

## 2.1 SOURCES OF MINISTERIAL POWER

### UK Primary legislation

#### Powers in primary legislation to make secondary legislation

#### The common law

#### Prerogative powers

### UK Primary legislation

The starting point is invariably the sovereignty of the UK Parliament. Parliament can, classically, make or unmake any law. The academic literature is rich (for an up to date critical survey start with Public law for Everyone, the website of Mark Elliott: [here](#)).

This brings important practical advantages. It can supersede all that went before. It is generally not subject to judicial review – though bear in mind key issues about reviewability in ECHR and EU law terms. The GLD Human Rights Centre of Excellence has produced a note on reviewability of legislation, including declarations of incompatibility: [here](#). It can trump the primary legislation made by devolved legislatures (though see the LION pages on devolution – [here](#) - and **[Module 1]** for more information).

Because it is the highest form of domestic law, UK primary legislation can change bring certainty and clarity unlike any other. There are as many, if not more, policy reason for making it: from delivering manifesto commitments, to fulfilling international obligations, to symbolism. But primary legislation is often very laborious and Parliamentary time is very limited.

#### **Essential awareness: guidance on making primary legislation**

You will often need to refer to the practical bible on primary legislative procedure, the Guide to Making Legislation. You do not need to read it now, but it is a critical and invaluable starting point, both to how to prepare primary legislation and Parliamentary practice. Bill lawyers must be familiar with it. You can find it on GOV.UK: [here](#). Further guidance is available on LION under the primary legislation working group pages: [here](#).

When Ministers are keen to get things down, a key practical concern for us is what the other options may be. In practice, the largest volume of legislation in practice is made under delegated powers. This practical importance is recognised in the emphasis which follows.

## **Powers conferred by primary legislation**

In this section we will consider:

- *What is secondary legislation?*
- *Where do I find powers (vires) to make it?*
- *What do vires enable Ministers to do?*
- *What are the restrictions on using vires?*

### **What is secondary legislation?**

The vast majority of legislation is enacted as secondary legislation made under powers delegated by Parliament (commonly known as “vires”). This is known as “secondary” or “delegated” legislation. “Subordinate legislation” is another general description, with an accompanying definition in the Interpretation Act 1978. There are important points of distinction between secondary and primary legislation.

(a) Unlike Bills, secondary legislation cannot be amended in Parliament. It is presented to Parliament on a take it or leave it basis.

(b) In terms of that “take it or leave it basis”, options for Parliament are limited, and depend on the nature of the Parliamentary process attaching to the power in question. Secondary legislation is usually made by Statutory Instrument (“S.I.s”). So called “negative” SIs can be voted (“prayed”) against in their entirety. This is usually after they have been made and come into force – a successful prayer leads to the revocation of the instrument. Parliamentary control of so called “affirmative” SIs depends on the precise form of the instrument. IN such cases, Parliament can resolve that the instrument;

- (i) not be made;
- (ii) not come into force;
- (iii) not remain in force beyond a specified time,

unless *approved* by a resolution of one or both Houses of Parliament. In other words, a *positive act* of approval is required.

(c) Not all secondary legislation is made by SI. The Act that allows the Minister to make secondary legislation will say whether the secondary legislation must be made by statutory instrument.

(d) Secondary legislation often receives less public scrutiny than Bills, meaning that in-house checks by other lawyers are particularly important.

(e) Secondary legislation is typically more detailed and technical than primary legislation. Primary legislation often deals in high-level principles that require fleshing out in secondary legislation.

### How do you find these delegated powers?

Delegated powers are contained in the primary legislation which delegates them. They will provide for a defined decision maker to make provision for the matter in question in a certain way. So for example, “The Secretary of State may by order prescribe conditions to be satisfied....”. The decision maker is not necessarily a Minister, for example, under the Civil Procedure Act 1997 section 2, “*Civil Procedure Rules are to be made by a committee known as the Civil Procedure Rule Committee*” (although Ministerial approval for the rules made by this statutory committee is also required under the terms of the 1997 Act vires).

Sometimes the vires might appear in a section in this form, “Regulations may make provision for” or similar wording. They might instead (or also) enable the Minister to do things other than make secondary legislation, e.g., to provide services, make grants, or appoint people to specified posts. Further detail such as the person or persons entitled to exercise the vires by making the Regulations may be found in the section itself or a related section, or (if there are several sets of vires in the Part, Chapter or Act) in a later section which contains rules applicable to all vires in that Part, Chapter or Act.

A statute might contain different vires to do different things, exercisable by different decision makers, and according to different procedures. In such a situation, the actual vires may be scattered through the statute but there will often be a provision (towards the final provisions of the statute, or towards the end of the relevant Part or Chapter dealing with the subject matter in question) which gives information on what procedures apply to which set of vires. For example, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 contains the following provisions at section 41 (in the final provisions of Part 1 of that Act) –

*“(4) Orders and regulations under this Part are to be made by statutory instrument.*

*(5) A statutory instrument containing an order or regulations under this Part is subject to annulment in pursuance of a resolution of either House of Parliament, unless it is an instrument described in subsection (6) or (9).”*

From this it is apparent that vires exercisable by making orders or regulations are to be exercised by making statutory instrument (this is usually but not always the case), and that the usual rule is that the negative resolution procedure is to be used (“subject to annulment in pursuance of a resolution...” is standard wording for use of the negative resolution procedure). (Section 41 also contains provision for use of the affirmative resolution procedure for certain types of regulation which you may wish to look at to see some typical wording for that procedure).

As a checklist, you will need to identify from the statute issues including:

- **Who** is entitled to exercise the power – the Secretary of State? Another body?
- Whether there are any **conditions or other limitations** on its exercise in statute (for example, the Civil Procedure Rules are made by the Civil Procedure Rule Committee, but under section 3 of the Civil Procedure Act 1997, the Lord Chancellor may “allow” or “disallow” rules. Other vires may have a condition such as a requirement to consult generally or certain persons/bodies, e.g. the Treasury.
- **What form** the statutory instrument should take (e.g. Regulations? Order in Council? Rules? Order?)

- **What Parliamentary procedure applies** – negative resolution, or affirmative resolution (and in the latter case, in what particular form).
- **What the vires entitle your Minister (or other decision maker) to do.** See next section.
- **Devolution restrictions** – make sure you know whether your Minister is able to exercise the power for other territories of the UK, or whether the power is limited to England and Wales.

If you do not know where to find the vires you need, the following might provide some helpful starting points:

- Ask a colleague experienced in the area in question. This is usually quickest!
- Identify the relevant question and subject area, and then key primary legislation in the relevant area (Halsbury's Laws or a practitioner text will be a good way in) and look at it. The index of sections may assist (for example, a section may be headed "rules and regulations under this Part", or "power to prescribe..."), and an electronic search on words such as "order", "regulation", "statutory instrument", "prescribe", or even "Secretary of State" (or "Lord Chancellor" for certain matters) will assist you to navigate your way around. Don't forget to ensure that you have identified all relevant provisions – they may be contained in more than one section and it is worth spending time trawling to ensure you have fully identified them (for example the individual power may be in one provision but details as to its exercise, e.g. relevant Parliamentary procedure, or supplementary provision, may be in another).
- Sometimes, the quickest way to identify the source of the relevant powers is to look at existing secondary legislation which you know to be relevant to the subject area in question. The preamble will cite the relevant powers under which it was made. For example, The Civil Procedure Rules 1998 are made under vires in the Civil Procedure Act 1997. By looking at the 1998 Rules, you would find that the preamble states: "*The Civil Procedure Rule Committee, having power under [section 2](#) of the Civil Procedure Act 1997 to make rules of court under section 1 of that Act, makes the following rules which may be cited as the Civil Procedure Rules 1998*".

### **What does the power enable your Minister to do?**

The use of powers to make secondary legislation and the exercise of other delegated powers is subject to control by the courts (principally by judicial review), and therefore interpreting vires correctly and legislating within the scope of the power they confer is of primary importance. The courts are particularly astute to ensure that your Minister is acting within the scope of the delegated power - so *intra vires* ("within the power") and not *ultra vires* ("beyond the power"). Acting *ultra vires* is *unlawful*. The potential scope of subordinate legislation is limited by the extent of the authority delegated by Parliament (for a recent discussion see the judgment of the Supreme Court in *R (on the application of the Public Law Project) v Lord Chancellor* [2016] UKSC 39).

You also need to bear in mind that primary legislation may not have given your Minister a power so much as a *duty*, in which case he or she will have no choice but to fulfil it. By contrast, a power confers a choice whether to exercise it. However, there remain restrictions. If the Minister has a power, he or she must consider whether to exercise it, and may not fetter or abdicate it, nor delegate it to

another decision maker unless there is power to do so. The first question is a matter of statutory interpretation – what is the scope of the power provided by the primary legislation?

This is not a course on statutory interpretation, a substantial subject in itself, but it may be helpful to briefly consider the key principles. If you need to interpret vires, one of the major texts on statutory interpretation is “**Craies on Legislation**”, now in its 15th edition.

**Essential awareness: textbooks on legislative practice**

As government lawyers, we are privileged to be involved in the whole life cycle of legislation: from before its conception, at every stage through its creation, to its implementation and, often, its repeal (primary) or revocation (secondary). We are assisted in this by some key texts which are used far more often than many others. Key amongst these are:

- Craies on Legislation
- Bennion on Statutory Interpretation
- Erskine May, Parliamentary Practice

It is essential that you are familiar with them all.

Identifying the scope of the provision

The rule for construction of a delegated power is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating.

This sounds simple enough, but “the intention of parliament” is a slippery concept. It is an objective concept, not subjective. You are not trying to identify the subjective beliefs and motives of Ministers and other players in the legislative process, or even of the Parliamentary majority. A judge looking at the statute will be trying to identify the intention which can be *reasonably imputed to* Parliament in respect of the language used (*R v SoS for the Regions ex p Spath Holme* [2001] 2 AC 349) – either from the express words, or by reasonable and necessary implication.

Further, you should be careful regarding reference to Hansard to try to identify Parliamentary intention. In *Pepper v Hart* [1993] AC 593 it was held that such materials can be referred to in support of statutory interpretation on the following conditions (applied strictly by the courts): (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of statements by a minister or other promoter of the Bill which led to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied on were clear. The important point to note here is that reference to Hansard as an aid to interpretation is only permissible if the legislation is ambiguous.

*Cardinal rule – the starting point - construction according to plain meaning.*

As far as possible, ascertaining what Parliament intended as to scope of the vires should be achieved by application of the normal and natural meaning of the words in the statute. The court proceeds on the *assumption* that words used in legislation are used with precision.

Therefore the courts must give effect to clear legislative language *even if* the consequences for the case in question are such that Parliament did not contemplate and would not have countenanced (for example they appear unjust).

There is a qualification to this rule where the clear language gives rise to an absurdity *in the sense that it produces inconsistency in, or falsifies*, the legislation (but not an absurdity in the sense that it produces a policy or practical result which it is hard to believe Parliament could have intended).

Of course, the usual problem is precisely that the language is not clear and unambiguous, at least in the sense that it can be read only in one way.

### *The importance of context*

In order to understand the meaning of the words being considered, and unless the plain meaning of the words is unambiguous, it is therefore necessary to consider the subject matter to which they relate, the statute as a whole, and the object of the legislation<sup>1</sup>. This is particularly important in interpreting vires, where matters such as the nature of the relevant function, the circumstances in which it is to be performed, and the nature of persons for whose benefit it is to be performed may be relevant.

In considering the scope of vires (and indeed of any other legislation), it is also important to bear in mind that the law is written in the specific context of being law of the United Kingdom, so that for example even if a proposition confers an apparently wide discretion on a Minister, the principles of administrative law will automatically imply certain limitations (e.g. that the power must be exercised reasonably).

Further, the effect given to the language of an Act may also be affected by one of the “constitutional” statutes, including the Human Rights Act 1998 and the European Communities Act 1972, if the literal meaning of an Act placed it in conflict with such provisions.

### *Rebuttable presumptions of construction, and other canons and principles of constructions*

Where the normal and natural meaning of the language is sufficiently unclear to require statutory construction, the courts have evolved a number of presumptions and canons of interpretation which are used as rules of thumb to guide that exercise. These are considered in detail in Craies on Legislation and this section will simply consider a number of these which are of particular relevance to interpreting and using vires.

- *Presumption against delegation of power* – in other words, the courts will assume that Parliament does not delegate power unless it has done so by express provision or unavoidable implication. Therefore, vires will be construed strictly against the person on whom the power is conferred.

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<sup>1</sup> A useful, and perhaps entertaining, demonstration of the relevance of looking at language in context is provided by the statement “all trains stop at Crewe”. “A person may say “all trains stop at Crewe” without there being any risk that anyone will assume that he is actually making the patently absurd assertion embodied in the literal meaning of the words spoken; his words will automatically be construed in the light of their obvious context. If he said “all trains that leave from this platform while in public service (and not merely going to the depot) stop at Crewe but only once they have arrived there and subject to the fact that they then leave Crewe whether to come back again or to go further or to go to the depot” he would be rightly regarded as an obsessive lunatic with a pedantic neurosis...”

- *Presumption against interfering with constitutional rights* – certain rights are afforded special protection under the common law pursuant to constitutional principles. Therefore, a power will not be interpreted to permit the decision maker to interfere with such rights unless it is clear from the express statutory language (or by necessary implication, which is rare) that the power is that extensive. Parliament is presumed not to have allowed the common law to be changed in this way unless such an intention is very clear. Further discussion of these rights is to be found in Auburn, Moffett and Sharland, “Judicial Review, Principles and Procedure” (see chapter 11), but they include many rights which are parallel to ECHR rights, such as those concerning access to justice, freedom of religion, and freedom of expression.
- *Presumption against defeating statutory rights* - where primary legislation confers a right on an individual, a power may not be exercised in a way that defeats that right unless there is clear statutory authority to the contrary.
- *Presumption against retrospectivity* – a power or a duty will not empower the decision maker to exercise the power in a way that has retrospective effect without the clearest statutory language.
- *No power or duty to make measures that are uncertain* - where those measures set out rights and obligations to the persons to whom they apply.

### Exercising vires

Under the Interpretation Act s.12, unless contrary intention appears in the primary legislation conferring the power or duty, the power is to be exercised, or duty performed, from time to time as the occasion requires.

### **Essential awareness: the Interpretation Act 1978**

This Act has a critical day to day impact on our work as Government lawyers. You should familiarise yourself with it (it’s not particularly long). Remembering to check the Act can save a great deal of time and effort. Practitioners in private practice often overlook it’s critical effect. We must not.

Even an apparently unfettered discretion must be exercised according to general principles of administrative law. So, it must be exercised reasonably, on the basis of only relevant considerations, and for authorised purposes (i.e it must be *intra vires*) (*R v Tower Hamlets London Borough Council ex p Chetnik* [1988] AC 858) – in exercising its powers the executive must act lawfully.

That will also include compliance with the obligations of a public body under the Human Rights Act 1998, to act compatibly with Convention rights, and to act in accordance with EU law and other international conventions that apply in the area in question.

You will also need to be aware of the devolution position. Does the power (or duty) extend only to making provision for a specific part of the UK (e.g. England and Wales), or is it wider? Clearly, purporting to exercise a power that is exclusively devolved to e.g. the Scottish Government under the devolution settlements would be *ultra vires*.



Some powers and duties are subject to conditions. Their availability may be conditional on a particular factual situation (e.g. a complaint having been made by a certain person). In the case of challenge, it will be for the court to decide whether the factual situation existed. Alternatively, the precondition may not relate to the existence of a factual situation but represent some other requirement, for example, a condition to consult (generally, or a specific person or body, such as The Treasury) or obtain agreement of a specific office holder prior to making the decision. A failure to identify and fulfil the latter type of condition will almost certainly render the exercise of vires or the performance of the duty unlawful, and therefore you need to be alive to the need to ensure that such conditions are fulfilled at the appropriate time (usually prior to exercise of the power).

#### Failure to exercise powers or comply with a duty

Clearly, if a Minister acts outside his or her powers or duties, or purports to exercise a power he or she does not possess, they are acting ultra vires. But failure to comply with a duty, and certain failures to exercise a power, are also unlawful.

Put shortly, the principles are these: a Minister (or other decision maker) –

- Has a duty to *consider* whether or not to exercise a power;
- Cannot fetter his or her discretion as to whether or how they exercise the power;
- Cannot abdicate his or her decision making functions in favour of another person; and
- Cannot delegate his or her power to another, unless there is an express or implied power so to do.

#### *Failure to consider whether to exercise a power*

Whether such a failure is unlawful depends on the terms of the power. If something is necessary to trigger it, for example a complaint, there is no failure in the absence of that trigger. Where there is an ongoing power to do something, the obligation to consider whether to exercise it should be undertaken from time to time (*R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513, at 551 and 575).

#### *Fettering discretion*

The general principle here is that if the Minister has power to act, he or she should not fetter his power – in other words, disable him or herself from giving proper consideration to the exercise of the relevant discretion. This might be done, for example, by adopting a rigid predetermined position (“I shall refuse all applications under this section” would be an extreme example); or operating an over rigid policy about how to apply the discretion.

The question arises whether a Minister can fetter his or her discretion by agreeing a term in a contract that commits him or her not to use the power, or only to use it in a particular way, or to disregard certain matters he or she would otherwise be required to take into account. Such a term would be void and unenforceable, and the courts would never imply this sort of term into a contract. The test is whether the term is incompatible with the statutory power – is there a reasonably probability that such an incompatibility could arise? However, this can be a difficult distinction to draw.

It is not possible to fetter powers by way of promissory estoppel – this concept has no place in public law, although it may be possible for the complainant to establish some form of legitimate expectation under general principles of public law.

### *Abdication of powers*

A decision is usually unlawful if a person who is not designated as the decision maker (or member of the body with the decision making power) participates in the decision making. This should be *distinguished* from the situation where the decision maker receives advice or representations from others before taking the decision. The principle therefore is that a Minister (or other decision maker) charged with a decision making power or duty must exercise that power him/herself and not abdicate that decision making to another person.

So for example, it was an unlawful abdication of the power of the Minister of Housing to grant planning permission for that Minister to adopt an approach that he would only exercise the power if the Minister of Agriculture did not object to a grant. Effectively, he was treating the Minister of Agriculture's views as determinative (had he simply taken them into account as relevant and made his own decision that would have been lawful).

### *Delegation of functions*

The Minister must perform the power or duty in question himself, and not delegate it, *except* if the legislation provides expressly, or implicitly, as a matter of statutory construction that such delegation is permitted.

Whether there is an implied power to delegate is a matter of statutory construction and the courts would look at the wording of the provision, and the context, in particular matters such as the importance of the function to be delegated, the impact of the function on individuals or the public at large, or on particular interests, and the identity of the delegator (if he or she is particularly suited to the function, the less likely it is that delegation powers will be implied). The more important the function, generally the less likely it is that it can be delegated.

If delegation is permissible, the scope of the delegate's functions or duties can be no wider than those of the delegator.

### **Essential awareness: the Carltona principle**

The ability of officials within a government department to exercise, in some circumstances, power conferred on their Minister is a long established principle of law, and essential to modern administration. This principle was most notably confirmed in *Carltona v Commissioner of Works* [1943] 2 All ER 560. This case is considered in **[Module 1]**.

### **Henry VIII powers**

Primary legislation may grant power to amend primary legislation via secondary legislation. Though a minority of powers, these are more common – at least for the purposes of making technical or minor changes – than is often understood. They are, however, a matter of very considerable controversy and need to be approached with particular care. These were considered in the *Public Law Project* case:

*“As explained in Craies on Legislation (10th ed (2015)), edited by Daniel Greenberg), para 1.3.9:*

*“The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation.”*

*When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.*

*The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an “amendment that is permitted under a Henry VIII power”, to quote again from Craies (op cit) para 1.3.11:*

*“as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.”*

*In two cases, R v Secretary of State for Social Security, Ex p Britnell [\[1991\] 1 WLR 198](#), 204 and R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [\[2001\] 2 AC 349](#), 383, the House of Lords has cited with approval the following observation of Lord Donaldson MR in McKiernon v Secretary of State for Social Security, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989, which is to much the same effect:*

*“Whether subject to the negative or affirmative resolution procedure, [subordinate legislation] is subject to much briefer, if any, examination by Parliament and cannot be amended. The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.”*

*Immediately after quoting this passage in Spath Holme, Lord Bingham went on to say “[r]ecognition of Parliament's primary law-making role in my view requires such an approach”. He went on to add that, where there is “little room for doubt about the scope of the power” in the statute concerned, it is not for the courts to cut down that scope by some artificial reading of the power.”*

#### *Implicit power to take steps incidental to statutory functions*

Vires confer express powers or duties upon Ministers but are usually silent regarding the power to take associated steps necessary for or incidental to the discharge of those functions. If the vires, or other statutory provision do contain such powers, then those are the relevant powers and there is no room for any implicit power to operate. But where there is no such provision, there is an implied power at common law to do things which are reasonably and fairly consequential on or incidental to the express statutory function conferred, provided that they are necessary to the exercise of the function (and not merely desirable) – in other words necessary to make the statutory power effective

to achieve its purpose. It should also be noted that this does NOT extend to powers to impose charges, fees and levies.

## **Common law powers**

Ministers do not only derive their powers from statute. In *R v Secretary of State for Health ex parte C* [2000] 1 FLR 627, Hale LJ said:

“At common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual”.

In *Shrewsbury & Atcham BC v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, Carnwath LJ said:

“[*Ex parte C*], which is binding ... on us, confirms that **the powers of the Secretary of State** are not confined to those conferred by statute or prerogative, but **extend, subject to any relevant statutory or public law constraints, and to the competing rights of other parties, to anything which could be done by a natural person**”.<sup>2</sup>

In summary, the Crown has all the powers of a natural person. Ministers act as agents of the Crown. Therefore Ministers have, subject to important limits, all the powers of a natural person.

Common law powers include the relatively uncontroversial powers to enter into contracts, to form companies, to employ staff, to buy or sell property, to make announcements, to publish circulars, to exchange information or other documents etc. But they go wider than this. The Court of Appeal in *C* accepted that the Department of Health had a common law power to maintain an index of people about whom there were doubts as to their suitability to work with children. Private persons could have maintained such a list and the Secretary of State was not interfering with the rights of others.

Common law powers of Ministers have come in for some criticism – or, at least, how they are described and understood has done.<sup>3</sup> Part of the hostility towards the use of common law powers may derive from the name given to these powers by generations of government lawyers: “Ram doctrine powers”. This derives from a memorandum from the then First Parliamentary Counsel Sir Granville Ram issued in 1945 and then published in 2003. It said:

“A minister of the Crown is not in the same position as a statutory corporation. A statutory corporation ... is entirely a creature of statute and has no powers except those conferred upon it by or under statute, but a minister of the Crown, even though there may have been a statute

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2 There was some disagreement in *Shrewsbury & Atcham* as to the scope of the common law powers of Ministers. The disagreement was academic because of the binding authority of *C*. *C* aside, Carnwath LJ was inclined to restrict common law powers to incidental powers which had to be exercised for the “public benefit” and for “identifiably governmental purposes”. Richards LJ thought it “unnecessary and unwise” to add such qualifications. Waller LJ indicated an instinctive preference to constrain common law powers by reference to the public benefit.

3 Lester & Weait [2003] PL 415; Harris (2010) LQR 373. For a sustained critique, see chapter 3 of the House of Lords Select Committee on the Constitution’s 13<sup>th</sup> Report of Session 2012-13, “*The pre-emption of Parliament*” (HL Paper 165, 1<sup>st</sup> May 2013).

authorising his appointment, is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute. In other words, in the case of a government department, one must look at the statutes to see what it may not do.”

The then Treasury Solicitor, Sir Paul Jenkins, giving evidence in March 2013 to the House of Lords Select Committee on the Constitution, deplored the use of the phrase “the Ram doctrine”. The phrase conveys nothing, even to many experienced lawyers and parliamentarians, thus arousing their suspicion as well as suggesting that Sir Granville Ram might have invented these powers. Sir Paul Jenkins spoke of common law powers being in the DNA of government lawyers. You’re probably better off bearing in mind the then A-G’s views:

“I think that Sir Granville Ram was emphasising that the Crown is not a creature of statute. Therefore, it has inherent powers that it can exercise, apart from prerogative powers, as if it were a natural person. But ... it is circumscribed by public law; by propriety; by human rights ... I do not think that Whitehall thinks the Government can do everything a private individual can do, because it is circumscribed by those very things I have just listed.”

What is clear is that, although the Crown possesses powers under the common law, and so is in a qualitatively different position from statutory public bodies such as local authorities, the exercise of its powers is constrained by general principles of public law. It is therefore important to get the terminology correct from the outset and talk about “common law powers”, not “the Ram doctrine” or “Ram doctrine powers”.

#### **Essential awareness: understanding Ministers’ common law powers**

As government lawyers we must understand the origins and limits of Ministers common law powers in the same way we understand their statutory powers. They are, though, often less certain and so can give rise to greater degrees of risk. You should therefore understand the basis of Ministers’ common law powers and their limits. And you should avoid referring to them as “Ram doctrine powers” as that language is increasingly viewed as archaic.

#### ***Limits on common law powers of Ministers***

First, Ministers have common law powers; statutory bodies do not. Statutory bodies only have the powers that Parliament confers on them expressly or implicitly.

Secondly, Ministers’ common law powers may be expressly or implicitly excluded by a statutory scheme covering the same subject matter. In *R v Home Secretary ex parte Fire Brigades Union* [1995] 2 AC 513, it was held that where Parliament had legislated for a new criminal injuries compensation scheme to replace the existing non-statutory scheme - subject to the Home Secretary’s power to commence the relevant provisions of the Act when he chose - he could not lawfully delay its introduction indefinitely and meanwhile modify the existing non-statutory scheme inconsistently with the Act. The unimplemented Act had restricted his freedom of action.

That case says as much about commencement powers as it does the principles underpinning the relationship between statute and the common law, and so it is an important marker for more reasons

than this. (Not least given the frequency with which statutory powers commence by Order, and our role in drafting them).

Bear in mind too, though, that statute can itself defeat this presumption. For some examples, see Crime and Security Act 2010, s 47(3) (“Nothing in this section affects any power of the Secretary of State to make payments to, or in respect of, persons who are injured as a result of terrorism outside the United Kingdom”) and s 44(4) of the Inquiries Act 2005 (“This Act does not affect (a) any power of Her Majesty to establish a Royal Commission, or (b) ... any power of a Minister or other person (whether under a statutory provision or otherwise) to cause an inquiry to be held otherwise than under this Act.”)

Thirdly, common law powers are limited to those powers available to a natural person; they do not include coercive powers. The Government can’t ban things or punish people using common law powers.

Fourthly, the exercise of common law powers by Ministers is constrained by ordinary principles of judicial review, by the Human Rights Act 1998 and by the competing legal rights of other people. Unlike ordinary people, Ministers are not free to act irrationally and they are bound by all the principles governing judicial review.

Finally, Ministers need money from Parliament to pay for their activities.

## **Prerogative powers**

In addition to powers conferred by legislation and under the common law at large, Ministers have powers under the royal prerogative. The royal prerogative consists of those non-statutory powers that are unique to the Crown and are not shared with its subjects.<sup>4</sup> In practice they are almost always exercised on advice from Ministers, or in some cases by Ministers. They include the power to go to war; make peace; conduct foreign affairs and diplomacy; appoint and dismiss Ministers; create peerages; or grant pardons.

They have been contested recently in the context of the foreign affairs prerogative in particular, see **R (Miller) v Secretary of State for Exiting the European Union** [2017] UKSC 5.

These are real powers of considerable practical importance. And they may not apply uniformly across the UK – by dint both of their intrinsic character, and local provision (see, e.g., s 23 Northern Ireland Act 1998 which makes general provision for Ministers to exercise the prerogative on behalf of Her Majesty where it relates to a transferred matter).

Prerogative powers can be exercised without even discussing the matter in Parliament - let alone obtaining Parliament’s consent. (Though note the example of legislating for a convention in relation to the exercise of the prerogative – ratification of treaties – which is Part 2 of the Constitutional Reform and Governance Act 2010). Nevertheless the royal prerogative is in principle judicially reviewable, and the Crown has no prerogative unless the law recognises it.

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<sup>4</sup> Blackstone in his *Commentaries* said that the prerogative consisted of powers unique to the Crown. Dicey said that the prerogative consists of all lawful acts that government can do without the authority of statute. Implicit in Dicey’s view is the proposition that all executive power rests on either statute or the prerogative. Blackstone’s view is supported by the most recent authority: para. 4 above.

Note too that Royal Charters are issued in the exercise of the prerogative. These too are of considerable practical significance, and can give rise to real legal and political discussions (not least that relating to self-regulation of the Press following the Leveson report). The Privy Council Office have a central role in the administration Charters and the 900 or so Chartered bodies.

#### *No prerogative contrary to statute*

There can be no prerogative power that is contrary to statute. Article 4 of the Bill of Rights 1688 famously prevents the government from *levying money for, or to the use of, the Crown by pretence of prerogative without grant of Parliament*. If a Minister has a statutory duty to supply a service, the statute contains no power to charge for the service and the Minister threatens to withhold the service unless payment is made, he can be compelled to perform his duty.

#### *The personal prerogatives*

Although the royal prerogative is virtually always exercised by the Crown upon the advice of Ministers, there are some “personal prerogatives” where the monarch is not bound to follow ministerial advice. The main one, as the 2010 general election revealed, is that there are still circumstances where the Queen may have a role in appointing a Prime Minister (as she did in 1957 and 1963). In a deadlocked hung Parliament, the monarch might have an awkward choice. Does she: (a) ask the Prime Minister to continue in government? (b) ask the Leader of the Opposition to try to form a government? (c) ask a “unity candidate” to try to form a government? (d) wait and see if the parties can sort it out amongst themselves?

In 2010 the parties came to an agreement within 5 days. (For a fascinating account of the process in 1974, see the (then) secret note from Sir Robin Butler ‘Events leading to the resignation of Mr Heath’s Administration on 4 March 1974’ on the Thatcher Foundation website).

## **Constitutional conventions**

The Cabinet Manual describes conventions as “rules of constitutional practice that are regarded as binding in operation but not law”. Some of the most important structural and operational matters of government rely on customary non-legal principles of political conduct of this sort. For example, the post of Prime Minister is established by custom not law, and equally the existence of the Cabinet has no foundation in law, but relies upon convention.

Conventions differ in nature from rules of law in that they are not enforceable by process of law. They are essentially enforced politically. For example, a Minister who breaches collective Cabinet responsibility by publicly dissenting from government policy without permission could expect to have to resign or be dismissed, and a Monarch who vetoed a government bill which had duly passed through Parliament might provoke a constitutional crisis that threatened the future of the monarchy. The existence of a convention is generally apparent from universal recognition and compliance with it as a matter of constitutional practice.

### **Essential awareness: the Cabinet Manual**

The UK Government first published the Cabinet Manual in 2011. It is a guide to the laws, conventions and rules on the operation of government. It is not legally authoritative, but it is an important source of explanation of many of the features of the contemporary constitution informing day to day practice. It is available on GOV.UK: [here](#).

The *Cabinet Manual* sets out the following examples of constitutional conventions.

- (1) The monarch will not dismiss a Prime Minister with a workable majority in the House of Commons (the last monarch to do so was William IV in 1834).
- (2) The monarch will not refuse royal assent to a Bill that has properly gone through all its parliamentary stages (the last monarch to do so was Queen Anne in 1708).
- (3) Money Bills start in the House of Commons.
- (4) Cabinet Ministers sit in Parliament and are members of the Privy Council.
- (5) A Bill will typically pass 3 Readings, a Committee and Report Stage in both Houses before being presented for Royal Assent.
- (6) All Government Ministers are bound by the collective decisions of Cabinet, save where this convention (known as “collective ministerial responsibility”) is explicitly set aside (as it was in the 1975 EEC Referendum and the 2011 Alternative Vote Referendum, and more recently in relation to the referendum on UK membership of the EU).
- (7) Governments observe discretion in initiating any new action of a continuing or long-term character in the period immediately preceding a local, European or General Election (sometimes called “purdah”) and immediately after a General Election if the result is unclear.
- (8) The House of Lords does not oppose at Second Reading a Bill that appeared in the Government’s manifesto (sometimes called the “Salisbury convention”).
- (9) The Westminster Parliament does not legislate on devolved matters without the consent of the devolved administrations (the “Sewel convention”).

ENDS.