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The Scope of and Limits to Central Government Powers to Act and Decide

19 June 2020

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The *Carltona* principle and the Supreme Court judgment in *R v Adams* [2020] UKSC 19

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Three Questions

This presentation will answer three broad questions:

1. What is the *Carltona* principle, and how does it fit into public law in the United Kingdom?
2. What did the Supreme Court say in *R v Adams* [2020] UKSC 19?
3. What (if any) are the lasting implications of the judgment in *R v Adams* [2020] UKSC 19?

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The *Carltona* principle (1)

- Ordinarily, a discretionary power must be exercised only by the public authority to which it has been conferred; but different considerations apply to powers conferred to a minister (*De Smith* at 5–159 & 5–185)
- This is because *'the functions are so multifarious that no minister could ever personally attend to them'* (*Carltona* [1943] 2 All ER 560)
- If every power conferred on a minister had to be personally exercised by that minister, *'public business could not be carried on'* (*Carltona* [1943] 2 All ER 560) — there would be too much of an administrative burden on ministers if this was the case.

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The *Carltona* principle (2)

- Arising from *Carltona* [1943] 2 All ER 560 order for requisitioning of a factory during the war effort
- Under the *Carltona* principle, *'the functions of a minister of the Crown can be exercised in his or her name by departmental officials'* and the minister is responsible for the exercise of those powers by officials (*Hamill* [2014] EWHC 2799 (Admin), [61])
- The principle applies so that *'a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself' (Bourgass* [2016] AC 384, [49]) — it is not a question of *'agency'* or *'delegation'*, but is *'one of devolution to the official as the alter ego of the minister'* (*Forsey* [2017] EWHC 1152 (QB))

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R v Adams [2020] UKSC 19 (1): Background

- From 1922 onwards, successive items of legislation authorised detention without trial in Northern Ireland — commonly referred to as internment
- Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972:
    - Interim Custody Order ('ICO') where Secretary of State considered that an individual was involved in terrorism;
    - They would then be taken into custody: had to be released within twenty-eight days, unless referred to a Commissioner who then made a decision, potentially resulting in a Detention Order.

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R v Adams [2020] UKSC 19 (2): Background

- Gerry Adams, ICO made on 21 July 1973 – signed by a Minister of State in the Northern Ireland Office. Referred to Commissioner, and a Detention Order made
- Then, two convictions for trying to escape from prison:
  - 20 March 1975 (18 Months)
  - 18 April 2975 (3 Years)
- There was no appeal against those convictions at the time; but, under the so-called 'thirty-year rule' new documents came to light in October 2009, in particular a legal opinion
- Granted permission to appeal against conviction, out of time

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R v Adams [2020] UKSC 19 (3): The Issue

- Appeal against conviction, said that it was unsafe because the custody order authorising his detention was not validly made because it was not personally considered by the Secretary of State
- Agreement that there was no personal consideration by the Secretary of State: the only issue was whether there needed to be personal consideration by the Secretary of State
- Adams argued that there was, relying on the wording of the provisions, the gravity of the power etc. But the Government relied on *Carltona* and said that there was no need for the Secretary of State to personally consider it – officials enough.

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R v Adams [2020] UKSC 19 (4): The Issue

- Article 4 (1) 1972 Order:

  'Where it appears to the Secretary of State [… that a person has been involved in terrorism … the Secretary of State may make an order ("interim custody order") for the temporary detention of that person'

- Article 4 (2) 1972 Order:

  'An interim custody order of the Secretary of State shall be signed by a Secretary of State, Minister of State or Under Secretary of State'

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R v Adams [2020] UKSC 19 (5): The Court of Appeal

- The starting point is that the *Carltona* principle applies, and the question is whether it has been disapplied by Parliament using express words or by necessary implication ([42])
- The necessary implication can be derived from the wording of the legislation, its framework and the context – the gravity of the subject-matter is an aspect of context ([42])
- Nothing in the wording or framework to suggest that Parliament intended it should be disapplied – wording is a *'common legislative formula'* ([43]) and the framework suggests a limited class of persons can make the decision, but not limited to Secretary of State ([44]). Not altered by context ([45] - [47]).

R v Adams [2020] UKSC 19 (6): The Court of Appeal

- Concluding that, *'this court has not been satisfied that there is material or information available that displaces the Carltona* principle' ([51])
- But, certifying the following point of law of general public importance for the Supreme Court:

  'Whether the making of an interim custody order under article 4 of the 1972 Order required the personal consideration by the Secretary of State of the case of the person subject to the order or whether the Carltona principle operated to permit the making of such an order by a Minister of State?'

R v Adams [2020] UKSC 19 (7): The Supreme Court

- Lord Kerr, writing for a unanimous Supreme Court, allows the appeal. The *Carltona* principle did not apply. The Secretary of State should have personally considered the case. The ICO was invalid because it was not. The convictions were unsafe.
- Some important points:
  - confirmation that the gravity of the subject-matter is relevant ([14]);
  - doubt about there being a *'presumption'* in favour of *Carltona* – preference to adopt a factor-based approach, textual analysis which is unencumbered by a presumption ([26])

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R v Adams [2020] UKSC 19 (8): The Supreme Court

- Goes on to apply that approach:
  - segregation of functions (i.e. making and signing) was of significance — they called for *'quite distinct treatment'* ([31]);
  - the ICO signed is to be *'that of the Secretary of State'* denotes that it is a personal decision ([32]);
  - added to this is the fact that the power was a *'momentous one'* ([38]);
  - no reason to believe that this would place an *'impossible burden'* on the Secretary of State ([39]).
- Parliament intended that Secretary of State personally ([40]).

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The Lasting Implications of *R v Adams* [2020] UKSC 19 (1): Future Claims

- Potentially affects c. 200 former internees, who may now challenge their internment on similar grounds:

> *'There is an onus on the British Government to identify and inform other internees whose internment may also have been unlawful … This is not about compensation; that is maybe work for another day'*

Gerry Adams

Speaking Following the Judgment on 13 May 2020

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The Lasting Implications of *R v Adams* [2020] UKSC 19 (2): Presumption

- Lord Kerr expressly leaves open the question of whether there is a *'presumption'* that that Parliament should be taken to intend the *Carltona* principle to apply, unless the contrary intention appears ([26]):
  - Lord Kerr expresses some doubt about this, his *'provisional view'* being that there is no such presumption — whether *Carltona* applies will depend on a careful examination of the relevant factors in every case ([25] - [26])
- No longer to be presumed that *Carltona* applies — a matter of interpretation, to be approached from a neutral starting point? Does this represent a change in approach ([25])?

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The Lasting Implications of *R v Adams* [2020] UKSC 19 (3): Subject Matter

- Settles the debate about the relevance of the *'importance of the subject matter'* to the application of the *Carltona* principle
  - There was previously some uncertainty about this: *Golden Chemicals* (Brightman J) [1976] Ch 300, 310; *Harper* [1990] NI 28.
- It is now clear that this is a relevant factor ([14], [26], [38]). Various formulations: the *'seriousness of the consequences'* [14]); the *'importance of the subject matter'* ([26]); whether the power is *'momentous'* ([38]). All asking the same question.
- Unsurprising, as this factor clearly bears on the question of Parliamentary intention.

The Lasting Implications of *R v Adams* [2020] UKSC 19 (4): Factor Based

- Clarity on the broad approach to be taken when a *Carltona* issue is raised, namely an *'open-ended examination'*, which considers the following factors in particular ([26]):
  - the framework of the legislation;
  - the language of the pertinent provisions in the legislation;
  - the importance of the subject matter.
- Other factors likely to be relevant too, for example, whether it would be an *'administrative burden'* for all decisions to be taken by the minister ([39])
- Gives a clear indication of the most relevant factors, encouraging a case-by-case analysis of relevant powers.

The Lasting Implications of *R v Adams* [2020] UKSC 19 (5): Further Reading

- '*Mishandling the Law — Gerry Adams and the Supreme Court*' Professor Richard Ekins and Sir Stephen Laws (foreword by Rt. Hon. Geoffrey Cox QC) Policy Exchange (May 30 2020)
- '*The Supreme Court's Misunderstanding in the Gerry Adams Case*' Rt. Hon. Lord Howell of Guildford, Policy Exchange (10 June 2020)
- *'Escape from Carltona? R v Adams [2020] UKSC 19'* Paul Daly, Administrative Law Matters (14 May 2020)

Policy Exchange

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Thank You

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Imputed knowledge of Ministers and civil servants in decision-making

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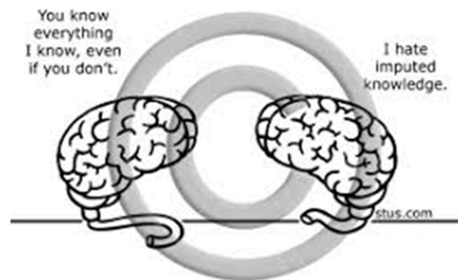
Roadmap:

- R (oao National Association of Health Stores & anr) v Dept of Health [2005] EWCA Civ 154
- NAHS in practice – consultation
- NAHS in practice – PSED
- NAHS in practice – local authorities
- Cf. Bushell v SSE [1981] AC 75



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R (oao National Association of Health Stores & anr) v Dept of Health [2005] EWCA Civ 154

- Decision to prohibit the sale of a herbal tranquiliser known as “kava-kava” for medicinal purposes and for use in foodstuffs
- Ministers did not know that the prohibition was opposed by Professor Ernst, a leading expert in physchopharmacology, on cogent grounds that he had set out in a published meta-analysis

- Qn posed: **does the law impute what the civil servant knows as the minister’s knowledge, regardless of whether the minister actually knows it?**

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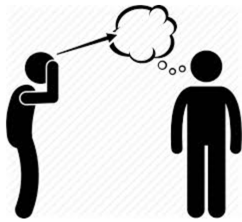
Per Sedley LJ at [24]:

Carltona, however, establishes only that the act of a duly authorised civil servant is in law the act of his or her minister. It does not decide or even suggest that what the civil servant knows is in law the minister"s knowledge, regardless of whether the latter actually knows it.



Per Keene LJ at [72]:

Carltona says nothing about the imputing of the knowledge of relevant facts to the minister merely because those facts are known to one or more of his civil servants, no matter how senior.

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per Crane J in the High Court at [72]:

It follows that information available to officials involved in advising a minster is information that can properly be said to be information taken into account by the minister. It was submitted by Mr. Thompson QC that this would mean that information known to any official in the department can be said to be known to the minister taking a decision. I do not think that follows. If on a challenge to a decision, it were to be asserted that the Secretary of State took into account such information, when in fact no official involved in the matter knew of it, that would in my judgment be an inaccurate assertion. Nor, for example, would it be an accurate assertion if the relevant information was buried in a file but not in fact considered by any official in the matter. However, it does not follow that the court will in the ordinary way investigate whether such an assertion is accurate.

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In my judgment, and with great respect to Crane J, this part of his decision is unfounded in authority and unsound in law. It is also, in my respectful view, antithetical to good government. It would be an embarrassment both for government and for the courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes worse, not better, when it is qualified, as Crane J qualified it and as Mr Cavanagh now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the *Carltona* doctrine of ordered devolution to appropriate civil servants of decisionmaking authority (to adopt the lexicon used by Lord Griffiths in *Oladehinde* [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge.

Per Sedley LJ [26]

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In contrast to *Carltona,* where this court gave legal authority to the practical reality of modern government in relation to the devolution of departmental functions, the doctrine for which Mr Cavanagh contends does not, certainly to my knowledge, reflect the reality of modern departmental government. The reality, subject no doubt to occasional lapses, is that ministers (or authorised civil servants) are properly briefed about the decisions they have to take; that in the briefings evidence is distinguished from advice; and that ministers take some trouble to understand the evidence before deciding whether to accept the advice. I will come later in this judgment to the critical question of how much of the evidence the minister needs to know; but I cannot believe that anybody, either in government or among the electorate, would thank this court for deciding that it was unnecessary for a decisionmaker to know anything material before reaching a decision.

Per Sedley LJ at [27]

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The serious practical implication of the argument is that, contrary to what the decided English cases take for granted, ministers need know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decisionmaker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake.

Per Seldey LJ at [37]

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What does the minister need to be told?

Reliance on Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] 162 CLR 39, per Gibbs CJ (pp. 30-31):

> *"Of course the Minister cannot be expected to read for himself all the relevant papers that relate to the matter. It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department. No complaint could be made if the departmental officers, in their summary, omitted to mention a fact which was insignificant or insubstantial. But if the Minister relies entirely on a departmental summary which fails to bring to his attention a material fact which he is bound to consider, and which cannot be dismissed as insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed his satisfaction in accordance with law"*

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What does the minister need to be told?

- Reference to Air 2000 v SST (No 2) [1990] SLT 335 - Civil Aviation Authority advice not seen by the SoS but by an interdepartmental working party that advised SoS
- Lord Clyde: mere physical delivery of advice not sufficient, but "if it is given to an official who has responsibility for the matter in question, that should suffice"
- CoA not agree that receipt by the official would amount to consideration by the SoS (per Sedley LJ at [38])
- Sedley LJ: "…it would be incumbent on such an official to ensure that either the advice or a suitable précis of it was included in the submission to the minister whose decision it was to be" (at [38])

NAHS in practice - consultation

R (oao Buckinghamshire CC et ors) v SST [2013] EWHC 481 (Admin) per Ouseley J

- Consultation process for HS2 - whether consultation response by HS2 Action Alliance Ltd (particularly concerning blight and compensation scheme) had been conscientiously considered by the minister
- *"Mr Wolfe is right, and the point was not really at issue, that it is the Minister's conscientious consideration of the response which matters; see the National Association of Health Stores case…"* [830]
- In reality the response had bee "just brushed aside"; if the response was considered at all, it was not considered conscientiously [841]
- Consultation process had been so unfair as to be unlawful
- "Whichever way it happened, I am satisfied that HS2AA's response was not conscientiously considered by the SST for the purpose of reaching the decision on the issue on which consultation had taken place" [835]

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NAHS in practice - consultation

- **R (Stephenson) v SSHCLG** [2019] EWHC 519 (Admin) – re consultation on revised NPPF, para 209(a) on shale gas/oil resources policy; useful summary of previous authorities (per Dove J at [36]-[41])

R (Kohler) v Mayor's Office for Policing and Crime [2018] EWHC 1881 (Admin) – re consultation on decision to close police stations, including a police station in Wimbledon and whether D failed to conscientiously consider consultation response by Merton Liberal Democrats

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NAHS in practice - consultation

The summary of consultation responses did not refer to that proposal or suggestion. On the evidence, <u>we cannot be satisfied that the deputy mayor herself read the Merton Liberal Democrats' submission.</u> The three options relating to alternative sites were discussed at the meeting. Whilst there are general references to discussing the feedback, there is no evidence that this proposal was specifically discussed. This is in contrast to the options relating to alternative sites, where the evidence does establish that those matters were discussed. We conclude, therefore, that this aspect of the claimant's consultation response was not addressed by the deputy mayor in the course of making her decision. And we are in no doubt that it ought to have been. This amounts, in our view, to a clear error of law. (**Kohler per Lindblom LJ and Lewis J at [68]**)

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NAHS in practice - PSED

R (oao Bracking) v SSWP [2013] EWCA Civ 1345

- Decision to close the Independent Living Fund (assisting persons with disabilities with their needs and helping them to live their lives more independently)
- Successful challenge – D failed to discharge the public sector equality duty imposed under s149 Equality Act 2010
- The Minister had inadequate information from her officials as to the proposal's true impact on the ability of users to live independent lives
- Several LAs had reported on the such potential adverse effects and these were not seen by the Minister (at [50])

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NAHS in practice - PSED

…(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: R (National Association of Health Stores) v Department of Health [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

Bracking Per McCombe LJ at [25]

It seems to me that what was put before the Minister did not give to her an adequate flavour of the responses received indicating that independent living might well be put seriously in peril for a large number of people. **Bracking per McCombe LJ at [62]**

NAHS in practice – local authorities

R (oao Bukartyk) v Welwyn Hatfield BC [2019] EWHC 3490 (Admin)

- Challenge to D's refusal to accept C's second homelessness accommodation application under ss183 and 184 Housing Act 1996
- C had provided further evidence to support her application, demonstrating that she had mental health concerns
- Qn: had this further information been considered these matters
- Court held – nothing in the decision to show that these issues were taken into account (at [52])
- D *inter alia* highlighted that one officer had made various entries in the housing file, showing an awareness of these concerns (at [50])
- D submitted that knowledge/consideration could be "imputed" to the council officer who made the decision, from these entries (at [53])

NAHS in practice – local authorities

Again, I cannot accept that submission. First, there is no principle of law by which the knowledge of one official in a public authority can generally be imputed to another when the latter makes a decision. Indeed, the position is to the contrary: see R (National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154 at [26] to [38] per Sedley LJ

Bukartyk per Grodzinski QC (sitting as a Deputy High Court judge) at [54].

Bushell v SSE [1981] AC 75

"…The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

Per Lord Diplock at 95G

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What is **fair procedure is to be judged** not in the light of constitutional fictions as to the relationship between the minister and the other servants of the Crown who serve in the government department of which he is the head, **but in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached**. To treat the minister in **his decision-making capacity** as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise."

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In my judgment *Bushell* is not authority for what Mr Cavanagh seeks to derive from it. It is a decision about due process – specifically, about what fairness requires where new material which emerges between the report to the minister and his decision is digested departmentally. Lord Diplock's point is that the departmental advice is part of the ministerial decision, not of the inspector's report. It is an element in the minister's thinking. It was not argued before the House, and their Lordships were not invited to decide, that the minister could reach his decision in ignorance of a relevant factor so long as it was known within his department. The question was whether what was known to the department ought to have been made available to the objectors….

Per Sedley LJ in NAHS at [33]

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- R (ClientEarth) v SSBEIS and Drax Power Ltd [2020] EWHC 1303 (Admin)

- Christopher Packham CBE v SST et ors [2020] EWHC 829 (Admin)

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The Ram Doctrine

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The Ram Doctrine

- "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 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."

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Origin of the Ram Doctrine

- Memo dated 2.11.45 by Sir Granville Ram, First Parl'y Counsel, in relation to the Ministers of the Crown (Transfer of Functions) Bill (Act of 1946)
- Dealt with the need for legislation to confer power to add new functions to Govt Depts by order
- HoL Constitution Ctte: Ram memo is not a source of law and should not be considered one – not an accurate reflection of the law today

Sources of Government power

- 1. statute
- 2. the Royal prerogative
- 3. common law powers – third source:
- recognised that the Crown is not a statutory body like say a local authority which only operates under statute
- the Crown has some inherent, de facto or non-statutory powers

Modern reliance on the Ram Doctrine

- 25.2.03 written answer from Bns Scotland of Asthal
- Ministers and Depts have common law powers which derive from the Crown's status as a corporation sole
- may be limited by statute, expressly or by necessary implication
- legislation is not always necessary for an extension of Ministers' powers

Modern reliance on the Ram Doctrine cont'd

- "During the past five years, as in previous periods, the common law powers of the Crown have **often been relied upon as the legal basis for government action**. Common law powers form the basis of such governmental actions as **entering into contracts, employing staff, conveying property and other management functions** not provided for by statute either expressly or by implication. To require parliamentary authority for every exercise of the common law powers exercisable by the Crown either would impose upon Parliament an impossible burden or produce legislation in terms that simply reproduced the common law."

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Modern reliance on the Ram Doctrine cont'd

- these are subsidiary, incidental and ancillary actions, and part of the normal day-to-day business of Govt
- would cover eg setting up trusts, appointing agents, making ex gratia payments, publishing policy/guidance, consulting, maintaining databases, sharing data, etc
- would also cover actions to implement new legislation, or dismantle old legislation, prior to Royal assent to a new Bill, eg appointing staff, seeking contractors, etc

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Scope of the Ram Doctrine

- managerial / subsidiary powers analysis is not very controversial
- meets practical, day-to-day needs of government
- Sumption JSC in *New London College* (2013): "the Crown possesses some general administrative powers" beyond statute and Royal prerogative
- although some say even this is too much

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Scope of the Ram Doctrine cont'd

- some say the powers are wider, eg Carnwath LJ in *Shrewsbury & Atcham BC*
- allow substantive governmental functions for identifiably governmental purposes for the public benefit
- subject to limits set by the law

Extension of the Ram Doctrine

- some take a further extended view of the doctrine, eg Richards LJ in *Shrewsbury & Atcham BC*
- said to mean Ministers have all the capacities and powers of a natural person, and so can do anything a natural person can do, unless limited by the law
- may create impression Ministers possess greater legal authority than is perhaps the case
- is very controversial with some commentators

Extension of the Ram Doctrine

- Lewis J in *Judicial Remedies in Public Law*:
- "The underlying principle, that the Crown, acting through central government ministers, has power to do anything which could be done by a natural person provided that it does not involve the violation of the rights of others or the doing of an act prohibited by law remains valid"

R (Hooper) v SSW&P [2005] UKHL 29

- SoS argued he had the power to make extra-statutory ex gratia payments under the common law powers of the Crown as a corporation sole
- as a corporation sole, the Crown had the same right to deal with its property, and to spend money, as any legal person, and did not need statutory authority
- example of Criminal Injuries Compensation Scheme, originally established without statutory authority
- L Hoffmann: a good deal of force in these submissions

R v SoS for Health, ex p C [2000] 1 FLR 627, CA

- CA endorsed footnote in *Halsbury's Laws*: at common law, the Crown, as a corporation possessing legal personality, has the capacities of a natural person
- power to maintain Consultancy Services Index derived from common law right of any person to do so
- list of persons who might not be suitable to work with children, to advise prospective employers, since 1930s
- obvious adverse consequences for those on the list

Carnwath LJ in *Shrewsbury & Atcham BC* (2008)

- *ex p C* confirms powers of the SoS are not confined to those conferred by statute or prerogative, but extend, subject to any relevant statutory or public law constraints, and to competing rights of other parties, to anything which could be done by a natural person
- examples given usually in nature of ancillary powers
- throws no light on what if any non-statutory *substantive* functions Crown has beyond prerogative

Carnwath LJ in *Shrewsbury & Atcham BC*

- "Unlike a local authority, the Crown is not a creature of statute. As a matter of capacity, no doubt, it has power to do whatever a private person can do. But as an organ of government, **it can only exercise those powers for the public benefit, and for identifiably "governmental" purposes** within limits set by the law"

Richards LJ in *Shrewsbury & Atcham BC*

- do not share Carnwath LJ's reservations about the extent of common law powers of the Crown – take a broad view of those powers
- Government has the normal powers, capacities and freedoms of a corporation with legal personality
- context is a special one, but the powers are the same

Richards LJ in *Shrewsbury & Atcham BC*

- "I accept, of course, that such powers cannot override the rights of others and, when exercised by government, are subject to judicial review on ordinary public law grounds. But I think it **unnecessary and unwise to introduce qualifications along the lines of those suggested by Carnwath LJ** at para 48, to the effect that they can only be exercised "for the public benefit" or for "identifiably 'governmental' purposes". It seems to me that **any limiting principle would have to be so wide as to be of no practical utility or would risk imposing an artificial and inappropriate restriction upon the work of government**."

Waller LJ in *Shrewsbury & Atcham BC*

- powers only confined by the limits set by the law
- instinctively favour some constraint on the powers by reference to the duty to act only for the public benefit
- unwise to say more

Criticism of the extension of the Ram Doctrine

- people can act irrationally, unfairly, improperly, etc
- people can act in ways which are discriminatory
- people do not eg issue immigration/planning policy
- people are spending their own, not public, money
- leaves the purposes covered at large and unclear
- Govt ought not to have an undefined source of power over people which could affect their legal rights / status

Position of the Crown

- position of the Crown is unique and not akin to that of a natural or legal person
- there is a kind of legal fiction that acts of Ministers are done by the Crown
- Crown's position as a corporation sole or aggregate derived from historical need to separate public and private/personal roles of the monarch – the office, rather than the individual holder for the time being

Modern constraints on common law powers

- statute, expressly or by necessary implication
- Human Rights Act 1998
- European law
- public law obligations / limitations – judicial review
- rules on financial propriety
- Parliamentary authority for appropriation of money
- Parliamentary Ombudsman

Influence of statute

- where statutory powers exist, common law powers cannot operate in the same area
- powers expressly or implicitly excluded by statutory scheme covering the same subject matter
- if statute provides a comprehensive code for regulating a function, no room for common law powers
- statutory body would have powers set out in the Act establishing it, and anything which had to be implied

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Conclusions

- remains an unclear and controversial area of the law
- a range of different formulations of the doctrine
- on firm ground in relation to subsidiary and managerial powers, but even then not favoured in every case (eg SC in *Suffolk Coastal DC* re planning policy)
- Govt promotes widest scope of powers, but outcome in *ex p C* might be different if argued again today
- increasing constraints on powers in any event

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