The Third Source of Authority for Government Action Misconceived

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Recent judicial acceptance that the government has residual freedom to undertake any action that is not prohibited, even without positive authorisation, has erroneously diverged from its earlier academic conception. The "third source" conception recognises that such residuary action is subordinate to all positive law. However, courts have attempted to find a positive law basis for residuary freedom in the common law, specifically in the Crown's legal personality. This "common law" conception fundamentally misunderstands the nature of residuary freedom because courts have not adopted what the author terms the "third way of judicial reasoning". This reasoning involves the court asking not whether action is authorised, but whether action is prohibited. The third source is thus being assessed by inappropriate criteria developed in the positive law context. Failure to adopt this judicial method has obscured the need for judicial and legislative development of positive legal rules to control third source action. It is the lack of such rules, not the third source itself, which is contrary to the rule of law.

Authority for executive action remains a vexed question in the unwritten constitutions of New Zealand and the United Kingdom. Without a constitutional document vesting "executive authority",[1] a government is traditionally seen as having statutory powers conferred by a sovereign Parliament, and a diminishing set of common law powers historically exercised by the Crown.[2] These positive forms of authority for government action set out explicitly what action government can take. A growing body of judicial decisions and academic writing debates the existence of a further residuary ability of the government to act without specific authorisation, if nothing prohibits that action. In reality, the government engages daily in actions lacking a formal source of authority, from the purchase of paper clips to the formation of public bodies.[3] Such action is usually incorrectly explained as another form of positive authority, in order to fit existing constitutional

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1 United States Constitution, art II. See also Australian Constitution, s 61.

2 This article will use the more neutral term "government" as opposed to "executive" or "Crown". See BV Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626 at 626.

3 At 627.

frameworks. Robust analysis is lacking, despite obvious constitutional and regulatory implications.

This article challenges such explanations, arguing that two distinct views of the government's residuary freedom have emerged. The first of these, the "third source" conception, considers the ability to undertake action where not prohibited to be a source of authority distinct from statute and prerogative. Instead, the ability exists as a necessary incident of an executive charged with the task of furthering the public good in an unpredictable and infinitely varied society, and requires a new conception of judicial reasoning.

In contrast, the "common law" conception holds that the government's residuary ability to act is seen as an aspect of the Crown's legal personality or corporate status. This conception has gained adherence in the United Kingdom since its recognition in *R v Secretary of State for Health, ex parte C*.[4] According to this conception, authority derives from the common law, rather than being distinct from it. This misunderstands the nature of residuary authority, yet is perpetuated by over-reliance on the common law, under-appreciation of its residuary nature and improper analogy with natural persons. Fundamentally, acceptance of residuary freedom has not been accompanied by adoption of what the author terms the "third way of judicial reasoning", whereby focus shifts from authorisation to prohibition. Rules designed for positive law are being applied inappropriately, causing concern about unfettered power and breach of fundamental principles of legal certainty and clarity.

The final section of this article provisionally responds to allegations that the third source violates the rule of law. The rule of law is reinterpreted as not requiring positive authorisation for all government action, so that only *unrestrained*, not unauthorised, action is in violation. The rule of law actually requires residuary freedom to enable the government to fulfil its public constitutional duties. Proper understanding will limit confusion and allow for effective accountability and restraint mechanisms to be developed.

I THE THIRD SOURCE CONCEPTION

Overview

The principle that the Crown — and thus the executive government as the Crown's agent — may do whatever is not prohibited has been operating unseen since an internal memorandum by Sir Granville Ram circulated English government in 1945:[5]

4 *R v Secretary of State for Health, ex parte C* [2000] 1 FLR 627 (CA).

5 Joint Committee on Statutory Instruments *Eighth Report of Session 2007–08* (The Stationery Office, HL Paper 47, HC 38-viii, 1 February 2008) annex to appendix 3 at [1] [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 ... is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has powers to exercise, except so far as he is precluded from doing so by statute.

The unwritten premise is that the Crown can do anything that is not prohibited, though no legal basis is cited. Officials regularly rely on the "Ram Doctrine" for action, which was not made public until 2003.

Academic attention by Bruce Harris, beginning in 1992, characterises such action as a *residuary* freedom, different in kind from positive authorisation found in statute and common law. For this reason, Harris terms it the "'third source' of authority for government action", statute and the prerogative being the first and second.[6] This source of authority is defined by its residuary nature, whereby it is subordinate to all positive law. Thus, any government action contrary to statute or a common law right is unlawful in the absence of positive authorisation.[7] Third source action may however impact individuals in a practical, rather than legal way. For example, ex gratia payments subsidising certain firms in an industry would have a potentially severe practical impact on non-subsidised firms, though no firm's legal position would be altered.[8]

Previous recognition had been prevented by adherence to Dicey's wide definition of "prerogative", which encompassed every lawful government action not performed pursuant to statute.[9] Harris and Elliott endorse Blackstone and Wade in restricting the term prerogative to those powers enjoyed uniquely by the Crown in contradistinction to subjects.[10] While prerogative action may create legal consequences and alter legal rights, third source action cannot. Furthermore, the third source covers a vast array of actions not prohibited, whereas the prerogative traditionally refers only to an ever-decreasing collection of feudal powers.[11] The two are thus conceptually distinct. Claiming that the government has a "power" to do what it can lawfully do under its residual authority is odd; thus the prerogative must refer to actions that, but for the prerogative, constitute legal wrongs.

Examples of third source action include distributing written information, entering into contracts, establishing bodies to act on the government's behalf and granting monetary sums under compensation schemes.[12] Such action

6 Harris, above n 2, at 626.

7 At 626–628.

8 At 629.

9 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) at 421.

10 Mark Elliott *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001) at 173. See HWR Wade "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 at 191–193; and William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 182.

11 Harris, above n 2, at 627.

12 At 627.

occurs daily, demonstrating the third source's ubiquity and practicality. It is far more efficient and economical for government departments to rely on residuary authority than to seek positive authorisation from Parliament.

The controversial case of *Malone v Metropolitan Police Commissioner* provides judicial support.[13] Sir Robert Megarry VC accepted the argument that a telephone tapping operation was legal simply because no law made it illegal:[14]

> England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.

His Honour premised that the Police Commissioner had residual authority to act, without reference to legal personality. The plaintiff attempted to find some law that had been transgressed, arguing for a breach of property rights, privacy rights and of rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[15] None were successful.

Third source critics often rely on *Malone* to highlight the deleterious impacts third source action can have on citizens' lives.[16] The notion that the government could tap telephone lines simply because nothing legally prevented it is unsettling and undermines the trust of the community. However, from the mere fact that the third source can be misused, does not follow that it does not exist or must be legislated away. The problem with *Malone* stems not from the third source, but from inadequate positive law protection of individuals at the time.[17] Telephone tapping would today unlawfully transgress expanded rights of confidence and privacy, fundamental common law rights and the Human Rights Act 1998 (UK). Focus on the subordinate nature of the third source allows it to be judicially controlled.

Judicial Control of the Third Source

1 Judicial Review

Though *Council of Civil Service Unions v Minister for the Civil Service* confirmed courts' ability to judicially review non-statutory government action,[18] effective review of the third source requires a shift to what the author terms the "third way of judicial reasoning". Judicial review has traditionally

13 *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 (Ch).

14 At 357.

15 At 381; and Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (opened for signature 4 November 1950, entered into force 3 September 1953).

16 See, for instance, Anthony Lester and Matthew Weait "The use of ministerial powers without parliamentary authority: the Ram doctrine" [2003] PL 415 at 421–422.

17 Mark Elliott and Robert Thomas *Public Law* (Oxford University Press, Oxford, 2011) at 157. The Interception of Communications Act 1985 (UK) later regulated telephone tapping.

18 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL). The Court used prerogative in the wide Diceyan sense, which would include the third source. See Harris, above n 2, at 640.

been premised on confining an actor within the limits of an empowering statute by assessing the scope of positive authorisation.[19] The third source by definition has no positive authorisation of which to determine the scope. Thus the third way of judicial reasoning requires courts to ask not whether action is positively authorised, but whether any legal rule prohibits action.[20]

The contrary common law conception largely results from a failure to adopt this method of reasoning. In *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority*, the Court of Appeal stretched the prerogative of "maintaining the peace" to extreme lengths. This was done to find positive authority justifying police purchase of riot equipment without the permission of the local police authority.[21] Arguably, acquisition of riot equipment was a residuary action not requiring positive authorisation.[22] Had the court employed the third way of judicial reasoning rather than stretching the prerogative, it would have instead inquired whether anything *prohibited* police from acquiring this equipment, including whether permission of the local police authority was necessary.

As Elliott explains, review of government non-statutory action is consistent with review of non-government bodies operating in the public arena as both lack statutory basis.[23] *R v Criminal Injuries Compensation Board, ex parte Lain* permitted review of actions of a board created by the government for the purpose of determining compensation payments.[24] *R v Panel on Take-Overs and Mergers, ex parte Datafin plc* extended *Lain* to allow review of a non-governmental body exercising regulatory functions over financial activity.[25] In both cases, the court asked whether the body concerned was performing a public function that was governmental in nature. Third source action undertaken by formal government bodies invariably satisfies this criterion.[26]

Decisions reviewing non-government bodies thus provide a model for review of third source action. The third way of reasoning must be adopted as statutory criteria are absent. Third source proponents overlook this, instead viewing the illegality ground as problematic given that proper and improper purposes cannot be determined absent a statutory framework.[27] This approach is unsuited to the residuary freedom context. The correct inquiry is not whether third source action is for a proper purpose, but rather

19 Elliott, above n 10, at 168.

20 At 168; and BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225 at 228.

21 *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (CA).

22 Harris, above n 20, at 231.

23 Elliott, above n 10, at 187–191.

24 *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (QB). The Court used "prerogative" in the wide sense. See Wade and Forsyth, above n 10, at 182.

25 *R v Panel on Take-Overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA).

26 Elliott and Thomas, above n 17, at 539–540. See also Clive Lewis *Judicial Remedies in Public Law* (4th ed, Sweet & Maxwell, London, 2009) at [2-048]. A particular action may however be considered non-justiciable.

27 Harris, above n 2, at 646; and Margit Cohn "Judicial Review of Non-Statutory Executive Powers after *Bancoult*: A Unified Anxious Model" [2009] PL 260 at 282. Unlike Harris however, Cohn supported supplementing the traditional review grounds.

whether the purpose transgresses any positive law rule. To be effective, the third way of reasoning requires courts to recognise common law rules protecting individual interests, rather than delineate the limits of a power. Being subordinate, any third source action transgressing these rules will be unlawful, and thus reviewable.[28]

A coherent set of rules enclosing third source action has not arisen due to the third source long being subsumed under the Diceyan prerogative, to which traditional review is applicable. However, courts have granted review where — in regards to third source action — the government creates and subsequently breaches legitimate expectations.[29] No statutory guidance is needed for plainly irrational decisions: no reasonable decision-maker would spend their entire annual budget on paper clips.[30] Recognition of common law fundamental rights outside those in the European Convention on Human Rights or New Zealand Bill of Rights Act 1990 has potential for further control.[31]

Theorists criticise this method of controlling the third source for being an ad hoc collection of legal rules, fuelling calls for reform.[32] However, this is not intrinsically problematic. The deficiency is that rules are not yet sufficiently developed to control third source action satisfactorily. A judiciary willing to engage these issues in an active and principled manner is essential for proper regulation of third source action, with support from other branches of government.[33] As the third source involves government action absent legislative control or intention, courts must become default regulators.[34] This reasoning is vital to ensuring a proper understanding of the third source, particularly its subordinate nature. From this, a coherent legal structure can be developed and accepted by citizens.

2 *Rule of Residuality*

Attorney-General v De Keyser's Royal Hotel Ltd held that where a statute covers an entire legal field, any prerogative power in that area is extinguished.[35] This was expressly applied to the third source in *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local*

28 Elliott, above n 10, at 193–194.

29 *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 1 WLR 1482 (QB). The Court held that published criteria for telephone tapping create legitimate expectations.

30 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL) at 177 per Lord Scarman. Contrast Lord Bridge, who was arguably not employing the third way of reasoning by considering the *Wednesbury* reasonableness assessment to require a statutory background: at 192.

31 Courts have been hesitant. See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453, where the majority declined to overturn a prerogative order transgressing common law rights of abode. The minority were more open to accepting this right existed.

32 See Harris, above n 20, at 232 and 240–249; and Cohn, above n 27, at 271–285.

33 Cohn, above n 27, at 284–285.

34 Or at least highlight the need for legislative action. See *Malone*, above n 13, at 380–381.

35 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 528 and 539–540.

Government.[36] Carnwath LJ held that action taken in advance of legislation being enacted was inconsistent with the outgoing statutory regime, which was still in force.[37] Any "common law powers" were thus extinguished. Margit Cohn terms this the "rule of residuality", which finds its basis in parliamentary sovereignty.[38] Prerogative or third source power cannot be exercised if contrary to Parliament's express intent. This provides additional tools for courts to find third source action precluded and unlawful.[39]

Admittedly, the rule has limitations. In *Shrewsbury*, Richards LJ accepted the application of *De Keyser's* but found no inconsistency between the statutory regime and preparatory work that had no legal effect.[40] As statutory regimes regulate action with legal effects, and third source action by definition does not produce legal effects, different action can often be reconciled. Statutes can be interpreted to be in a different field of action, or as not excluding all forms of action in that field, thereby rendering third source action consistent.[41] For example, courts have found that statutory compensation schemes do not preclude parallel ex gratia payments under the third source.[42] Careful legislative interpretation focusing on parliamentary intent is required to maintain the efficacy of the rule of residuality, which remains a central and symbolic limitation on third source action.[43]

3 Private Law Action

Any third source action constituting a tort or breach of contract or equity is unlawful, as the third source is subordinate to common law.[44] Thus, a person has an action in trespass if police officers enter their private property without permission or a valid warrant.[45] The government is effectively in the same position as other legal persons, as it acts under the same principle as private persons: everything is permitted except what is prohibited.[46] This paradigm mirrors judicial review under the third way of reasoning, as residual liberty of individuals and government is restricted in the same way.[47] The difference lies in the particular restrictions on their action.

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36 *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All ER 548.

37 At [52] and [56]. The later statute validated these actions when enacted: at [57]–[58].

38 Cohn, above n 27, at 272.

39 The rule of residuality is intrinsic given the third source's subordinate nature, but framing this as an external rule provides clarity and certainty.

40 *Shrewsbury* (CA), above n 36, at [75].

41 Cohn, above n 27, at 272–273.

42 *Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289. The Court used prerogative in the wide sense.

43 Cohn, above n 27, at 274.

44 Harris, above n 2, at 647.

45 For example, *Entick v Carrington* (1765) 2 Wils KB 275, 95 ER 807; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. Contrast *R v Ngan*, where discovery of illicit substances during a routine gathering of items after a car accident was held not contrary to any law and thus needed no positive authorisation: *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48.

46 Subject to the Crown Proceedings Act 1947 (UK) 10 & 11 Geo 6 c 44; and Crown Proceedings Act 1950 (NZ).

47 Elliott, above n 10, at 194, n 89.

The Third Source's Fundamental Nature

While commentators have distinguished the third source from prerogative, there is little literature that addresses its origins. A number of possibilities arise. The term "residuary" implies some kind of nebulous excess resulting from constitutional arrangements. For Harris, it is a consequence of the rule of law principle that everything not prohibited is lawful, and this principle is assumed to apply to the government.[48] Cohn sees residuary freedom arising by necessity: statute and the prerogative cannot authorise every action, so an area of government action necessarily arises between them.[49] Since government business simply cannot occur without residuary authority, residuary authority must exist.

Both disapprove of the argument that the Crown's status as a legal person or corporate entity gives it the ability to act freely like a natural person, a fundamental tenet of the common law conception. However, the analogy between the government and natural persons breaks down given the government's different nature and function; such analogy introduces a degree of uncertainty that dilutes government duties of public service and altruism.[50] Whereas society is designed to maximise individual freedom, government freedom is not to be protected in this way. The far greater threat posed by unregulated government activity necessitates greater control.[51]

Legal personality clearly is not endorsed by leading third source theorists or *Malone*, and is described as an archaic medieval concept having no place in a modern constitutional democracy.[52] Recourse to it is due to unclear articulation of the third source's fundamental nature and constitutional legitimacy. Continued reliance on legal personality is a major source of confusion and a primary reason for the divergence of the common law conception. Inadequate recognition of the third way of judicial reasoning contributes to this; decision-makers search vainly for a positive law basis for residuary action, and purport to find it in legal personality.

II PROBLEMS WITH THE COMMON LAW CONCEPTION

Unrecognised Confusion

The divergence between the third source and common law conceptions is barely recognised.[53] Most discussions merge the third source into the common law conception, where the government's legal personality authorises it to

48 Harris, above n 2, at 626.

49 Margit Cohn "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive" (2005) 25 OJLS 97 at 107.

50 Harris, above n 20, at 239; and Cohn, above n 49, at 111.

51 Harris, above n 2, at 635.

52 Lester and Weait, above n 16, at 420.

53 It appears only John Howell distinguishes the two: John Howell "What the Crown May Do" [2010] JR 36 at 39.

do anything that a natural person can.[54] By conflating these conceptions, theorists mistakenly attack straw-man versions of actual views.

This section evaluates aspects of the common law conception, named after the use of the term "common law powers". After tracing its development, this section identifies the following problems: failure to distinguish between capacity and substantive action; failure to fully appreciate residuary authority's subordinate nature, through conflation with the prerogative and inappropriate use of the terms "common law" and "power"; and inappropriate obiter comments in hard cases. The fundamental error of proponents of the common law conception is their failure to appreciate and adopt the third way of judicial reasoning, adhering instead to an inappropriate positive law paradigm.

"Common Law Powers"

1 Perpetuation of Legal Personality

Despite the Ram Doctrine being modus operandi for government officials, a link between legal personality and a general power to do all that a natural person may do has not been forthcoming. Rather, links with specific actions requiring legal personality have been made, which has inappropriately expanded into a general authority for action. Though Terence Daintith, William Wade and Christopher Forsyth linked the Crown's legal personality to the capacity to contract, employ servants and convey land, neither they nor others generalised this to an ability to do all that is not prohibited.[55] Case law prior to *ex parte C* similarly linked only specific abilities to corporate status. *The Case of Sutton's Hospital* established that the Crown existed at common law as a corporation sole with the specific capacity to sue,[56] and *The Bankers Case* held that the Crown could contract where there was no contrary statute.[57]

Commentators have made the link between legal personality and a general residuary freedom based on these authorities, despite their restrictive scope. Blackstone stated that a corporation could "sue or be sued, implead or be impleaded, grant or receive, by its corporate name, *and do all other acts*

54 This occurs when citing Harris and Cohn, who reject legal personality being residuary authority's basis. See Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, London, 2007) at [5-022]–[5-023].

55 Terence Daintith "Regulation by Contract: The New Prerogative" (1979) 32 CLP 41 at 42; and William Wade and Christopher Forsyth *Administrative Law* (7th ed, Clarendon Press, Oxford, 1994) at 249. See also DL Mathieson "Does the Crown Have Human Powers?" (1992) 15 NZULR 117 at 131–137; Peter W Hogg and Patrick J Monahan *Liability of the Crown* (3rd ed, Carswell, Ontario, 2000) at 219; *Verreault v Attorney General of the Province of Quebec* [1977] 1 SCR 41 at 42; and *Attorney General of the Province of Quebec v Labrecque* [1980] 2 SCR 1057 at 1082–1083.

56 *The Case of Sutton's Hospital* (1613) 10 Co Rep 23a at 30b–31a, 77 ER 960 at 970–971. The Court listed incidents of incorporation.

57 *The Bankers Case* (1700) Skinner 601, 90 ER 270 (Exch Ch).

as natural persons may".[58] While based on the incidents of incorporation from *Sutton's Hospital*, these final words are Blackstone's original addition.[59] Similarly, Philip Joseph claims that *Malone* and similar cases endorse the Crown's natural capacity to act where not prohibited, this being the essence of legal personality.[60] This latter proposition is erroneous.

Possibly following the lead of these academics, Baroness Scotland publically endorsed legal personality as the basis of residuary freedom. In written answers to the House of Lords, following publication of the Ram Doctrine and questions about whether it accorded with modern democratic principles, she wrote:[61]

> The Ram doctrine reflects a well-established principle of constitutional law. Like many other persons, Ministers and their departments have *common law powers which derive from the Crown's status as a corporation sole.*

The original Ram Doctrine made no reference to common law powers or the Crown's corporate status. This embellishment links legal personality to a general ability to act, rather than to specific action.

Ex parte C established this erroneous view as law.[62] The case concerned the lawfulness of a Consultancy Service Index maintained by the Department of Health without statutory basis, listing people about whom there were doubts over their suitability to work with children. Though not prohibiting employment and having no legal effect, it enabled contact between past and prospective employers. Inclusion had a powerful negative effect on future job prospects.[63] The High Court held that the Crown has ordinary powers of natural persons at common law, except as restricted by statute or regulation.[64] No authority was cited, nor was legal personality or corporate status referred to. Analysis of relevant statutes showed no removal of this power to operate the Index and so the action was lawful.[65]

On appeal, Hale LJ endorsed this view,[66] but found additional support in a footnote in *Halsbury's Laws of England*, which cites no authority:[67]

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

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58 William Blackstone *Commentaries on the Laws of England* (Bancroft-Whitney, San Francisco, 1915) at 685 (emphasis added).

59 Howell, above n 53, at 44.

60 Philip A Joseph "The Crown as a legal concept (II)" [1993] NZLJ 179 at 179 and 183.

61 (25 February 2003) 645 GBPD HL WA12 (emphasis added) [Baroness Scotland].

62 *R v Secrtary of State for Health, ex parte C* [1999] 1 FLR 1073 (QB).

63 *Ex parte C* (CA), above n 4, at 628–629.

64 *Ex parte C* (QB), above n 62, at 1082.

65 At 1081–1082.

66 *Ex parte C* (CA), above n 4, at 632.

67 *Halsbury's Laws of England* (4th ed, reissue, 1996) vol 8(2) Constitutional Law at [101], n 6. This is likely based on Blackstone's embellishment to the principles of corporations. See Howell, above n 53, at 44.

It can be inferred that judicially approving legal personality as the basis of residuary freedom helped popularise the term "common law powers" in the United Kingdom.

The House of Lords in *R (Hooper) v Secretary of State for Work and Pensions* followed. The case concerned extra-statutory payment of compensation to widowers.[68] The Court of Appeal accepted the Secretary of State's ability to make such payments under a residuary common law power without hearing full argument, although it noted the Ram Doctrine.[69] The House of Lords ultimately expressed no final opinion, not needing to resolve the issue. However, Lord Hoffmann saw "a good deal of force" in the Crown, as a corporation sole, having the same right to deal with property as other legal persons.[70] Lord Hope agreed.[71] Thus two of their Lordships were inclined to recognise — and none expressly denied — common law powers based on legal personality, adding implicit support for the common law conception.[72]

However, *Shrewsbury* expressed concern at the link between legal personality and residuary freedom.[73] Being bound by *ex parte C*, both the High Court and Court of Appeal concluded that the Secretary of State had a common law power to undertake any action not prohibited, including preparatory work for incoming legislation.[74] But Carnwath LJ doubted that the ability to contract or hold property threw any light on the general scope of non-statutory action, being simply ancillary powers necessary for carrying out government functions.[75]

Carnwath LJ thus went beyond mere rejection of residuary freedom having a common law basis, to complete rejection of residuary freedom altogether. This is one extreme. Hale LJ's acceptance in *ex parte C* that legal personality gave rise to residuary freedom represents the other. Lack of proper analysis has perpetuated this false dichotomy, with no middle ground arguing that residuary freedom based purely on the lack of prohibition is constitutionally legitimate.

2 *Criticisms of Legal Personality*

Critics who reject residual authority along with legal personality struggle to explain how the government acts daily without specific authorisation. Claims that the government acts in its common law "private capacity" simply restate

68 *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681.

69 *R (Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 1 WLR 2623 at [113]–[137].

70 *Hooper* (HL), above n 68, at [46]–[47].

71 At [69] and [79].

72 At [6] per Lord Nicholls. He preferred to express no view. Lord Scott and Lord Brown employed alternative reasoning that did not engage the issue.

73 *Shrewsbury* (CA), above n 36, at [48].

74 *Shrewsbury & Atcham Borough Council v Secretary of State for Communities and Local Government* [2007] EWHC 2279 (Admin) at [15]–[17]; and *Shrewsbury* (CA), above n 36, at [44] per Carnwath LJ.

75 *Shrewsbury* (CA), above n 36, at [45]. Waller LJ was inclined to agree: at [81].

the argument from legal personality in different terms, which contradict rejection of the Crown's corporate status as an archaic medieval concept.[76] Interestingly, the same edition of *Halsbury's* cited in *ex parte C* stated that the practical consequences of the Crown's corporate status are "meagre".[77]

John Howell's historical analysis reveals that the Crown's personal legal capacity is irrelevant to its public function — such capacity was conferred to separate the political office from the particular individual monarch and avoid unjust consequences of property transfers between generations.[78] Corporate status is equally irrelevant as historically it differed greatly from chartered or statutory corporations, a difference exemplified by the Crown's inability to sue or be sued. Howell concludes:[79]

> Treating the Crown as a corporation or as a legal person is a recognition that there is an office which is distinct from the holder of the office for the time being. But of itself that does not reveal anything about what may be done by virtue of that office.

Invocations of legal personality in specific circumstances should thus not be taken as a basis for the general proposition that the Crown can do anything a natural person can, insofar as it is not prohibited. Having legal personality is a prerequisite under contract and property law for holding property and entering contracts, and allows generally applicable law to apply to the Crown.[80] However, a necessary precondition must not be confused with a source of authority to act. Elliott hints at this when distinguishing contractual power from statutory power, prerogative power and residuary freedom. The former is merely a means by which the government gets things done, unlike the latter three, which are sources of authority.[81] Corporate status falls into the former category: it is merely a means by which the government can achieve objectives.

The law regulating action of corporations demonstrates that residual freedom and legal personality are merely correlative, not causative. Section 16(3) of the Companies Act 2006 (UK) states that a body corporate is capable of exercising all functions of an incorporated company from the date of incorporation. Other sections set out these functions, notably s 31(1), which permits a company to act without restriction, subject to its articles of association. If the ability to act unrestricted were implicit in corporate status, s 31 would be superfluous.[82]

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76 For this mistaken claim, see Lester and Weait, above n 16, at 419–420.

77 *Halsbury's Laws of England* (4th ed, reissue, 1998) vol 12(1) Crown and Royal Family at [7], n 10.

78 Howell, above n 53, at 48–49.

79 At 46.

80 See *Madras Electric Supply Corp Ltd v Boarland (Inspector of Taxes)* [1955] AC 667 (HL). The Court found that the Crown's status as a "person" brought it within the scope of tax legislation.

81 Elliott and Thomas, above n 17, at 157–158.

82 See also Companies Act 1993, ss 15–16. These sections separately confer legal personality and the ability to act freely.

Continually linking the government's residuary freedom to legal personality has caused further misunderstandings. First, it invites inappropriate analogy between the Crown and natural persons, blurring *capacity* to act with actual action. Secondly, it gives residuary freedom a positive common law basis, obscuring its subordinate nature and creating unwarranted fear of abuse.

Conflation of Capacity and Action

Third source literature contains many references to government being able to "act like a natural person". This is capable of two interpretations. In one sense, the phrase refers to the capacity or principle under which the government acts: any action may be taken that is not contrary to any statutory or common law rule. The government "acts like a natural person" because natural persons also operate under this principle of action. This accurately describes residuary freedom.[83]

However, in another sense, "act like a natural person" means performing the same *particular* action as a natural person. This refers not to the principle by which government and natural persons act, but to their actual substantive actions. This less accurately describes residuary freedom, as it fails to account for the different constitutional positions of the government and natural persons.[84] Though the principle of action is the same, the particular legal rules and practical circumstances restraining action differ. Comparison of what natural persons and the government can do is thus irrelevant and misleading.

Problematically, the third source is regularly referred to in this second, less accurate sense. This proliferation is primarily attributable to questionable judicial reasoning. When assessing the lawfulness of the Index in *ex parte C*, Hale LJ considered whether a private person could have operated it and concluded, citing *Malone*, that they could so long as no rights were infringed.[85] Therefore, the Department of Health could also, subject to the same restrictions. This comparison has no bearing on the legality of government action and only propagates the less accurate sense of acting "like a natural person". The correct judicial inquiry would have been whether any legal rule prohibited the Department from maintaining the Index, regardless of whether a private person could do so.

This misdirection stems from earlier commentary criticising *Malone* for finding police action lawful when private persons could not have tapped phone lines. George Winterton argued that residual freedom only applied when government and private actions were identical, a rare occurrence given that government action is inherently different and has greater

83 Elliott, above n 10, at 194, n 89.

84 Harris, above n 20, at 239.

85 *Ex parte C* (CA), above n 4, at 632.

impact on liberties.[86] However, the problem in *Malone* was the lack of law restricting government action at the time. Sir Megarry VC was correct not to employ comparative reasoning that would avoid the true issue and prevent development of appropriate restraints.[87]

Howell strongly adheres to the less accurate sense of "like a natural person", which causes him considerable misunderstanding of the third source. He reasons that since private persons can act with any motive and have unfettered discretion, then for government officials to act like an individual would likewise require them to have unfettered discretion. It being contrary to public law principles for officials to have such discretion, the government cannot act like a natural person.[88] Howell therefore rejects as an impossible fetter Hale LJ's view in *ex parte C* that the Index not be used in an unreasonable or oppressive way, as this restriction would not apply to natural persons.[89]

Howell's logic only holds when attacking a straw man; he misrepresents the opposing view by inaccurately interpreting "like a natural person". Only the principles of action are equated, not substantive actions. Therefore, extra fetters on government such as the tort of misfeasance or Hale LJ's prescription of unreasonable action do not harm the equivalence between the government and natural persons. Different natural persons are subject to different restrictions, yet no one would deny that both have residuary freedom. A person aged 18 may exercise their residuary freedom to purchase alcohol, but a person under 18 is prevented by law from doing so. If different restrictions apply to different natural persons in the same constitutional position, then the case for different restrictions applying to the government is even stronger given its different constitutional position.

The more accurate sense of "like a natural person" has fortunately had some recognition, along with appreciation that the government's different constitutional position is reflected in the different rules restricting residuary freedom.[90] Future decisions ought to adopt a *Malone*-style method of reasoning that eschews references to natural persons, to avoid confusion and allow easier adoption of the third way of judicial reasoning.

Obscuring Residual Freedom's Subordinate Nature

1 "Common Law Powers" Is Misleading

Third source actions are variously referred to as "non-statutory, non-prerogative powers", "new prerogatives", "residual liberties", "de facto

86 George Winterton "The Prerogative in Novel Situations" (1983) 99 LQR 407 at 409–410.

87 *Malone*, above n 13.

88 Howell, above n 53, at 36.

89 At 46.

90 Daintith, above n 55, at 43; Elliott, above n 10, at 19 and 194, n 89; and *Shrewsbury* (CA), above n 36, at [73] per Richards LJ. Harris appropriately uses natural persons' actions as an illustrative analogy to explain how action is limited to what is physically possible: see Harris, above n 2, at 634.

powers", and most prominently "common law powers".[91] Those who link residual freedom with legal personality are generally indifferent about which term is used. However, for those who reject reference to legal personality the terms are not synonymous. Harris uses "third source" to clearly distinguish such action from statutory and prerogative action. The term "common law powers" implies the action has positive authority from common law, which insinuates the capacity to override other common law rules and rights and risks obscuring residual freedom's subordinate nature.[92]

Several authorities have implicitly recognised this subordinate nature when stating that third source action cannot interfere with rights or liberties of others, including those at common law.[93] Others only refer to restriction by statute, without mention of common law rules. Dangerously, the Ram Doctrine and authoritative judicial decisions on residuary freedom fall into the latter category.[94] Combined with reference to common law powers, this perpetuates a misunderstanding that residuary freedom is equal to, and thus not restricted by, other common law rules.

This has fuelled fear of abuse of power and inhibited the development of control mechanisms. Howell describes how third source action could be abused through unfettered provision of goods, services, financial assistance and resource use.[95] Without an understanding that common law rules confine the third source, the need to develop such rules will not be identified and the necessary framework for regulating government action will not eventuate.[96] As, by definition, third source action occurs absent a statutory regime, common law rules and fundamental rights must be the primary means of regulation. Discarding the term "common law power" would greatly assist the efficacy of these rules as their superiority would be clear. It is no coincidence that *R v Ngan*, which did not use common law language, recognised the completely subordinate nature of third source action and the constraints of positive law.[97]

2 *Conflation with the Royal Prerogative*

As explained, courts have long-accepted the correctness of Dicey's definition of the prerogative, which encompassed every non-statutory power. In both *Lain* and *R v Secretary of State for the Home Department, ex parte Fire*

91 Cohn, above n 27, at 260. See also Harris, above n 20, at 225–226.

92 Harris, above n 20, at 226.

93 See Elliott, above n 10, at 171; Andrew Le Sueur "The Nature, Powers, and Accountability of Central Government" in David Feldman (ed) *English Public Law* (2nd ed, Oxford University Press, Oxford, 2009) 155 at [3.96]; Richard McManus "The Crown's Common Law Powers" [2010] JR 27 at 35; and Lewis, above n 26, at [2-046].

94 See, for example, *Hooper* (CA), above n 69, at [132]; *ex parte C* (QB), above n 62, at 1082; and *Shrewsbury* (CA), above n 36, at [44] per Carnwath LJ. Contrast *ex parte C* (CA), above n 4, at 632; *Shrewsbury* (HC), above n 74, at [17]; and *Shrewsbury* (CA), above n 36, at [74] per Richards LJ. See also Ram Doctrine, above n 5, at [1]; and Baroness Scotland, above n 61, at WA12. The Ram Doctrine, while merely the opinion of one government lawyer, is influential on government practice. See McManus, above n 93, at 28.

95 Howell, above n 53, at 54–55.

96 Elliott, above n 10, at 193–194.

97 *Ngan*, above n 45, at [97].

Brigades Union, non-statutory compensation schemes were held to be a prerogative exercise simply because they were non-statutory.[98] Compensation schemes are, however, mere exercises of the government's residual freedom, not of any historical power exclusive to the monarch. Conflation has facilitated assumptions that the third source is, like the prerogative, a common law power. This obscures its subordinate nature and introduces the problems discussed above.

There is now a growing judicial trend to endorse Blackstone's narrow definition,[99] especially since *ex parte C* distinguished common law powers from prerogative powers.[100] Prerogative action is generally action that could not otherwise lawfully be taken, as it potentially alters legal positions. It being odd to have a "power" to do an action that is already lawful, Blackstone's definition is more accurate.[101] Dicey's antiquated definition reflects 19th century theory, which related everything to parliamentary sovereignty.[102] All non-statutory powers were termed "prerogative" as they existed without Parliament's consent.

However, appropriate control requires differentiating between types of non-statutory powers, as conflation allows restrictions on the prerogative to be applied inappropriately to the third source. Howell, endorsing Dicey's wide definition, notes two key restrictions. First, "the King hath no prerogative, but that which the law of the land allows him".[103] Secondly, no new prerogatives can be created.[104] For Howell, the third source allows the government to take action in new areas without Parliament's consent, thus creating new prerogatives and violating both restrictions.[105]

While properly applied to the prerogative in the narrow sense, these restrictions cannot logically apply to the third source. They were created to confine archaic legal powers considered contrary to modern democratic principles and prevent the extension of government power. Applied to residuary freedom, they simply disable the government's ability to undertake meaningful action. Since the government already has freedom to do anything that is not prohibited, undertaking new action is merely an exercise of existing freedom for the first time, not an extension of power. When Courts apply such restrictions to desirable government action that is without positive authorisation, they are forced to choose between declaring the desirable action to be unlawful, or dangerously expanding existing prerogatives in order to find positive authorisation. *Northumbria* exemplifies the latter.[106] This creates significant

98 *Lain*, above n 24, at 881; and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) at 545–546, 555 and 573.

99 That is, to confine "prerogative" to those historical powers enjoyed uniquely by the Crown.

100 See *Datafin*, above n 25, at 848 per Lloyd LJ; and *ex parte C* (CA), above n 4, at 631. *Malone*, above n 13, at 356, expressly stated that telephone tapping was not carried out pursuant to any prerogative.

101 Elliott, above n 10, at 173–174.

102 BS Markesinis "The Royal Prerogative Re-visited" (1973) 32 CLJ 287 at 287.

103 *Case on Proclamations* (1610) 12 Co Rep 74 at 76, 77 ER 1352 (KB) at 1354.

104 *Bancoult (No 2)*, above n 31, at [69].

105 Howell, above n 53, at 38.

106 See, for example, *Northumbria*, above n 21.

potential for abuse as it involves extending a non-subordinate legal power.

3 Inappropriate Use of "Power"

The third source is often referred to as a power, for consistency with "statutory powers" and "prerogative powers". This language fails to capture the conceptual difference between a residuary freedom subordinate to positive law, and a conferred positive power with boundaries set by that conferral. The third source ultimately involves no exercise of power, only the lack of prohibition.[107]

The term "power" must therefore be used carefully lest it obscure this conceptual difference. Harris explains power in two senses. In Wade's narrow sense, power means the ability to interfere lawfully with or modify existing legal rights. Third source action cannot be an exercise of power in this sense, as by definition it cannot override legal rights. However, in a wider sense power refers to control or influence over individual persons or the community, which may not necessarily be legal control or influence. The government's extensive resources and weighty bargaining influence mean third source action can constitute a power in this wider sense.[108]

Problems arise when aspects of these distinct senses are conflated. Powers in the narrow sense require a positive legal basis as changes in legal position cannot otherwise occur. Those who endorse Wade and see government action solely in terms of narrow legal power tend to reject as illegitimate any suggestion of government action lacking a positive law basis. Laws J famously stated in *R v Somerset County Council, ex parte Fewings* that private persons' powers were different from public authorities' as the latter required positive authority for all action.[109] This utilised Wade's definition of power and improperly views the third source as something akin to a narrow legal power.

Howell misuses "power" further, reasoning that since all powers require a legal basis, third source proponents must rely on Wade's narrow definition. As third source action requires no legal basis, it cannot be a power. Rather, it is a capacity to act. Howell then argues to two mistaken conclusions.

First, Howell argues that this reasoning nonsensically implies having the capacity to do something, but no power to do it.[110] This criticism incorrectly presupposes that all actions are powers. On this understanding, individuals would have no power to enter into contracts or convey property because they have no common law authorisation. Yet no one would argue that they could not undertake such action. The capacity for action is sufficient because these are liberties, not powers. Expressed in Hohfeldian terms, this means no one has any

107 Elliott, above n 10, at 168.

108 Harris, above n 2, at 628–629.

109 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) at 524. See also *Shrewsbury* (CA), above n 36, at [32] per Carnwath LJ, who shows a similar misunderstanding.

110 Howell, above n 53, at 51.

right to prevent their exercise.[111] Likewise, not all government actions are powers, so the government having capacity to act without a specific power is plausible.

Secondly, Howell argues that the narrow conception of power is false, and the wider definition correct. However he maintains that all powers require positive authority, arguing that otherwise the many examples of statutes that confer powers on officials to do what a natural person could do anyway would be pointless legislation.[112]

This view of legislation is misguided, as legislation may be needed to regulate better third source action. Officials could issue ex gratia payments under the third source, but Parliament may wish to regulate such payments by restricting quantum or the considerations that an official may, may not or must take into account. Though the basis for the power becomes statutory, the purpose is not to confer an ability that previously did not exist, but to regulate better that activity for the public benefit. While all powers require positive authority, not everything with positive legal authority is a power. Furthermore, much legislation simply authorises a particular official to bind the government, which differs from actually conferring the government's capacity to act.[113] Howell's conclusion that such legislation would be pointless is thus without merit. This flaw weakens his argument that the narrow definition of power is false.

Due to the influence of Wade's definition of power, use of that term is best avoided. It improperly implies an ability to alter legal rights or effect legal change, and so obscures the third source's subordinate nature, thereby adding to critics' fears.

Residuary Freedom in Hard Cases[114]

The previous section highlighted fear of abuse as a major concern of third source critics, fear which has led to condemnation of residuary freedom rather than proper efforts to control and account for it. These fears reach their zenith where the government transgresses the law in ways that offend the public conscience, such transgressions facilitating judicial pronouncements restricting government ability to act even where residuary freedom is not engaged. Problems arise when statements in these extreme circumstances are generalised to support arguments against harmless, everyday third source action.

In *Fewings*, Laws J considered the lawfulness of a local council resolution to ban deer hunting. As local governments are statutory entities,

111 Joseph, above n 60, at 181.

112 Howell, above n 53, at 51.

113 Joseph, above n 60, at 184.

114 The following discussion of *Hamed* was adapted for an online blog. See Jeff Simpson "R v Hamed and the Third Source" (16 October 2011) New Zealand Supreme Court Blog <www.nzscblog.com>, cited favourably in Edmund Thomas "Hamed and the Common Law" (7 November 2011) New Zealand Supreme Court Blog <www.nzscblog.com>; Chris Gallavin and Justin Wall "*Hamed*: Anticipatory Warrants" [2012] NZLJ 40 at 41; and Chris Gallavin and Justin Wall "Search and surveillance, and the exclusion of evidence in New Zealand: clarity or confusion?" (2012) 16 E&P 199 at 207.

parliamentary sovereignty dictates that they cannot act beyond the powers specifically conferred to them. They therefore have no residuary freedom. However, in describing public powers, Laws J spoke of "public bodies" generally, local authorities being but one type:[115]

> Public bodies and private persons are both subject to the rule of law; ... [b]ut the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. ... *But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.* ... [I]t has no rights of its own, no axe to grind beyond its public responsibility[.]

This statement is wide enough to apply to central government and is thus antithetical to the third source's existence. Laws J's motivations were threefold. First was his Honour's desire to uphold the rule of law principle that no decision-maker has an unfettered discretion.[116] As explained, such concern results from the improper analogy to private individuals and would be allayed with development of appropriate positive law constraints.

Laws J's second motivation was to protect individual liberty vehemently. This required justification for every interference with liberty rather than just for interferences with legally established human rights.[117] Such scope embodies actions that have a practical, but no legal, impact. But if human liberty is to be protected so strongly, it would be arbitrary to distinguish the government from individuals or corporations. Such persons could interfere with liberty in the same practical way but are not so restricted. The third source is subordinate only to established positive law, not to a general right to freedom from interference.[118]

The third motivating factor was likely the highly public and controversial nature of the council's decision, which attracted much media attention.[119] Laws J perhaps felt compelled to calm the public by projecting a tightly controlled government, even though his comments were superfluous to the lawfulness of the council resolution. The Court of Appeal implicitly limited its approval of Laws J's views to the local government context.[120] Yet, despite this and the unmentioned inconsistency with *Malone*, these comments have been relied on as authority against the third source's existence and have promulgated a general distrust of residuary freedom.[121]

Elias CJ in *Hamed* went to a further extreme.[122] The decision

115 *Fewings* (QB), above n 109, at 524 (emphasis added).

116 At 524.

117 John Laws "Public Law and Employment Law: Abuse of Power" [1997] PL 455 at 465.

118 Harris, above n 20, at 232.

119 *Fewings* (QB), above n 109, at 515.

120 *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037 (CA) at 1042.

121 Lester and Weait, above n 16, at 422; and Woolf, Jowell and Le Sueur, above n 54, at [5-025], n 78.

122 *Hamed*, above n 45.

concerned the admissibility of evidence obtained pursuant to police search and surveillance powers. The majority held the search warrants invalid, and that the Police had violated the right to be secure against unreasonable search or seizure in s 21 of the New Zealand Bill of Rights Act 1990. No third source action was involved as entry onto private property requires positive legal authority. Elias CJ in the minority agreed with this aspect, interpreting s 21 broadly to confer a general guarantee of reasonable expectations of privacy that the surveillance breached.[123] But her Honour continued to discuss whether an individual could have undertaken such surveillance, ultimately stating that there was "a wider principle of the common law which withholds from State agents the liberties preserved for individual citizens".[124] Her Honour claimed it was an accepted principle in the United Kingdom and New Zealand that public officials do not have the power that private individuals have to act freely unless prohibited.[125]

However, none of the authorities referred to by her Honour supports these propositions. Elias CJ cited Laws J's remarks in *Fewings* as Court of Appeal-approved authority.[126] This ignores *Ngan*, which considered *Fewings* to be flawed and of little precedential value.[127] Furthermore, the Court of Appeal only used language specific to local authorities, not public bodies generally. *De Smith's Judicial Review* is cited,[128] but is based on *Fewings* and suffers the same problems.[129]

The third and fourth editions of *Halsbury's Laws of England* are cited as supporting a lack of residuary authority. These have been superseded by the fourth edition reissue, which endorsed the government's residuary freedom and was approved in *ex parte C*.[130] *Herbert v Allsopp* stated that government action required positive authorisation, but simply referred to the outdated second edition of *Halsbury's*.[131] Both *Transport Ministry v Payn* and *R v Jefferies*, cited in *Hamed* to support a general requirement of positive authorisation, involved searches of property.[132] Positive authorisation was required because action would otherwise breach legal rights. Nothing cited supports a general requirement of positive authorisation for all government action.

Nowhere does Elias CJ refer to *ex parte C*, *Hooper*, *Shrewsbury* or *Ngan*, which directly contradict her Honour's claim that her view is established authority in the United Kingdom and New Zealand. Her Honour argues that *Malone* and the New Zealand cases endorsing it should not be

123 At [9]–[11].

124 At [23].

125 At [24].

126 At [26].

127 See *Ngan*, above n 45, at [95].

128 Woolf, Jowell and Le Sueur, above n 54, as cited in *Hamed*, above n 45, at [25].

129 *Hamed*, above n 45, at [25]. See Woolf, Jowell and Le Sueur, above n 54, at [5-025].

130 *Hamed*, above n 45, at [27]. See *Halsbury's*, above n 67, at [101], n 6.

131 *Herbert v Allsop* [1941] NZLR 370 (SC) at 374; and *Hamed*, above n 45, at [27].

132 *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA); *R v Jefferies* [1994] 1 NZLR 290 (CA); and *Hamed*, above n 45, at [20] and [27].

followed because: the European Court of Human Rights overturned *Malone*; *Malone* has been academically criticised; and the *Malone* approach would be inconsistent with the New Zealand Bill of Rights Act.[133] This ignores all academic and judicial support of *Malone*. Further, this fails to appreciate that while European law and the New Zealand Bill of Rights Act create new positive law obligations prohibiting specific action, they do not defeat the general proposition that the government can do all that is not prohibited.

Elias CJ's expansive interpretation of s 21 reveals a fundamental motivation to protect individual liberty, which is defined as that area in which the government is not authorised to interfere.[134] If the government has that authority, it could interfere in every area of life without authorisation, destroying individual liberty.[135] This is a strange definition, as liberty turns on whether anyone else has the right to stop an individual from acting, not on whether action can be carried out.[136] As the government has no right to stop individual action without positive authorisation, individual liberty is preserved. Elias CJ has taken the opportunity in a high profile case to calm public fear and reinforce the misconception that the government can only do what Parliament permits — a misconception irrelevant to the issues before the Supreme Court and contrary to authority.[137]

Both Laws J's and Elias CJ's comments strive to protect individuals from the practical consequences of residuary freedom. Both were fuelled by a perception that the executive's vast powers and resources make it the most dangerous branch of government.[138] *Fewings* and *Hamed* involved sensitive public issues, where categorically denying the government's ability to act was an easier option compared to the necessary but difficult task of formulating positive legal obligations constraining such action. Without these restraints, *Malone*-type cases will occur. Fortunately, Laws J's views have been strictly confined to the local government context both academically and judicially.[139] In *Hamed*, Tipping and McGrath JJ directly challenged Elias CJ by endorsing *Ngan*, which approved the third source authority of police officers.[140]

Both decisions epitomise many misconceptions about the third source. Failure to appreciate its subordinate, highly restricted nature heightens the fear of abuse beyond what is reasonable and leads to denial of its existence — particularly under media scrutiny. This permits unfortunate efforts to

133 *Hamed*, above n 45, at [32]–[33]; *R v Fraser* [1997] 2 NZLR 442 (CA); and *R v Gardiner* (1997) 15 CRNZ 131 (CA).

134 *Hamed*, above n 45, at [34]–[36].

135 At [28].

136 Joseph, above n 60, at 181.

137 See Mai Chen "Urewera Case Five Reasons to Worry" *The New Zealand Herald* (online ed, Auckland, 22 September 2011). Chen discusses *Hamed*'s constitutional implications though she labours under the misconception.

138 RS French, Chief Justice of the High Court of Australia "The Executive Power" (Inaugural George Winterton Lecture, Sydney Law School, Sydney, 18 February 2010) at 16–17.

139 See *ex parte C* (CA), above n 4, at 631.

140 *Hamed*, above n 45, at [217] and [275]. The Court of Appeal in *Lorigan v R* [2012] NZCA 264 confirmed this majority view, and that *Gardiner*, above n 133, and *Fraser*, above n 133, are still good law.

explain third source action as "incidental" to legislative authorisation, which artificially links government action back to parliamentary intention.[141] Such attempts are judicial creations, and involve interpretation inquiries that allow courts to decide what actions are and are not impliedly authorised. This dangerously gives artificial legislative authority to otherwise subordinate action. Efforts to find positive authority reveal the underlying problem behind the common law conception generally: the failure to adopt the third way of judicial reasoning.

Failure to Endorse the Third Way of Judicial Reasoning

Despite the expansion of judicial review and protection of human rights in recent decades, there has been little development of rules specifically regulating the third source. The recognition of residuary freedom — at least, its common law conception — has not been accompanied by corresponding change in judicial and academic thinking to the third way of reasoning. This lack of change has obscured the need for appropriate regulation of the third source. Instead, the third source is being regulated and evaluated using inappropriate criteria developed within a statutory paradigm. Much of this is due to overreliance on parliamentary sovereignty, despite the fact that non-statutory action occurs in a completely different context. Pre-action parliamentary authorisation and scrutiny of government action is considered the democratic optimum that best meets public law principles of certainty, accessibility and clarity. However, this attitude neglects other ways in which these principles might be met.

The third way of judicial reasoning is not new. The Ram Doctrine stated that one must look to statute to see what government departments may not do, not what they may do.[142] The reasoning in *Malone* looked for legal rules and rights that phone tapping would transgress, rather than for positive authorisation.[143] Harris sums up the reasoning process as an onus on claimants to show that government action transgressed a legal prohibition, with the onus then switching to the government to show positive law authorisation that overcomes the apparent prohibition.[144]

However, this has not permeated generally through legal practice in the United Kingdom. Prior to the Companies Act 2006 (UK), corporate bodies did not have freedom to act for any purpose not contrary to law, being restricted to purposes expressed in memoranda of association.[145] The method of looking first for prohibitions is thus a foreign concept, apparent in the use of "ultra vires" language in *ex parte C* and *Shrewsbury*.[146] The courts searched

141 At [24] per Elias CJ.

142 Ram Doctrine, above n 5, at [1].

143 *Malone*, above n 13.

144 Harris, above n 2, at 628.

145 See s 31; and *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653.

146 See *ex parte C* (QB), above n 62, at 1081–1082; *ex parte C* (CA), above n 4, at 631–632; *Shrewsbury* (QB), above n 74, at [15]–[17]; and *Shrewsbury* (CA), above n 36, at [44].

for, and purportedly found, positive law authorisation for action in the Crown's legal personality at common law. This judicial insistence on finding inappropriate positive authorisation for third source action complicates the reasoning process and allows the common law misconception to flourish.

Critics attack residuary freedom for leaving the boundaries of permitted government action undefined. Howell titles his article "What the Crown May Do", and rejects residuary freedom for not comprehensively answering this question or stating when and what new activities the government may engage in.[147] Yet, the third source extends to potentially every action that is not prohibited. Attempts to list all permitted action will thus be futile. Critics need to account for this rather than categorically reject residuary freedom. Howell is asking the wrong question. He should have asked: what may the Crown *not* do?

Continued adherence to classic reasoning is considered necessary to satisfy public law principles of legal certainty, clarity, accessibility, participation and accountability. These are fundamental rule of law criteria and required of United Kingdom law by the European Court of Human Rights.[148] According to critics, the third source suffers from a democratic deficit by allowing the government to act without the community's prior approval, thereby threatening these principles.[149] They further argue that because it is wrong to leave lawfulness to be decided by judges retrospectively, the third source does not satisfy every person's entitlement to know in advance whether their conduct is illegal.[150]

These principles have been developed within a positive law paradigm. So strong is the Diceyan adherence to parliamentary sovereignty that the third source is criticised for being opposed to principles that have not been properly adjusted to the non-statutory context. These principles must refocus on the external rules controlling third source action, as there is no statutory or common law authorisation of which to determine the scope. It must be clear and certain what the government cannot do, rather than be clear and certain what the government can do. Complete certainty need not be achieved, as gaps in the law surrounding government action is endemic.[151]

Positive legal obligations clearly stating what the government cannot do must thus be judicially and legislatively developed in order to satisfy principles of certainty, accessibility and accountability. Failure to endorse the third way of judicial reasoning fetters development of such rules by maintaining focus on authorisation, not prohibition.

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147 Howell, above n 53, at 36, 39, 52 and 66. See also Woolf, Jowell and Le Sueur, above n 54, at [5-022], discussing the extent government is "permitted" to achieve aims through extra-statutory means.

148 Cohn, above n 49, at 113.

149 At 103 and 108.

150 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [38] per Elias CJ, who endorsed these in *Hamed*, above n 45, at [38], when arguing that all government action must be authorised by positive law. However, this statement was made in the criminal law context, and only applies where the government is granted an ability to interfere in individual liberty.

151 French, above n 138, at 17–18.

The precise formulation of these rules is evasive, requiring an active judiciary for progress to occur.[152] Hale LJ in *ex parte C* endorsed a requirement that third source action not be unreasonable or unlawful, which restrained the Index from being operated in any manner the government deemed fit.[153] In *Shrewsbury*, Carnwath LJ argued that the government's constitutional position required that third source powers only be exercised "for the public benefit, and identifiably 'governmental' purposes".[154] These overly broad restrictions require supplementation with more specific rules to be of any utility.[155] They are more usefully framed in the negative: third source action must *not* run counter to governmental purposes and must *not* be to the public's detriment.

This would alter the inquiry to focus more clearly on prohibitions. Appreciation of the third way of judicial reasoning would stimulate the formulation of less abstract and more practical rules, which ought to develop over time in the tried and tested incremental fashion of the common law.

III RECONCILIATION WITH THE RULE OF LAW

If the third source can satisfy the principles of certainty, clarity and accountability, then it can be reconciled with the rule of law. This final section provisionally outlines how reconciliation might be achieved in order to fill the conceptual gap from which misconceptions have developed, though these ideas will require expansion.

Dicey's rule of law required all government action to be authorised by positive law. Arbitrary government action was fundamentally contrary to the rule of law and the conferral of wide discretion carried a real risk of arbitrary exercise of power.[156] A government's ability to undertake any action not prohibited is seen as a wide discretion to undertake potentially arbitrary action, and is therefore contrary to Dicey's view. But such a conservative rule of law is inappropriate in modern society, where the government requires discretion to act in diverse unique circumstances and where specialist bodies need freedom to act when particular situations arise.[157]

Third source action only violates the rule of law when undertaken arbitrarily or on impulse. The lack of a positive legal basis does not necessarily make third source action arbitrary.[158] Thus, the rule of law principle that "all

152 This is, unfortunately, left somewhat wanting. See Cohn, above n 27, at 284–285.

153 *Ex parte C* (CA), above n 4, at 633.

154 *Shrewsbury* (CA), above n 36, at [48].

155 At [74] per Richards LJ. See also BV Harris "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373 at 376. Harris criticises these restrictions for being too vague to implement effectively. Contrast Cohn, above n 27, at 284, on vagueness being necessary to allow abstract legal rules to apply to real situations.

156 Jeffrey Jowell "The Rule of Law and Its Underlying Values" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th ed, Oxford University Press, Oxford, 2007) 5 at 7 and 10.

157 At 15.

158 Cohn, above n 49, at 112.

government action should be subject to the law"[159] should not be read as "all government action should be authorised by law". Residuary freedom will be subject to the law when controlled by external rules preventing its arbitrary exercise. In contrast, statutory or prerogative action is subject to the law when courts confine the government to the authorised scope of the conferred power. The differing approaches implement the same rule of law principle, albeit in different ways to account for the different conceptual contexts.[160]

There are obvious practical advantages in not having to find positive authorisation for each individual government action. The government can efficiently meet its daily needs and respond to situations with minimal time and cost.[161] Requiring constant positive authorisation would place an impossible burden upon Parliament, the cost of which would be passed onto taxpayers.[162] These benefits have, in the author's view, been understated. The third source is not only pragmatic, but *necessary* for the government to carry out its constitutional and public duties. A substantive rule of law that views the government as normatively required to maximise individual liberty or serve the community requires the government to take action in pursuance of an ideal society. As the founding fathers of the United States realised when drafting the Constitution, strong society requires strong government. Alexander Hamilton wrote in 1788:[163]

> Energy in the executive is a leading character in the definition of good government. ... A feeble executive implies a feeble execution of the government. ... [G]overnment ill executed, whatever it may be in theory, must be, in practice, a bad government. ... The ingredients which constitute energy in the executive are: unity; duration; and adequate provision for its support; *competent powers*.

In the United States, the Article II conferral of executive power has been interpreted widely to give the government competent powers to fulfil its constitutional duties. The Supreme Court has recognised that the President's constitutional powers allow action without specific authorisation from Congress, so long as no Act of Congress is contradicted.[164] Although the United Kingdom and New Zealand lack written conferral of executive power,

159 Harris, above n 2, at 630. See also TRS Allan "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 CLJ 111 at 113, who expresses the synonymous principle that executive action be "justified" in law.

160 Elliott, above n 10, at 185–186. See also Cohn, above n 49, at 106, who rejects a single, grand public law theory to account for all government action.

161 Harris, above n 20, at 237, endorsed by McGrath J in *Ngan*, above n 45, at [96].

162 Baroness Scotland, above n 61, at WA13.

163 Alexander Hamilton "Federalist 70" in Peter Woll (ed) *American Government: Readings and Cases* (16th ed, Pearson Longman, New York, 2006) 288 at 288 (emphasis added).

164 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1951) at 637 per Justice Jackson. See also *Cunningham v Neagle* 135 US 55 (1889), where a Presidential order was held valid despite the lack of authorisation from Congress. The extent of "executive power" is still a matter of debate, with different Presidents taking different views on the scope of their powers. See Andrew Rudalevige "Unilateral Powers of the Presidency" in Michael Nelson (ed) *Guide to the Presidency* (4th ed, CQ Press, Washington DC, 2008) 511 at 512.

recognition of similar wide-ranging abilities to act — albeit in conformity with Parliamentary sovereignty — is consonant with the executive's comparable goals in each society. Both strive to serve the people: a difficult task when the ability to act is constrained. Ironically, Laws J's recognition of public duties owed by the government to the people supports rather than opposes the government having residuary freedom.[165]

Endorsement of a strong executive with wide ability to act alarms those concerned to protect individual liberty and underpins anti-third source statements in *Fewings* and *Hamed*. However, individual liberty is threatened not by the government's ability to act, but by the government's ability to act *without restraint*. The government needs wide abilities to act in order to create a society where individual liberty can be exercised. Constructing effective positive legal obligations and accountability mechanisms will regulate such action and protect individual liberty. An expansive reading of individual rights is one method, such as Elias CJ's interpretation of the right to be free from unreasonable search and seizure as a general right to be left alone.[166]

Requiring positive authorisation for all government action would pose a greater threat to individual liberty. The only way to achieve this would be to confer wide discretionary powers under statute; but this would not be intrinsically subordinate to positive law. The principle of legality from *R v Secretary of State for the Home Department, ex parte Simms* — requiring explicit statutory language for encroachment on rights and freedoms to be valid — goes some way towards protecting individual rights.[167] Yet, whether such wide powers would give way to laws other than those protecting rights would involve difficult issues of statutory interpretation. Thus the potential for unrestrained government action is arguably higher, and would result in increased opportunity for interference with individual liberty and violation of the rule of law. The inherent limits of written language mean the assumption that pre-written statutory authorisation would invariably be more consonant with the rule of law is questionable.

John Locke thought the prerogative necessary to enable the government to act for the public good in situations where statute would only impede action.[168] The same reasoning applies to the third source. So long as clear, enforceable rules exist stating what the government may not do, arbitrary power is minimised and the rule of law not affronted. Balance between rules and discretion provides the best mixture of certainty, accountability and flexibility.[169] This requires courts to take an active role in developing such rules. Judicial oversight of government action is an essential component of the rule of law as it safeguards individual liberty.[170] While some areas are

165 See *Fewings* (QB), above n 109, at 524. Laws J sees residuary freedom of individuals as an inherent aspect of autonomy. Arguably, public duties constitute a similar basis for the government's residuary freedom.

166 *Hamed*, above n 45, at [10] per Elias CJ.

167 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

168 See Rudalevige, above n 164, at 512.

169 Jowell, above n 156, at 14.

170 At 13; and French, above n 138, at 9 and 17.

better dealt with by Parliament, this will not always be the case.[171]

IV CONCLUSION

Residuary freedom remains a controversial and misunderstood area of law, where two differing conceptions have unwittingly emerged. On the correct third source conception, the government's ability to do anything that is not prohibited arises out of necessity, it being impossible to authorise all government action in advance. Its subordinate nature distinguishes it from the prerogative, as it cannot override any positive legal rule in statute or common law. Judicial control is achieved through judicial review and private law action, but requires courts to adopt the third way of judicial reasoning in order to account for conceptual differences with positive authority. There is no conferral of authority for courts to assess the scope of. Thus, judges must assess whether third source action is prohibited by any positive legal rule.

The United Kingdom has not adopted this conception with complete accuracy. An alternative common law conception attempts to understand residual freedom within existing mechanisms designed to control positively authorised government action. Both *ex parte C* and *Shrewsbury* attempted to rationalise third source action by linking it to the Crown's legal personality, thereby giving it a positive law basis.[172] But historically, legal personality allowed the Crown to undertake specific actions, such as entering contracts or holding property. It did not confer a general ability to act where not prohibited. Furthermore, the common law conception invites improper analogy with natural persons, insinuating that the government can undertake every action a natural person can. This ignores the multitude of different restrictions on government.

Attempts to base residual freedom in the common law risk obscuring its subordinate nature, giving rise to unreasonable fears that it will be used to interfere arbitrarily with individual liberty. Confusing the third source with the prerogative and with legal powers contributes to this, as both can alter legal rights. The judiciary ought to be the primary regulator of non-statutory action and develop positive law constraints to regulate third source action that might have harsh practical consequences. But courts have hesitated from doing so because they are labouring under the common law misconception, thus missing the need for such rules. To calm public fear, judges have sometimes denounced residuary freedom altogether.[173] They have also failed to endorse the third way of judicial reasoning. In doing so, they have approached residuary freedom from inappropriate positive law paradigms and criticised

171 *Ngan*, above n 45, at [99] per McGrath J, who noted police search powers as an area better suited to statutory regulation. The author considers that courts should still signal to Parliament when such areas require legislative attention, as in *Malone*, above n 13, at 380–381.

172 *Ex parte C* (QB), above n 62, at 1081–1082; *ex parte C* (CA), above n 4, at 631–632; *Shrewsbury* (HC), above n 74, at [15]–[17]; and *Shrewsbury* (CA), above n 36, at [44].

173 See generally *Fewings* (QB), above n 109; and *Hamed*, above n 45.

it for not meeting principles of certainty, accessibility and accountability that have not been properly adjusted for the non-statutory context.

Continued adherence to the common law misconception will only obscure the need for positive law constraints on third source action. The third source is not inconsistent with the rule of law, but arbitrary action in the absence of effective constraints is. The government's public and constitutional duties require residuary freedom in order to be fulfilled. While some worry that individual liberty is to be protected by an eclectic set of positive law rules, the challenge for courts and Parliament is to formulate a more coherent framework for regulating third source action. These are pressing issues, which courts can often address only in a narrow way.[174] But before they can address them at all, they need to understand what they are dealing with: a residuary freedom, not a common law rule.

174 *Youngstown*, above n 164, at 635.