The "third source" of authority for Government action revisited

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The legal authority for government action is fundamental to the functioning of the UK constitution. A majority of the House of Lords appears recently to have given implicit support to the principle that the executive branch of government is free to act without authority being provided by statute or the prerogative.

There have, however, been differing views from the courts as to whether the government, like an individual, has the freedom to do that which is not legally prohibited or contrary to the legal rights of others. Both this freedom and the royal prerogative are criticised because they allow the government to act legally in advance of Parliament having the opportunity to consider and authorise the particular action.

The objectives of this article are to explore the current understandings of UK courts and commentators of the freedom the government has to act independently of deliberate authority in positive law, assess the criticisms of this freedom as a source of authority for government action and explore critically possible alternatives for the future provision of legal authority for government action.

The residuary freedom which the government has to act where not legally prohibited is known by a variety of names including: "de facto powers"; "common law discretionary powers"; "common law personified powers"; "secondary prerogative powers"; "pretended prerogatives"; "non-statutory powers" and "capacities". When first writing in 1992 about the government's freedom to do that which is not legally prohibited I used the label "third source of authority for government action". The label was designed to distinguish the residuary freedom from the authority that the government has to act under statute (first source) and under the prerogative in the narrow sense (the second source). The prerogative in the narrow sense refers to those common law powers which are unique to the Crown, such as summoning Parliament or exercising the prerogative of mercy.

The label which has gained ascendancy in recent years is "common law powers" and this label was used in the House of Lords decision referred to. The label is arguably unsatisfactory for two reasons. First, it obfuscates the necessary distinction between the government's freedom to act when not prohibited and the prerogative, the latter also being a common law power. Secondly, the label is misleading because it gives the impression that the government is acting pursuant to specific authority in positive law, which would imply the possible capacity to override competing legal rights that may be vested in the person or persons who are being affected by the government's actions. This is not the position. Rather, the government has only a residuary freedom to do that which does not conflict with what other persons are permitted to do by the authority of positive law. For these reasons I prefer to continue to use the "third source" label.

Thousands of government actions take place each day which find their legal authority in the third source. Examples of the government acting under the third source include, inter alia, entering into contracts; making "ex gratia" payments available to widowers; the making of pensions available to widowers; the making available of lists of persons whose suitability to work with children was in doubt and making pamphlets available to the community containing information.

Aspects of modern government are frequently achieved through contract. Although the freedom to contract can be explained as an aspect of the third source of authority for government action, it does give the government an avenue to legal enforceability of that which it has agreed in the contract. The enforceability derives not from the third source, but can be traced to the consent of the other contracting party and the provision private law makes for enforceability of contracts.
Although the taking of action by the government under the third source is the exercise of power, in the sense of the exercise of *dominium* as distinct from *imperium*, it is affected by the restraints imposed by the common law and by statute. The third source does not authorise the government to override competing legal rights recognised by positive law. For example, the law of trespass, the principles of judicial review and the restraints imposed by the Human Rights Act 1998 protect citizens from attempted third-source actions by the government which society, through the courts' development of common law and Parliament respectively, has decided are unacceptable.

*L.Q.R. 228* Recognition of the third source of authority for government action contemplates that the government will be constrained by positive law protection of justifiable competing interests, rather than that there are express limits accompanying any positive authorisation of the particular government action. In contrast the prerogative is a deliberate common law authorisation of government action with accompanying recognised limits which the courts have the capacity to ascertain and uphold. In further contrast to the third source the prerogative may be found by the courts to authorise the government to override competing common law legal rights. However, the prerogative authority may remain subject to the constraint of competing statute law, because, consistent with parliamentary supremacy and democratic theory, a conflicting statute will prevail over the common law prerogative.

Returning to the third source, since justifiable restraints do not accompany the authorisation, the courts and the legislature have to anticipate the consequences of government third-source action and put in place common law and statute law respectively to protect competing interests from the government's potential action under the third source. Much of the common law that operates to constrain the government acting under the third source has historically developed as private law to protect individuals and their property from not only government, but more commonly from the otherwise unrestrained actions of other individuals. The common law is also allowing judicial review to develop public law constraints on government action under the third source. Some statutes, such as the Human Rights Act 1998, have as a major purpose the constraint of government action taken under any of the three sources.

Statutes protecting competing interests from the effect of government actions under the third source should be contrasted with statutes which confer powers upon the government subject to prescribed limits. In the latter circumstance the legislature at the time of vesting power in government is specifically directing its collective mind to what it wishes the government to be authorised to do and what it does not wish the government to be authorised to do. This allows the legislature to give pre-action approval to foreseeable governmental activities. In contrast, when the government acts pursuant to the third source the legislative scrutiny is likely to be only after the action unless any statutory protection of individual rights has anticipated possible particular third-source action by the government.

Parliament does have the capacity through its passing of appropriation legislation to exercise pre-action control over that third-source action which requires the expenditure of public money. It is a fundamental constitutional principle that the government can only spend that money which has been appropriated. However, appropriation is unlikely to be a very effective instrument for parliamentary pre-action oversight of that which the government intends to do under the third source. The reason is that the appropriation will, in most circumstances, be in considerably broader terms than the particular later third-source government actions, which some may consider should have been subject to specific pre-action scrutiny and authorisation by the legislature.

Acceptance that the government is free to do that which is not legally prohibited suggests that when the legality of government action is challenged in the courts, the courts should consider asking, not whether there is authority in statute or the prerogative for the government action, but rather whether there is any common law or statute preventing the government from doing that which it wishes to do. This approach does not appear to have been confidently recognised in the UK courts, which tend first to look for authority in positive law when government action is challenged.

Post-action executive accountability for third-source action can be facilitated through parliamentary scrutiny and consequent ministerial responsibility, invocation of the ombudsman's jurisdiction, civil proceedings in the courts and judicial review. The amenability to judicial review of government decision-making taken under the third source has been facilitated by the movement in recent years of the availability of the courts' judicial review jurisdiction away from being dependent upon the nature of the source of authority for the particular government action. Now the threshold question is whether the government or other body, the action of which is being questioned, is performing a public...
The late Professor Sir William Wade questioned whether judicial review should *L.Q.R. 230* be available in respect of government third-source actions, as they do not affect the legal rights of other legal persons.\footnote{41} In contrast a more recent Cambridge commentator, Dr Mark Elliott, has argued that judicial review of third-source government action is a fulfilment of the courts' responsibilities under the rule of law.\footnote{42}

**THE EVOLVING PERCEPTION IN THE UNITED KINGDOM OF THE SOURCES OF AUTHORITY FOR GOVERNMENT ACTION**

There has not been a universal recognition in the UK courts of the third source of authority for government action. Some courts have recognised the government's freedom to do that which is not legally prohibited or in conflict with the legal rights of others,\footnote{43} whereas other courts have held expressly\footnote{44} or implicitly\footnote{45} that the government may only do that which is authorised by statute or the prerogative. In 2005 the House of Lords in *R. (on the application of Hooper) v Secretary of State for Work and Pensions, with no discussion of relevant authorities, recognised what the Law Lords called the “common law powers” of government.\footnote{46} The Appellate Committee of the House of Lords appeared by a majority to accept that the government could pay pensions to widowers even though the payment of such pensions was not positively authorised by statute. Notwithstanding the small amount of discussion of the principle in the judgments, the decision was arguably recognition at the highest judicial appellate level that the government is free to do that which is not legally prohibited or contrary to the legal rights of others.

A minister when providing written answers to parliamentary questions has also recently made clear that the understanding on which the government operates, and on which previous governments have operated, is that the government is free to do that which is not legally prohibited or in conflict with the legal rights of others.\footnote{47} The principle is quaintly known in the civil service as the “Ram doctrine”, after a 1945 memorandum of the First Parliamentary Counsel, Sir Granville Ram, to this effect.\footnote{48}

*L.Q.R. 231* Prior to *R. (on the application of Hooper) v Secretary of State for Work and Pensions,*\footnote{49} the highest profile judicial support for the recognition of the third source was in the much commented-on judgment of Megarry V.-C. in *Malone v Metropolitan Police Commissioner* \footnote{50} in which the court recognised that the Post Office, on the instructions of the police, could intercept a telephone conversation at a telephone exchange, because there was at the time no domestic positive law preventing such action and it was not contrary to the legal rights of others.\footnote{51} The principle that the government can do that which is not legally prohibited or contrary to positive law rights vested in other legal persons has also been implicitly recognised in several other decisions.\footnote{52}

Nevertheless, there is evidence that the third-source perspective has not been to the fore in all judicial minds. The Court of Appeal in *R. v Secretary of State for the Home Department, ex p. Northumbria Police Authority* \footnote{53} searched strenuously for, and found, authority in both statute and prerogative for the challenged government action in distributing riot equipment to the local police authority, when arguably such a distribution was within the law since there was no law preventing the government from carrying out the distribution. The latter analysis was not broached by the court.

The highest profile judicial questioning of the principle has been by Sir John Laws when sitting in the Divisional Court in *R. v Somerset County Council, Ex p. Fewings.*\footnote{54} A local authority purported to ban deer hunting on common land. The legal authority to put in place the ban was questioned in judicial review proceedings. Laws J. found that there was no statutory authority for the local authority to put in place such a ban, with the result that it was therefore illegal. Local authorities are normally the creation of statute and are only permitted to do that which is authorised by statute.

In the course of his judgment Laws J. said in respect of “public bodies … any action to be taken must be justified by positive law”.\footnote{55} Notwithstanding that this statement was made in the context of judicial review of local authority decision-making and notwithstanding the absence of discussion of relevant authorities, the pronouncement has been seized upon to advance the principle that all public bodies, including central government, must find authority in positive law for their actions.\footnote{56} Such an understanding is in direct conflict with the holding in principle of Sir Robert Megarry in *Malone* \footnote{60} and now the understanding of the majority of the House of Lords in *Hooper.*\footnote{61} Also it directly contradicts the Ram doctrine under which the central government operates.\footnote{62}

In *Fewings* Laws J. did not make his meaning as clear as he could have done. Consequently, a possible explanation could be that in making the statement Laws J. was thinking only of situations where the public body was in its actions intending to assert legal rights over the residuary freedoms of
others, as the local authority was attempting to do with its ban on hunting. The third source has never been recognised as giving the central government rights over others. Citizens are always free to ignore without legal consequence that which the government attempts to do under the third source.

When writing extra-judicially Sir John Laws appears to justify his approach by recognising “the individual's right not to be interfered with” and he continues “in that case it is an appeal to the ideal of freedom and is, ultimately, a constitutional right”. This underscores the difference between the approach of Sir John Laws and the understanding of the third source. The understanding of the third source does not recognise a bald natural right to the guarantee of freedom of the individual from interference, only that an individual has judicially enforceable freedom from interference when there is available identifiable and relevant positive law, often in the form of torts, criminal law, common law recognition of fundamental rights in the course of judicial review or statutory human rights law. The passage of time, and the recognition by the common law of the different circumstances in which there is a potential for the freedom of individuals to be interfered with, has caused the development of a coterie of common law causes of action, and increasing judicial recognition of fundamental human rights protecting the individual. Implicit in the writing of Sir John Laws is the idea that this ad hoc positive law protection of individual freedoms is inadequate. He acknowledges being influenced by “the Kantian ideal of the sovereignty of the individual … [where] any interference with another's liberty stands in need of justification”.

*L.Q.R. 233* But will the third source sustain an executive interference with an individual's actions when the person potentially affected is entitled to continue with what he or she is doing? Theory would say that the government does not have the potential to interfere under the third source with an individual's liberty because the individual can ignore the government's action if that action is not authorised by positive law. However, a government could curtail an individual's residuary freedom if it used its third-source authority to do something which, physically or for another practical reason, rendered it impossible for an individual to do what they wished to do. This is a situation where the government cannot further its intention through the courts, but there is no positive law to protect the individual from the government's interference, and the individual cannot from a practical point of view escape the effect of the interference by the government. *Malone* provides an example. The police achieved the interference with the individual's interests under the third source. The individual did not have the benefit of access to positive law to prevent the interference, and for practical reasons, namely lack of knowledge of the police action at the time it took place, the individual did not have the opportunity to take practical action to avoid the interference.

An even more obvious example is provided by *R. v Secretary of State for Health, Ex p. C.* The government had the freedom from the third source to collect information related to persons who might not be suitable to work with children and to advise employers as to whether prospective employees were on the list. The action of the government had obvious adverse consequences for those on the list. Not only in the absence of falsity there was no positive law to protect their interests, but also there was no practical way whereby those named could prevent the naming and its consequences for their reputations and employment prospects. Many would support the government being able to collect such information and make it available to prospective employers. However, critics of the government being able to act in such a way under the third source would argue that this power over the reputation and employability of individuals should be deliberately conferred by the legislature after political debate.

A different legal and practical result follows if the court recognises that a positive law right is being interfered with by the government action. In *R. v Secretary of State for the Home Department, Ex p. Simms* the prison authorities argued that they had authority under delegated legislation to prevent prisoners being interviewed by journalists who might publish information gained in such interviews. The House of Lords recognised the prisoner as having a fundamental right to be interviewed by journalists. *L.Q.R. 234* derived from the prisoner's rights of freedom of expression and access to justice. The Appellate Committee recognised the “principle of legality”, that legislation could only take away such a fundamental right with appropriately clear language. Although not expressly discussed in the judgments, it is implicit that the government could not fall back on the third source of authority to prevent the interviews by journalists, since the prisoner's right of access to the journalists through interview is being recognised as a positive law right to which government action under the third source must always defer.

Sir John Laws is concerned that there not be abuse of power. He obviously does not have confidence in the protection against abuse of the third-source authority provided by the existing common law causes of action, the judicial recognition of fundamental rights and the traditional
mechanisms of executive accountability.

It is clearly apparent from Sir John Laws' extra-judicial writing that he is driven by a concern that "dangers" of abuse of power "arise in any situation where someone is placed in the position of official governance over others." He continues:

"… and behind that lies the true difference between private and public law; whereas for the private individual everything is permitted that is not forbidden, for the public body, all its actions must be justified by positive law. Yet behind both the law's principle—that abuse of power is not to be tolerated — is the same. It applies in different ways: for the citizen there is a presumption of freedom of action, for the public body there is not."

Dr Mark Elliott, who has shown a perceptive appreciation of the third source, or what he prefers to call "de facto" powers, is a forthright critic of the "reasoning process" of Sir John Laws in Fewings. The Court of Appeal reasoned that the Somerset County Council had to show authority in positive law for its decision because it was a public authority and "all public authorities have to demonstrate legal authorisation for everything which they do". Elliott believes that there is a "broad implication … that government authorities have no residual liberty". This implication is held by Elliott to "[conflict] starkly with both government practice and established legal principle". Sir John's approach is labelled as "too simplistic", Elliott stating that statutory corporations, like the Somerset County Council, require authority in positive law, whereas central government only needs authority in positive law where the government "[action] … aims to produce legal consequences—by, for example, affecting legal rights or status of others" or where the government wishes to take action "which would otherwise be unlawful". Where the government "seeks merely to do something which is not intended to provoke legal changes and which is not unlawful, it can rely on its residual liberty."

Sir John Laws' implicit understanding in Fewings that even central government has to be able to point to positive authority in law for all its actions does not appear to have received support from later courts. Further, most commentators accept that the government is free to do anything that does not interfere with the judicially-enforceable rights of others and is not otherwise legally prohibited.

Two recent commentators are Professor Andrew Le Sueur and Dr Margit Cohn. Both authors were writing before the House of Lords delivered its judgment in Hooper. Professor Le Sueur diplomatically suggests that Laws J.'s understanding in Fewings "may be subject to exceptions in relation to central government departments and ministers". It is noteworthy that he uses the tentative words "may be" rather than the more confident "is". After acknowledging the third-source principle from Malone he notes that "this needs to be treated with extreme caution and is better viewed as applicable (if at all) only to central government departments and ministers."

*L.Q.R. 236* The qualifying "if at all" suggests that the author is not confident that present-day courts would uphold the Malone principle. Le Sueur emphasises that the principle does not extend to "any public authority created by an Act of Parliament", the actions of which are confined to that expressly or implicitly authorised by Parliament. The distinction between the "common law powers" and the prerogative powers of the ministers and government departments is recognised. The tone continues to be tentative:

"it is therefore conceivable that a Secretary of State may have some ‘freedom to act’ in the absence of specific statutory or prerogative power, though the ambit of such action will necessarily be limited."

In respect of limitations he recognises that government action under the third source cannot: alter "peoples' existing legal rights"; involve spending of public money outside that which has been appropriated by Parliament or interfere with rights protected by the Human Rights Act 1998. Le Sueur's understanding of the third source is orthodox, although the hesitancy of his approach would suggest that he may not be enthusiastic about the government having such freedom of action independent of statutory authorisation.

Dr Margit Cohn accepts more confidently the availability in the current law of what she calls "common law personified powers" of the executive, and contemplates their continuance, although further limited, in a model which she advances for the future provision of executive authority. She explains the third source as arising because the government found actions to be necessary that were provided for by neither the prerogative nor statute. It has filled a conceptual "gap". Such government actions
are “a necessary part of modern reality”. Cohn opines that “no constitutional framework, even one that enshrines a strict doctrine of separation of powers, can fully prevent actual invocation of executive non-statutory powers”.

*L.Q.R. 237 ARGUMENTS FOR AND AGAINST THE MAINTENANCE OF THE THIRD SOURCE AS AUTHORITY FOR GOVERNMENT ACTION

The main argument in favour of the government being free to do that which does not conflict with other legal rights, or is not prohibited by positive law, is that this legal position meets the practical day-to-day needs of government. The government is able to respond quickly, flexibly and relatively unhindered with the action it considers appropriate to meet, sometimes unexpected, societal needs. The government does not have to find existing positive law authority in statute or the prerogative, or request Parliament to create at short notice new statutory authority. Cynics may suggest that governments value the freedom from pre-action scrutiny which both the third source and the prerogative provide.

There are also practical arguments against changing the status quo to a requirement that all government action be authorised by positive law. This change would raise the dilemma of having to choose between inevitably incomplete specific authorisation of all anticipated and needed government action, and the provision of more general authorisations which would ensure that the government was not left short of positive law authority when needed.

The latter generality of authorisation raises the same concerns that are the main reason for arguing against the maintenance of the third source as authority for government action. The government action and policy implementation taken under the general statutory authorisation, or under the third source, may not have the benefit of appropriate focused consideration and approval by the legislature before the government action takes place. This is a concern about democratic legitimacy. A requirement of pre-action legislative authority would allow the democratically-elected Parliament to enact the power it believes the government should have and, at the time that the powers are created, ensure that justified and clear limits are put in place in respect of the government’s exercise of the powers. In contrast the third source leaves constraint to the random eclectic collection of laws protecting legal persons from the interference of others, and the different generic post-action accountability mechanisms that are available in respect of executive action.

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The call for advance authorisation by positive law implies dissatisfaction with the mechanisms available for facilitating post-action accountability. Those mechanisms are primarily: scrutiny by the National Audit Office under the auspices of the Auditor and Comptroller General; select committee scrutiny of government action; ministerial responsibility to Parliament for the action taken; judicial upholding of private law with which attempted third-source action may conflict; judicial review of government third-source decision-making; and review by the Parliamentary Commissioner for Administration.

A lower profile mechanism sometimes available to facilitate post-action scrutiny is the existence of internal codes within the executive. Daintith and Page advance as examples the Citizens Charter Programme and the Code of Open Government. The Parliamentary Commissioner for Administration can have a role in the enforcement of internal codes. Legal rights of access to government information help facilitate parliamentary and public scrutiny of government third-source action.

It is difficult to gauge the real level of concern about the absence of prior parliamentary scrutiny of potential government third-source action. Certainly, Lord Lester and Dr Weait have expressed concerns. It is noteworthy that there is a more overt level of concern about the absence of pre-action parliamentary scrutiny of action taken by the government under the prerogative.

In addition to the concern that there is not pre-action legislative consideration and approval of government third-source action, the concerns of Sir John Laws, addressed above, in respect of “the individual’s right not to be interfered with” ground arguments against the continuing recognition of the third source of authority for government action. In a corresponding way lawyers have a tendency to react intuitively against the existence of the third source. There are several reasons for this reaction.

First, there is the intuitive concern among lawyers that the executive in a democracy always has to be kept on a tight legislative leash in order to protect against abuse of power. Secondly, in a
related way, the executive is perceived as acting on a limited authority delegated by the legislature. The legal reality, of course, is by contrast that the executive has an inherent freedom of its own. The perception imagines a direct chain of democratic authorisation from the electorate to Parliament to government.

Thirdly, the expectation of a requirement of pre-action positive law authorisation sits comfortably with an intuitive sense of how the rule of law ought to operate. The idea is that the already existing law prescribes what the government may do with some degree of precision and the courts ensure that the government complies with the law.

A fourth reason for the intuitive response of lawyers is that even when not affecting the legal rights of citizens, the government action may have an effect on individuals’ interests, and consequently should be constrained by the requirement of pre-action authorisation from the democratically-elected legislature. The government has immense resources and influence, and exercises power even in circumstances where its actions are not underpinned by positive law. This reasoning is closely allied to the position taken by Sir John Laws. 

The theoretical explanation that the government has freedom of action from the third source because of its technical legal status as a corporation sole, corporation aggregate or a natural person is not perceived as convincing because the government is so different in nature and magnitude of influence from other legal persons. In a liberal democracy a primary objective of organised society is to maximise the freedom of the individual. Legal restraint on the individual is only justified in order to allow higher value freedoms of others to be exercised. This approach in respect of individuals could be argued to be inappropriately transferred to government since society does not have an analogous driving desire to protect the freedom of action of government. Freedom of government action threatens the liberty of individuals, the value of such liberty being the justification for the individual having the freedom to do anything not prohibited by law.

Professor Dawn Oliver appears to sympathise with the above critique when, in referring to the government, she says:

“They are under duties of altruism and public service, and they are not entitled to protection of their dignity, autonomy, respect, status or security in their own right: in effect they are subject to principles of considerate altruism.”

"L.Q.R. 240 Professor T.R.S. Allan finds a similar distinction between the action of government and private individuals:

“No simple analogy is available between private and government action because the latter is inherently different from the former: it asserts the authority of the state.”

Cohn has commented that the equating of the public and private sectors fails to recognise adequately their differences:

“Personification/corporatization, which relies on an analogy between the state and other juristic persons’ freedom to act as long as they are not prohibited by law, is gaining force, but it misdirects attention from the particularities of public power. Analogies to legal bodies (whatever their nature may be) disregard the ‘democratic deficit’ problem. They deflect attention from the distinct nature of public power, which justifies, even in today’s ‘rolled back’ state, more than an emulation of private law constructs.”

**ALTERNATIVE MODELS FOR THE PROVISION OF AUTHORITY FOR EXECUTIVE ACTION**

If the absence of parliamentary pre-action scrutiny and authorisation, and the value of freedom of the individual recognised by Sir John Laws, are sufficiently major concerns to warrant the questioning of continuing the existing three-source model of authority for government action, alternative models need to be designed and evaluated. Statute, the prerogative and the third source have spontaneously evolved as sources of authority for government action over many years. Constitutional design is now being thought about more deliberately in terms of having in place government structures and patterns of functioning which best fulfill the ideals upon which the constitution is based. Pre-action parliamentary authorisation and accompanying accountability in respect of all potential executive action would further the ideals of democracy and from a practical point of view allow the authorisation to better meet “the principles of legal certainty, accessibility and clarity”.
From a theoretical point of view a strong argument can be mounted that it is better that all authority for government action be provided by positive law enacted by the legislature rather than that some authority be left to residual freedom. This principle is consistent with the idea that the community has put in place a constitution at the centre of *L.Q.R. 241* which is a democratically-elected Parliament from which government authority should cascade. Parliament is the delegate of the people and the government is the delegate of Parliament. The government acts with authority expressly or implicitly given to it by Parliament. It follows that the more comprehensive and more prescriptive the positive law emanating from Parliament to authorise particular executive action, the greater the control Parliament has over the government and the more accountable the government is to Parliament for the action taken under the parliamentary authorisation. Both those in Parliament and the courts are able to hold the government accountable for the compliance of its actions with the clearly accessible democratically pre-determined positive law.

The upholding of the rule of law is straightforward. The community is likely to have increased confidence in the system of government because of the greater certainty and openness about what the government can and cannot do, and the better operation of the accountability mechanisms. In contrast, under the third source, the scope of the residuary freedom is determined by not necessarily random, but certainly eclectic, positive laws that may, or may not, protect individual interests. The law's perspective is that of the individual's interests rather than anticipatory at the time of authorisation of what should be the scope of the executive's freedom.

Three alternatives to the status quo which would allow greater pre-action parliamentary scrutiny warrant explanation. They are what I will term, the mandatory positive authorisation model, the Cohn model and the conventional expectation model.

**The mandatory positive authorisation model**

The obvious alternative to the status quo which would enable democratic pre-action scrutiny of what would otherwise be third-source action would be for the law to require all government action to be authorised in advance by Parliament. The requirement would also extend to all government action currently taken under the prerogative. Adoption of the requirement of positive law authority for all government action would mean, of course, that an ultra vires question potentially may be asked of every government action.

Codification in statute, and the on-going amendment, of all authority required for government action currently taken under the common law would be an immense practical task. No one has yet succeeded in comprehensively collecting together in an accessible form all the prerogative powers and immunities of the Crown, the evidence for *L.Q.R. 242* which should largely be in the law reports and published commentaries. Collecting all the circumstances where third-source authority is relevant would be an even more daunting task. Much of the existing third-source use will not have been systematically recorded and it would be challenging to work out the specific authorities the government may need in the future.

If this model of requiring comprehensive pre-action specific authorisation in statute were to be adopted, the enactment of the relevant pre-action authorisations would have to be executed by a process which allowed sufficient debate and participation through the democratic process to ensure that the ideals of pre-action accountability were able to be fulfilled. There must be doubts as to whether these ideals are likely to be achieved.

Given the political reality of the influence that the government has on legislative decision-making, how effective will the legislative scrutiny be, and will the legislature not end up giving the executive substantially all the authority it wants? Also, given the immensely varied responsibilities of modern government, the sheer volume of provision of authority that would be needed, and the demand for ongoing provision of new authorities, are likely to be difficult to manage. The demand for increased legislation would threaten the functioning of Parliament where currently between 35 and 50 government Bills are presented during an annual session. Increased legislation would frustrate those who call for less statutory regulation in the community with its accompanying inefficiency causing transaction costs.

More general statutory authorisations of government action would address the difficulty of foreseeing all of the specific authority required for government action and would also reduce the volume of legislation required. However, as noted above, such general authorisations would be likely to compromise significantly the effectiveness of pre-action accountability. Broad prior statutory
authorisations may be little different from relying on the third source, because Parliament will be unlikely to have directed its mind to the full range of actions which the government will be found by the courts as authorised to take under the statutory empowerment. Such broad statutory authorisations may threaten legal rights of citizens which would have prevailed should the government action have been taken under the third source. However, current approaches to statutory interpretation suggest that Parliament would have to use clear language to take away the common law rights of individuals.

Reviewing courts will inevitably find statutory authority provided not only expressly, but also by implication. Where it is argued that the authority is provided implicitly, questions may properly be asked whether the purpose of a pre-action authorisation has been fulfilled in terms of the legislature addressing its mind to the types of executive action which may be found to be implicitly authorised.

The Cohn model

Cohn has tentatively suggested a model which addresses some of the concerns about the absence of pre-action legislative scrutiny and approval. The model encourages statutory authorisation, but does not advocate that it should be comprehensive. The continuation of “nonstatutory powers, as a necessary part of modern reality” is accepted. However, Cohn suggests three limits on the continuing recognition of such powers:

“First, a legal system should prohibit non-statutory action that directly affects human rights and freedoms. Second, the rule of residuality, according to which existence of statute excludes non-statutory action in the same subject matter, should be firmly followed …. Lastly, such powers should be assessed by a loose pro-legislation rule, under which issues that have long-lasting bearing on society, even if they do not bear directly on human rights, should generally be treated as requiring a statute.”

All three suggested constraints raise issues of vagueness. It could be argued that the law already requires legislative authority, or prerogative authority, for the executive to impose legal limits upon human rights and freedoms. Third-source government action is constrained by all rights provided for in positive law. Also, in most circumstances the government cannot rely on the third source to take away residuary individual freedoms. Indeed the individual, from the point of view of the law, remains free to disregard any attempt by the government to use the third source to constrain his or her residuary freedom.

However, that said, the government, because of the magnitude and influence of its operation, may provide, free of charge, veterinary services through its own veterinarians to all livestock farmers. Assuming the quality and availability of the service are equivalent, farmers would be likely to choose to use the free government service rather than paying professional fees to private veterinarians. The likely consequence would be that private veterinarians, although legally able to provide services to farmers, would not be able to because there would be no demand for their higher cost services. The government acting under the third source will have effectively prevented the individual veterinarians from exercising a residual freedom.

Many freedoms of individuals are protected directly or indirectly by accompanying positive law. Third-source government action will be constrained by such positive law. For example, independently of the Human Rights Act 1998, the individual derives protection for residuary freedom of movement from the common law torts, such as assault and battery, that would support the courts issuing remedies to constrain government agents from physically restricting the movement of individuals.

Although not there expressly discussed, it is implicit from the decision of the House of Lords in R. v Secretary of State for the Home Department, Ex p. Sinns that independent of a recognised tort the freedom of a prisoner to communicate with a journalist is a common law right that cannot be taken away by prison authorities acting under the third source. Such a right could be upheld against government third-source action through the procedure of judicial review. The courts are able to develop the common law in the public law context by means independent of, and additional to, private law tortious causes of action, in order to constrain government use of the third source. In addition to
recognising common law limits, such as fundamental human rights, on what the government can do without clear statutory authorisation, the reviewing courts may also, for example, find mandatory relevant considerations, independent of statute, which they require the government to take into account, and they *L.Q.R. 245 may also insist that government third-source decision-making meets the standards of Wednesbury reasonableness.*

Such an approach to judicial review of third-source government action is in the same spirit as the recognition of the principle of legality in that the courts are recognising public law principles and rights which the government may only override if clearly authorised by statute. Although this is imposed as a form of post-action accountability it is probable that the government will soon foresee the types of common law restraints likely to be imposed in the event of judicial review and adjust its future third-source action accordingly. In this way the evolving post-action judicial review accountability mechanism will cause pre-action self-regulation by the government.

The Cohn model, in expecting statutory authority for government interference with human freedoms, would suggest that the government provision of free veterinary services to farmers should only be able to be provided if authorised in advance by statute. Should statutory authority be required for government interference with all human freedoms, or should the courts decide whether the private veterinarians' freedom to provide professional services to farmers is a human freedom, the interference with which, warrants a requirement of prior legislative authorisation? In the absence of positive law prescription, such as in the Human Rights Act 1998, how will the courts decide the human freedoms, the interference with which, requires statutory authorisation? Are these questions not raising issues about recognition of natural rights as justiciable law? If this is Cohn's intention she is not alone, because other commentators have argued that authority in positive law is required for the government to interfere with human freedoms, irrespective of whether or not they are protected by deliberate positive law. In essence this is what underlies the suggestions of Sir John Laws in *Ex p. Fewings.*

The second constraint advanced in the Cohn model on the government using non-statutory powers is the idea that if the authority for the government action is provided by statute, the action should be taken under the statutory authority, and not have its authority attributed to non-statutory powers. Cohn terms this “the rule of residuality”. If non-statutory powers include both the prerogative and the third source then the suggested constraint would mean that neither may be resorted to as authority for government action if that action is also authorised by *L.Q.R. 246 statute.* It follows that if the statute has provided a narrower authority than was formerly available at common law, the authority is limited to that provided by the statute. Such a principle is already clearly recognised when a statute provides for action that was formerly provided for under the prerogative. There is uncertainty, however, as to whether the prerogative authority may subsist alongside the statutory authority, and be available as an alternative source of authority in so far as it does not exceed the authorisation provided by statute. It is likely that the courts may regard this as a matter of statutory interpretation. In contrast the “enhanced rule of residuality” advanced in the Cohn model suggests that the common law power clearly should not remain as an alternative source of authority should pre-action statutory authority be available.

The rule of residuality is consistent with the democratic underpinning of the constitutional system and the prevailing understanding of the supremacy of Parliament. The second constraint in the Cohn model is less vague than the first and third constraints.

As a third constraint on the government's non-statutory powers, Cohn suggests that there is a need for pre-action legislative authority where the government action is anticipated as having a “long-lasting bearing on society”. The implication is that the third source cannot authorise such action. How will it be decided which government action is included within this prescription? What is meant by “long-lasting bearing”? How is the drawing of a line between some bearing and a “long-lasting bearing on society” justified? Surely there will be government actions under the third source having a short-term impact which will arguably be as deserving of parliamentary pre-action scrutiny as other third-source actions having a long-term impact. At present, since all government action, the impact of which affects positive legal rights vested in other legal persons, requires authority in positive law, the requirement suggested by Cohn would only be innovative in extending a need for legislative pre-action approval to those third-source actions not in conflict with existing positive law which have “long-lasting bearing on society”.

*The conventional expectation model*
The conventional expectation model would involve creating a new and clearer set of expectations about the provision of authority for government action. Under the model the clear expectation from constitutional convention could be that executive action will normally be authorised in advance by statute put in place with appropriate scrutiny through the parliamentary processes.

The practical problems, discussed above, of anticipating all the needed authority and the difficulty of the legislative process considering with appropriate specificity all the needed statutory authorisations would be relevant. Rather than statutory authorisations being enacted in one mass exercise, they could be enacted incrementally as particular needs arose, and Parliament had helpful contexts in which to carry out its responsibilities as to pre-action accountability. In this model the third source could be maintained to allow the government authority to do the unforeseen, but the expectation could be that the third source should only be utilised as a last resort.

The justification for maintaining the third source to enable the government legitimately to do the necessary, but unexpected, requires further comment. It can be speculated that the government may not often be called upon to employ this flexibility advantage of the third source. The unexpected will not necessarily demand action under the third source. The need could well be met by the urgent enactment of specific authorising legislation. Also, there are now broad statutory authorisations available to the executive to enable it to deal with emergencies.

Formal accountability mechanisms could be put in place by positive law to ensure that under this model the use of the third source was only in justifiable circumstances. Under the model there obviously would be an increased consciousness of any use of the third source. Its use could be required to be fully recorded and reported upon to Parliament. Formal accountability mechanisms could include a requirement that such a report be referred by Parliament to an appropriate select committee within a specified time period of the action being taken. Parliament upon receiving the report could not only call the executive to account, but in theory could enact legislation to counter the action taken by the government. However, the reality of executive domination of the legislature may limit the likelihood of such a parliamentary reaction. Also there may be practical difficulties in facilitating this parliamentary accountability because of the volume of government action which will continue to find its authority in the third source. Competing positive law would remain a legal constraint on the third-source action in much the same way as it currently constrains such action.

Where the third source is used from time to time to allow the government to do the unanticipated, the legislature could follow the action with an appropriately scrutinised statutory authorisation for future similar action. The legislature, when addressing the issue of statutory authorisation of similar executive action, may wish to give retrospective statutory authority to the action already taken by the government under the third source. Perhaps a convention could be encouraged to develop whereby the legislature would be expected retrospectively to authorise such reasonable action as may have had to be taken under the third source. A similar expectation exists in relation to executive actions taken under martial law.

If the conventional expectation model were to be adopted one would expect the courts on judicial review of all executive action to adopt the intuitive approach of inquiring first whether there is authority in positive law for the action, rather than inquiring as suggested with the current three-source design, whether there is any positive law to prevent the government taking the action which it wishes to take. The suggested approach to judicial review would be consistent with the expectation and convention that authority should normally be provided in positive law in advance for all action of the executive government. That said, the conventional expectation approach would continue to recognise all action not authorised in advance by positive law, as legitimate provided that it does not conflict with positive law. Notwithstanding the survival of the third source, the expectation model would encourage greater pre-action authorisation by Parliament of executive action.

A refinement on the conventional expectation model would be to replace the continuing availability of the third source with a statutory authorisation for the executive to act in unspecified circumstances, where there is no law to the contrary, there is no other authorisation of the intended action in positive law, and such action is reasonably necessary in order to further good government. In these circumstances the executive would be taking the specific unforeseen action under the authority of statute. The courts would be able to review the action of the executive to determine whether the qualifications on the statutory authority have been met, action beyond the limits being found to be ultra vires. The courts would, however, struggle with the justiciability of a requirement that government action be reasonably necessary in order to further good government. Also the courts could justifiably regard such a broad authorisation for executive action as an unacceptable abdication.
by Parliament of its legislative function. The accountability feature of this extended conventional 
expectation model would be enhanced if it were specified in statute that the authority to act under the 
residuary authorisation should expire after a certain time unless replaced by a specific statutory 
authorisation for the executive action.

*L.Q.R. 249* The residual authorisation, whether from the third source or an equivalent statutory 
authorisation, could remain surrounded by a convention that it should only be used in the rarest of 
circumstances where the justification is necessity. Authority for government action should normally be 
provided in specific positive law with its contextually tailored safeguards.

The rule of residuality, the second constraint or non-statutory powers of government recognised by 
Cohn, could also be a feature of the conventional expectation model. If particular government 
action is authorised by statute the government will be required to find the authority for that action in 
the statute, not any non-statutory source which may have previously been a legitimate legal 
foundation for such action.

**CONCLUSION**

The sources of the legal authority for government action are both theoretically and practically 
important. The sources are statute, the prerogative and what has been called in this article “the third 
source”. I have been concerned to explore the current understanding of the third source, that is the 
freedom which the government appears to have to do anything that is not in conflict with positive law. 
There are different judicial and academic opinions about whether the third source should be a 
legitimate source of authority for government action.

The third source has been criticised because it allows the government to take action before the 
prospect of that type of action has been scrutinised and authorised by the legislature. The suggestion 
is that post-action accountability mechanisms are not always by themselves adequate.

The article explores three alternative constitutional design models for the provision of the authority 
which the government currently derives from the third source. I have called them the mandatory 
positive authorisation model; the Cohn model and the conventional expectation model. Each model is 
concerned to address the tension between the need for the government at all times to have the legal 
authority to do that which good governance of society requires and the democratic importance of the 
legislature having the opportunity to prescribe the power the government has to act in advance of 
such action taking place. Democratic theory points towards authority for executive action being best 
provided in advance of the action taking place by suitably specific statute law.

It is not possible to resolve the tension perfectly. The unpredictability and infinite variety of human 
society are such that governments will always have to have the capacity to take legitimate action to 
further the public good in advance of the legislature deliberately deciding on the acceptability of the 
particular action which has had to be taken. *L.Q.R. 250* Further, required government action from 
time to time will inevitably be so unanticipated and multifarious that if it were to be authorised by the 
legislature in advance of action being taken, the authorisation would have to be in such broad terms 
that the members of the legislature would be unlikely to have their minds directed to the particular 
action the government has thought it necessary to take.

The mandatory positive authorisation model is likely to be considered too inflexible: there has to be a 
capacity, in what the community may want to be rare circumstances, for the government to take 
legitimate action where the particular need for authority in positive law has not been anticipated. The 
Cohn model, although providing for increased pre-action scrutiny, confines the requirement for such 
scrutiny to vaguely specified areas of government activity and leaves a relatively broad freedom for 
the government to act under the third source.

In contrast the conventional expectation model creates a clear expectation that government action 
should normally be anticipated and authorised in advance by the legislature, but maintains the 
freedom for the government, where justified, to act without pre-action legislative authorisation. It is 
speculated that over time the conventional expectation model will leave a relatively small range of 
potential justified government action to require authority to be found in the third source. Further, 
post-action accountability mechanisms could be enhanced to better ensure that any use of the third 
source does not go beyond that which can be justified. The conventional expectation model could 
also accommodate the statutory codification of the prerogative and the rule of residuality as advanced 
by Cohn.
Adoption of the conventional expectation model would be unlikely to cause any dramatic changes to what the government can and cannot do. The differences would lie in the more comprehensive pre-action legislative scrutiny of authority for government action and the opportunity for better facilitation of post-action accountability. There is a need for an ongoing constitutional conversation which has the objective of bringing an improved order to an aspect of the UK constitution that is currently uncertain, unclear and sits uncomfortably with the democratic constitutional ideal.

B.V. HARRIS.


L.Q.R. 2007, 123(Apr), 225-250


2. See R. (on the application of Hooper) v Secretary of State for Work and Pensions [2005] UKHL 29; [2005] 1 W.L.R. 1681. The principle attracted little direct discussion in the judgments and did not have to be specifically upheld in order for the appeal to be determined. See, however, Lord Hoffmann at [43]-[47]. Lord Nicholls of Birkenhead (at [6]) expressly preferred not to express a view on the issue without fuller argument. See below at p.230.


5. In this article the expression “positive law” is used to include statutory law and common law, the royal prerogative and the principles providing grounds for judicial review being examples of the latter.


7. See, e.g. P.P. Craig, Administrative Law (5th edn, 2003), p.555; Lester and Weait, above, fn.5, at 418.


11. See Cohn, above, fn.9, at 97.


13. See Harris, above, fn.1, at 626.

14. See H.W.R. Wade, “Procedure and Prerogative in Public Law” (1985) 101 L.Q.R. 180 at 191-193. See generally Harris, above, fn.1, at 626, fn.5. The UK courts on occasion continue to use the expression “prerogative” broadly to include all non-statutory authority of the Crown, including the third source. See, e.g. the recent classification of ex gratia payments as an aspect of the prerogative: In re McFarlane [2004] UKHL 17; [2004] 1 W.L.R. 1269 at [40], per Lord Scott of Foscote.

15. See R. (Hooper) v Secretary of State for Work and Pensions, above, fn.3.

16. See the similar observation made in Harris, above, fn.1, at 626, fn.6.


19. See Wade, above, fn.15, at 191 and Lester and Weait, above, at fn.5, at 419.

20. See, e.g. R. (on the application of Hooper) v Secretary of State for Work and Pensions, above, fn.3.

21. Ibid. See also Wade, above, fn.15. Contrast R. v Secretary of State for the Home Department, Ex p. Harrison [1988] 3 All E.R. 86 at 90, per Farquharson J. and at 93, per Stuart-Smith L.J. where such payments were labelled as an aspect of the royal prerogative. Similarly, see In re McFarland, above, fn.15, at [40]-[41], per Lord Scott of Foscote.


25. See, McLean, above, at pp.139-140.


27. See, e.g. Entick v Carrington (1765) 19 St. Tr. 1030.
28. See, e.g. Gillick v West Norfolk and Wisbech Area Health Authority, above, fn.24 (government memorandum to area health authority); R. v Secretary of State for the Environment, Ex p. Greenwich LBC, above, fn.24 (distribution of pamphlets); R. v Secretary of State for Health, Ex p. C, above, fn.23 (government list of persons whose suitability to work with children is in doubt) and In re McFarland, above, fn.15 (ex gratia payments). For a comprehensive discussion of judicial review of the third source see Elliott, above, fn.7, at p.186 et seq. See also Harris, above, fn.1, at 639-647.


30. See, e.g. BBC v Johns [1965] Ch. 32; Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] A.C. 75.

31. See, e.g. Burmah Oil Co (Burma Trading) Ltd v Lord Advocate, above. For discussion of circumstances when the prerogative may not override competing positive law rights, see Vincenzi, above, fn.10, at pp.14, 15.

32. See 

33. For example, the law of trespass: see Entick v Carrington, above, fn.28.

34. Above, fn.29.

35. See, e.g. s.6 of the Human Rights Act 1998.


37. See In re McFarlane, above, fn.15, at [40] citing Auckland Harbour Board v The King [1924] A.C. 318 at 326-327, per Viscount Haldane.

38. See art.4 of the Bill of Rights 1688; David Feldman, English Public Law (2004), para.3.31; Terence Daintith and Alan Page, The Executive in the Constitution (1999), Ch.6.


41. See, e.g. Entick v Carrington, above, fn.28.

42. Above, fn.29.


44. See, e.g. Wade, above, fn.15, at 190-194; Wade, letter to The Times, May 18, 1989, above, fn.24.

45. See Elliott, above, fn.7, at pp.191-192.


47. See, e.g. R. v Somerset County Council, Ex p. Fewings, above, fn.4.

48. See, e.g. R. v Secretary of State for the Home Department, Ex p. Northumbria Police Authority, above, fn.40.

49. Above, fn.3.

50. The Parliamentary Secretary, Lord Chancellor's Department, Baroness Scotland of Asthal: H.L. Deb., Vol.643, col.W.A. 98 (January 22, 2003); H.L. Deb., Vol.645, col.W.A. 12 (February 25, 2003); H.L. Deb., Vol.646, col.W.A. 59 (March 24, 2003). See Lester and Weait, above, fn.5, at 415-418. The authors suggest that the memorandum should be construed narrowly. For reference to government publications acknowledging the government's understanding that it is free to do what "an ordinary person" may do see Daintith and Page, above, fn.39, at p.34.

51. Above, fn.3.

52. Above, fn.4.

53. Above, fn.4.


55. See the cases cited above, fn.47.

56. Above, fn.40.

57. Above, fn.4. This decision was appealed to the Court of Appeal (see [1995] 1 W.L.R. 1037) which dismissed the appeal, but clearly continued its holding to the uncontroversial principle that all the actions of local authorities must be authorised by positive law (see p.1042, per Sir Thomas Bingham M.R.).

58. Above, fn.4, at 524.

59. See, e.g. Lester and Weait, above, fn.5, at 422.

60. Above, fn.4.

61. Above, fn.3.

62. Above, fn.52.


64. ibid.

65. See, e.g. R. v Secretary of State for the Home Department, Ex p. Simms, above, fn.47.

66. Above, fn.64, at 465.
67. Above, fn.4.
68. Above, fn.23.
69. Above, fn.47.
70. Above, fn.64, at 466.
71. ibid., at 466.
72. ibid.
74. See Elliott, above, fn.7, at 169-171.
75. ibid., at 169. (The italics are those of Dr Elliott.)
76. ibid.
77. ibid.
78. ibid.
79. ibid.
80. ibid.
81. ibid., at 170-171.
82. Above, fn.4.
83. E.g. the House of Lords did not take the opportunity to show support in R. (on the application of Hooper) v Secretary of State for Work and Pensions, above, fn.3.
84. See, e.g. Wade, above, fn.15, at 191; Daintith, above, fn.19, at p.211; Wade and Forsyth, above, fn.17, at p.349; Daintith and Page, above, fn.39, at pp.17, 33 and 34; Vincenzi, above, fn.10, at pp.14-16; A.W. Bradley and K.D. Ewing, Constitutional and Administrative Law (13th edn, 2003), p.404; P.P. Craig, Public Law and Democracy (1990), at pp.188-189; Craig, above, fn.6, at p.555; Hadfield, above, fn.18 at pp.201-202; Elliott, above, fn.7, at p.166; Cané, above, fn.7, at pp.50-51. For more critical commentary see Lester and Weait, above, fn.5, at 421-422; Dawn Oliver, Common Values and the Public/Private Divide (1999), pp.112-114; T.R.S. Allan, Law, Liberty and Justice (1993), at pp.157-160. See also Michael Taggart, "The Peculiarities of the English: Resisting the Public/Private Law Distinction" in Paul Craig and Richard Rawling (eds), Law and Administration in Europe: Essays in Honour of Carol Harlow (2003), 107 at pp.115-116.
85. Above, fn.3.
86. Above, fn.4.
87. See Le Sueur, above, fn.30, at para.3.118.
88. Above, fn.4.
89. Above, fn.88.
90. ibid.
91. ibid., at para.3.119.
92. ibid.
93. ibid., at para.3.120.
94. ibid.
95. Above, fn.9, at 120.
96. ibid., at 100.
97. ibid., at 107.
98. ibid.
99. ibid., at 120.
100. ibid.
101. For discussion of the benefits to government of being able to use prerogative authority, see Rodney Brazier, Ministers of the Crown (1997), at pp.204-205. See also F.N. Forman, Constitutional Change in the United Kingdom (2002), at pp.196-197.
102. See Le Sueur, above, fn.30, at para.3.130.
103. ibid., at para.3.146.
104. For criticism of ministerial responsibility as an accountability mechanism in respect of government action under the prerogative see Rodney Brazier, Constitutional Reform (2nd edn, 1998), p.105; Lester and Weait, above, fn.5, at 426.
105. See, e.g. Entick v Carrington, above, fn.28.
106. See above, fn.29. The potential of judicial review to facilitate accountability is limited by its characteristics of often being well after the action, expensive and not addressing the merits of decision-making. There is also the possibility that the reviewing court may find the third source decision-making non-justiciable.
107. Above, fn.41.
108. See Daintith and Page, above, fn.39, at p.27.
109. ibid., at p.349.

See Lester and Weait, above, fn.5, at 425-428.


Above, p.232.

Above, fn.64.

Above, p.232.

See R. (on the application of Hooper) v Secretary for State for Work and Pensions, above, fn.3, at 1695-1696, per Lord Hoffmann. See also Harris, above, fn.1, at 635-636.

See Winterton, above, fn.55, at 409; Cohn, above, fn.9, at 99 and Zines, above, fn.13, at 284.

My colleague, Hanna Wilberg, suggested this observation on reading a draft of the article.


See Allan, above, fn.74, at p.159.

See Cohn, above, fn.9, at 121.


See Brazier, above, fn.102, at p.203, fn.4; Brazier, above, fn.105, Ch.6.


There is even considerable difficulty in keeping records of when the royal prerogative is used: see Le Sueur, above, fn.30 at para.3.109.

See P.P. Craig, Public Law and Democracy in the United Kingdom and United States of America (1990), p.192.


Above, p.237.

See Vincenzi, above, fn.10, Ch.10.

See, e.g. R. v Secretary of State for the Home Department, Ex p. Simms, above, fn.47, at 130 and 131-132 where Lord Steyn and Lord Hoffmann respectively recognised the “principle of legality” whereby fundamental rights may not be overridden by “general or ambiguous words” (Lord Hoffmann).

See Cohn, above, fn.13.

ibid., at 120.

ibid.

ibid.

Above, fn.47.


Above, fn.4.

Above, fn.9, at 120.


See Cohn, above, fn.9, at 121.

ibid., at 120.

ibid.

Above, p.237.


See Bradley and Ewing, above, fn.85, at pp.610-611.

Cl. Brader v Ministry of Transport[1981] 1 N.Z.L.R. 73 at p.78, per Cooke J.

See Cohn, above, fn.9, at 120-121.

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Authority; Constitutional law; Executive power; Legal positivism

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