative theory of the rule of law.

In pursuing these aims, I set out a conceptual framework that is carried by the following features: (i) a *concept of office* as an impersonal, institutionalised role separate to its incumbent from time to time, which is the repository of powers amenable to judicial review; (ii) an account of the *Crown* as a corporation sole, which is a particular type of office, in which common law and statutory powers repose; (iii) *rules of competence* that confer those powers and set the scope of the office's vires in the narrow sense; (iv) *rules of conduct* which impose restrictions on the manner in which, and purposes for which, an official uses her powers *virtute officii*; and (v) a *logic of official action*, by which we can understand how the actions of a (human) individual are attributed to an office – and thence to the Crown that sits at the centre of the British constitutional tradition.

At the broadest level, both prerogative-type and third source-type powers (as I shall call them) comprise 'powers' in the sense of vires. These powers are reposed in the Crown and its officials by rules of competence that are unwritten, but just as capable of judicial

entente assez cordiale? (Hart 2005), 106, citing Sir Stephen Sedley, 'Public Power and Private Power' in Christopher F. Forsyth (ed.), *Judicial Review and the Constitution* (Hart 2000), 296; see also C. F. Forsyth, 'Beyond *O'Reilly v Mackman*: The Foundations and Nature of Procedural Exclusivity' (1985) 44(3) *Cambridge Law Journal* 415.

determination as their statutory counterparts. This should not be a challenging notion. The common law always imposes rules of conduct that govern the exercise of powers, whether those powers are conferred by statutory or non-statutory rules of competence. Combined with a logic of action, acting in excess of a rule of competence produces a nullity, a 'non-action', whereas breaches of a rule of conduct yield a prima facie valid but voidable (or perfectible) official action. This raises difficult questions of attribution and liability, and it is necessary to develop the conceptual framework of official action that embraces official wrongdoing as such. For largely historical reasons, not least because the authority claims of government officials have been understood through very different lenses over the centuries, there is insufficient clarity around the personal *versus* official accountability of officials before the law.[19]

I will argue that there is no reason to identify different conceptual bases for the supervisory jurisdiction over statutory and non-statutory executive powers, let alone for different categories of non-statutory executive powers. Both statute and the common law are *always* relevant to determine the limits of an office's vires, understood as a product of rules of competence (statutory and/or common law) with inherent limits and rules of conduct (often statutory and always common law). While legislative intention is clearly important, *where it exists*, there is no reason to impute it counterfactually to explain the common law powers of an institution (i.e., the court) that predates the modern institution of Parliament. It is the legitimate role of judges, within the British constitutional tradition, to supervise the limits of valid official action. The normative justification for this is a concept of the *rule of law* as the *rule of officials acting lawfully*. The repository of a power is always subject to the inherent limits of that power, and that power it always conjoined with duties. It is the judges' unique and inalienable constitutional role to

[19] Janet McLean describes four broad periods of development. In the seventeenth century, emphasis was on proprietary tenure of office as a bulwark of independence against royal power. In the eighteenth century, criminal law was used to control officials' incentives towards self-service. In the nineteenth century, governmental authority moved from an office-based justification to one based on the implicit rationality of bureaucratic organisation. In the twentieth century, the narrative shifted to democracy and the legislative intent (a.k.a. ultra vires) theory of judicial review. See Janet McLean, 'The Authority of the Administration' in Elizabeth Fisher, Jeff King, and Alison Young (eds.), *The Foundations and Future of Public Law* (Oxford University Press 2020), 55 discussing *Woodgate* v. *Knatchbull* (1787) 2 TR 155.

determine those limits and to determine how duty conditions the exercise of power.

Compared to the existing literature on the English law of judicial review, this represents a novel departure point in at least two respects. The first has already been noticed, namely the decision to look at the supervisory jurisdiction over non-statutory powers as the primary case, and to draw conclusions about the supervisory jurisdiction generally from that. The second is to focus on the role of officials in administration and the concept of office as the central concept in public law. As judicial review is concerned with official action, the logic of action in this mode provides the conceptual footings of the supervisory jurisdiction on which we can construct a rational doctrinal structure.

The approach that emerges implies a sustained critique of the so-called ultra vires theories, with a particular focus on the latest and most sophisticated such theory presented in the early 2000s by Mark Elliot.[20] However, while I present a kind of 'common law theory' of judicial review, my approach also implies a critique of leading common law theories, in particular their reliance on outcome-driven judicial discretion in the development of the supervisory jurisdiction. If successful, my critique will reignite interest in the conceptual basis of judicial review and break the ground for a 'third way' that circumvents the impasse reached in the historical ultra vires debate. At the least, I believe it is well-founded enough to warrant the reappropriation of the language of ultra vires for my theory of judicial review, which is based on the logic of ultra vires and is capable of application across the whole spectrum of statutory and non-statutory executive powers. This would lead to the rebranding of the ultra vires theories as 'legislative intent theories' of judicial review.[21] If accepted, my approach would also lead to the definitive rejection of the 'third source' as it is understood by the majority of its proponents.

1.2.3 The Scope and Focus of This Book

This book addresses two clusters of questions. The first cluster sits squarely in 'administrative law' proper: What non-statutory executive powers repose in the Crown and its officials? What is their source? What are their extent and limits? How are they supervised by the judicial

[20] See generally Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2000).
[21] As suggested by Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press 2018), 58.

branch? Are all the same doctrines of judicial review applicable, and what special considerations apply in this context? Why is this the case?

These questions raise a cluster of preliminary questions in constitutional law, constitutional theory, and legal theory. As we will see, the cases and scholarly literature on the 'third source', for example, force us to ask whether Ministers and Secretaries of State can make contracts on behalf of the Crown because (i) the Crown is a natural person; (ii) the Crown is a corporation (a) sole or (b) aggregate with the same, open-ended capacities as a natural person; or (iii) the Crown is a placeholder for the organised 'polity' or 'state' that has some inherent capacity to perform acts-in-the-law (like making contracts). There are, unfortunately, no pre-packed answers to these questions. They raise technical issues of deontic logic and of the logic of action. These preliminary questions cannot be avoided – if we attempt to do so we turn in circles. The literature is full of basic errors on precisely these points, many of them born of an understandable but fatal desire to avoid 'academic' and 'technical' problems. In writing this book, I have made the intentional decision to confront them squarely. Certain chapters are therefore quite technical. However, my theoretical investigations always serve some practical purpose, either by shedding light on a specific doctrinal question (usually by identifying the way to *frame* it properly), by connecting administrative law with its constitutional context, or by identifying a fundamental error in the cases and commentary.

My analysis is, in the first instance, of the law of England and Wales. This is for the rather accidental reason that I undertook the research for this book in England, but it is also for a deeper one. English law is the root from which the other branches of the Commonwealth legal family have grown. In my view, there is great value in reflecting on the English position from a 'colonial' perspective – in my view, that perspective is often more interesting, particularly when it comes to working out the juristic nature of the Crown, for the simple reason that federation has forced Australian and Canadian scholars and judges to engage with problems like suits between states or between a state and the federal centre. Such questions are still fudged in the United Kingdom through insistence on a unitary state under a unitary Crown. There seems to be an irresistible, if glacial, shift regarding the appropriateness of discussing 'federalism' in the United Kingdom; however, that is not the focus of this book.[22]

[22] See, e.g., Martin Laffin and Alys Thomas, 'The United Kingdom: Federalism in Denial?' (1999) 29(3) *Publius: The Journal of Federalism* 89; Michael Keating, 'Why No Federalism

I have, wherever possible, incorporated both English and Commonwealth perspectives. However, the main focus remains on English law, for the simple reason that a comprehensive survey of Anglo-Commonwealth administrative law is beyond the scope of this book. There are too many jurisdictional differences to account for without detracting from my core focus. My reference to authorities from Australia, Canada, and New Zealand is limited to those that illustrate a difference between jurisdictions that is important to my argument or, just as often, to those that are particularly illustrative of a general point. There are a number of authorities in the latter category, especially in the opening chapters.

My argument should not be uninteresting from a Commonwealth perspective, however. There is great value in adopting an Anglo-Commonwealth, rather than an Anglocentric, perspective.[23] That perspective also suggests that we have, at times, perhaps made too much of the obvious divergences that exist. Australian constitutional jurisprudence since the 1980s, for example, seems to be characterised by a project of establishing the independence of Australian constitutional law. This is as it should be, but there is a strand of Australian exceptionalism that doth protest too much. I have always found the shared assumptions and commonalities across the jurisdictions just as interesting than the differences between them.

Given the substantive features of its constitutional system and historical separation from the United Kingdom, the New Zealand branch perhaps lies closest to the English root. But the Australian and Canadian positions are also derivative. The Australian Constitution Act 1900 (Imp) section 61, for example, provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative. This has been interpreted by modern Australian judges to mean that executive power flows from the federal compact in the Constitution, and should not be seen as a species of the Royal Prerogative.[24] But, as D. G. Morgan observed in the Irish context, provisions like this are 'barren ground for any analytical

in the United Kingdom?' in Alain G. Gagnon, Soeren Keil, and Sean Mueller (eds.), *Understanding Federalism and Federation* (Routledge 2016), Ch 11.

[23] See also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press 2013); Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press 2018).

[24] See *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J); *Ruddock* v. *Vardarlis* (2001) 110 FCR 491, 540 (French J).