

# The Crown's Administrative Powers

Adam Perry<sup>★</sup>

In addition to its statutory and prerogative powers, the Crown has extensive administrative powers. The Crown's administrative powers range from the power to form contracts to the power to circulate written material, and include powers to make ex gratia payments, convey property, and create policies. Much of the ordinary business of government falls under the Crown's administrative powers, yet these powers are poorly understood. There are two existing accounts of the Crown's administrative powers, but I show that both are unsound. I set out a better account, according to which the Crown's administrative powers are of two sharply different types: (i) legal powers, which derive from the common law, and which extend to what a natural person can do and what the law permits; and (ii) non-legal powers, which stem from wide social recognition, and which extend beyond what a natural person can do or what the law permits. This 'twofold account' suggests several new ways of distinguishing the Crown's administrative powers from its prerogative powers. It also suggests that the Crown's administrative powers pose an unusual and serious threat to the rule of law.

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## INTRODUCTION

A.V. Dicey said that all of the Crown's non-statutory powers are prerogative powers.<sup>1</sup> That claim has come under stinging criticism. The Crown shares some of its non-statutory powers with its subjects, and a power that everyone has is no one's 'prerogative' in the ordinary sense of the word.<sup>2</sup> Moreover, the source of the Crown's prerogative

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<sup>★</sup> Lecturer in Law, Queen Mary University of London. Email: a.perry@qmul.ac.uk. This is a draft. Please do not cite or quote without permission.

<sup>1</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn. London, Macmillan 1915) 282.

<sup>2</sup> See, eg, H.W.R. Wade, *Constitutional Fundamentals* (London, Stevens & Sons 1980) 47 ('[O]ne essential of "prerogative," if I may be forgiven for saying so, is that it should be prerogative'). Sir William Wade is echoing Blackstone, who said the prerogative powers are always 'singular and eccentric': W. Blackstone, *Commentaries on the Laws of England*, vol. I (Oxford, Clarendon Press 1765) 239.

powers is custom, and not all of the Crown's non-statutory powers have their source in custom.<sup>3</sup> Contrary to what Dicey claims, therefore, the Crown has some non-statutory and non-prerogative powers. The Court of Appeal for England and Wales acknowledged the existence of these powers in 2000.<sup>4</sup> In 2013, the Supreme Court did the same. In *R (New London College) v Secretary of State for the Home Department*<sup>5</sup>, where the issue was whether the Crown had the necessary power to create certain immigration guidelines, Lord Sumption said for the majority: 'the Crown possesses some general administrative powers ... which are not exercises of the royal prerogative and do not require statutory authority'<sup>6</sup>.

The Crown's 'administrative powers'<sup>7</sup>, as Lord Sumption called them, and as I shall call them here, are unglamorous but important. They range from the power to form contracts to the power to circulate written material, and include powers to convey property, hire and fire staff, consult with officials, make ex gratia payments, and create policies (as in *New London College*). All of these powers are shared by the Crown<sup>8</sup> with its subjects; none of them derive from custom; and together they account for much of the ordinary business of government. Their importance makes it worth understanding the Crown's administrative powers better, and that is my overall aim in this article.

The answers to two key questions are especially 'controversial'<sup>9</sup>, as Lord Sumption noted. First, what is the basis or source of the Crown's administrative powers? Second, what is the extent of the Crown's administrative powers, ie, what in general do these powers enable the Crown to do? There are two sets of answers to these questions in the

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<sup>3</sup> See, eg, C. Munro *Studies in Constitutional Law* (2<sup>nd</sup> edn London, Butterworths 1999) 257 ('[T]he prerogatives are recognised, rather than created by the common law, for their source is in custom').

<sup>4</sup> *R v Secretary of State for Health, ex p C* [2000] H.R.L.R. 400 (C.A.) 405-406.

<sup>5</sup> [2013] UKSC 51.

<sup>6</sup> *New London College* (n 5) [28]. Lord Hope, Lord Clarke, and Lord Reed agreed with Lord Sumption. Lord Carnwath wrote a separate judgment in which he expressed the opinion that the Crown's powers are all either statutory or prerogative ([33]-[34]).

<sup>7</sup> The Crown's non-statutory and non-prerogative powers have been given a variety of other names: see, eg, M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford, Hart 2001) 166-7 ('de facto powers'); H.W.R. Wade, *Constitutional Fundamentals* (London, Stevens & Sons 1980) 80 ('pretended prerogatives'); C. Vincenzi, *Crown Powers, Subjects and Citizens* (London, Pinter 1998) 14-16 ('secondary prerogative powers'); B. Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 L.Q.R. 225, 225-6 ('residual' powers).

<sup>8</sup> The expression 'the Crown' is notoriously ambiguous. In this article I shall use 'the Crown' in an institutional sense, ie, to mean the monarch and the executive branch of government. See M. Sunkin, 'Crown' in P. Cane and J. Conaghan (eds), *The New Oxford Companion to Law* (Oxford, O.U.P. 2008) 286; *M v Home Office* [1993] 3 All ER 537, 540 (per Lord Templeman).

<sup>9</sup> *New London College* (n 5) [28].

academic literature and case law, and thus two existing accounts of the Crown's administrative powers. The first account, favoured by many commentators, finds the answers in the Crown's 'residual freedom'. The second account, favoured by the Court of Appeal, finds the answers in the common law. Lord Sumption did not opt for either account in *New London College*, preferring to decide the case on other grounds.<sup>10</sup> That was fortunate, I argue here, because both accounts are unsound. The residual freedom account conflates powers and permissions, while the common law account ignores the differences among various types of powers.

I argue for a better account. At the heart of my account is the claim that the Crown's administrative powers are of two types. Some administrative powers are legal powers (roughly, abilities to change people's legal positions). Their source is the common law, and their extent is determined by what a natural person can do and by what the law permits. Most administrative powers are non-legal powers, however. Their source lies outside the law, in a kind of social recognition. They extend beyond what a natural person can do, and even beyond what the law permits. I go on to explain that this 'twofold account' has several important implications, including for how the Crown's administrative powers are distinguished from its prerogative powers. I conclude by raising several new questions about administrative powers.

## **THE RESIDUAL FREEDOM ACCOUNT**

My starting point is *Entick v Carrington*<sup>11</sup>. The King's agents forcibly entered Entick's property to carry out a search and, in doing so, acted unlawfully. The agents lacked 'positive' authority for their actions, ie, no legal rule or order specifically authorised their actions. In addition, the agents' actions were contrary to the common law prohibition against trespass. There are two ways to read this famous case.<sup>12</sup> One reading says that the agents' actions were unlawful simply because they lacked positive authority. The fact that their actions were also contrary to a common law prohibition was incidental. An alternate reading says that the agents' actions were unlawful primarily because they were prohibited at common law. The absence of any positive authority mattered only because it meant that the common law prohibition was not trumped by any higher law. Thus, had the agents' actions not been prohibited, they would have been lawful, even absent positive authority.

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<sup>10</sup> Lord Sumption held that the act at issue in *New London College* was impliedly authorized by the Immigration Act 1971: *New London College* (n 5) [29]-[30].

<sup>11</sup> *Entick v Carrington* (1765) 19 St. Tr. 1030.

<sup>12</sup> See, eg, C. Turpin and A. Tomkins, *British Government and the Constitution* (2<sup>nd</sup> edn. Cambridge, C.U.P. 2011) 101.

This second reading of *Entick* was endorsed in *Malone v Metropolitan Police Commissioner*<sup>13</sup>. As with *Entick*, the facts of *Malone* are too well known to repeat in detail. Essentially, the police had placed a wiretap on Malone's phone, but without entering his property. At issue was the lawfulness of the wiretap. Malone's counsel argued that the wiretap was unlawful because the police had not obtained a warrant, a contention that Sir Robert Megarry VC rejected. The 'underlying assumption of this contention', he said, 'is that nothing is lawful that is not positively authorised by law'<sup>14</sup>. Yet, 'England ... 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.'<sup>15</sup> This rule holds true for everyone, Sir Robert Megarry said, therefore it holds true for the Crown. That makes the critical question, not whether the wiretap was 'positively authorised by law', but whether it had been carried out 'without any breach of the law'<sup>16</sup>. The judge believed it had been, and concluded that the wiretapping was lawful 'simply because there ... was nothing to make it unlawful'<sup>17</sup>.

What does all this have to do with the Crown's administrative powers? A great deal, according to Bruce Harris, who has done more than anyone else to draw attention to the Crown's administrative powers.<sup>18</sup> Taking inspiration from *Malone*, Harris argues that the rule that what is not legally prohibited is legally permitted gives everyone, including the Crown, a 'residual freedom'<sup>19</sup> to act within the bounds set by legal prohibitions. Harris believes the Crown's residual freedom constitutes a 'third source' of power or (the word Harris prefers) 'authority', in addition to statute and custom.<sup>20</sup> In his original 1992 article, Harris said that this 'third source' gives the Crown 'authority' to enter contracts, distribute written information, and establish bodies to carry out functions on behalf of the Crown (as well as to place wiretaps, as in *Malone*).<sup>21</sup> In his more recent articles, Harris says that the third source also gives the Crown the authority to convey property

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<sup>13</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch. 344.

<sup>14</sup> *Malone* (n 13) 366-7.

<sup>15</sup> *Malone* (n 13) 357.

<sup>16</sup> *Malone* (n 13) 367.

<sup>17</sup> *Malone* (n 13) 367.

<sup>18</sup> See Harris, 'The "Third Source" of Authority for Government Action' (n 7); B. Harris, 'The "Third Source" of Authority for Government Action Revisited' (2007) 123 L.Q.R. 225; B. Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 L.Q.R. 373.

<sup>19</sup> Harris, 'The "Third Source" of Authority for Government Action Revisited' (n 18) 240.

<sup>20</sup> Harris, 'The "Third Source" of Authority for Government Action' (n 7). Authority is a type of power. However, 'power' is a more apt term in this context than 'authority', for reasons I explain towards the end of this article.

<sup>21</sup> Harris, 'The "Third Source" of Authority for Government Action' (n 7) 645.

and to hire and fire staff.<sup>22</sup> Indeed, it is clear that Harris believes that there are only three sources of Crown authority, and therefore that the 'third source' is the source of all of the Crown's administrative powers. The extent of the Crown's administrative powers is then defined by the absence of positive prohibitions. Harris's residual freedom account can be stated like this:

*The Residual Freedom Account*

The source of the Crown's administrative powers is its residual freedom. The Crown's administrative powers extend as far as legal prohibitions are absent.

Judges in this country have often cited Harris's work, but the substance of his account has never been endorsed in full.<sup>23</sup> (His account has, however, been endorsed in New Zealand.<sup>24</sup>) Many commentators agree with at least the thrust of Harris's account, including Mark Elliott<sup>25</sup> and Colin Munro<sup>26</sup>.

### **Powers and Permissions**

I find Harris's account fascinating, but I am not convinced by it. The problem lies with his argument that the source of the Crown's administrative powers is its residual freedom. It helps to make the steps of that argument clear. Here is what Sir Robert Megarry claims in *Malone*:

*Crown's Freedom*

If the Crown is not prohibited from performing an act, then the Crown is permitted to perform that act.

Harris ultimately concludes that the Crown has a power to do what it is not prohibited from doing. Note the shift from 'is permitted' to 'has a power'. Permissions and powers are very different, so Harris's conclusion does not follow from *Crown's Freedom*.<sup>27</sup> Harris must be assuming a bridging principle, namely:

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<sup>22</sup> Harris, 'The "Third Source" of Authority for Government Action Revisited' (n 18) 226-7, 230-4; Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (n 18) 374-5.

<sup>23</sup> A possible exception is Hobhouse L.J. in his dissenting judgment in *R v Home Secretary, ex p Fire Brigades Union* [1995] 2 A.C. 513, 531-34.

<sup>24</sup> See, eg, *The Minister for Canterbury Earthquake Recovery v Fowler Investments* [2013] NZCA 588, [75]-[85].

<sup>25</sup> Elliott (n 7) 168.

<sup>26</sup> Munro (n 3) 259.

<sup>27</sup> In Hohfeldian terms, the contrast is between powers and privileges (or liberties): W.N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16, 41-43. For a modern discussion of the differences between powers and permissions, see, J. Raz, *Practical Reason and Norms* (rev. edn. Princeton, Princeton University Press, 1991) c 3.

*Harris's Assumption*

If the Crown is permitted to perform an act, then the Crown has a power to perform that act.

Now Harris's conclusion follows:

*Conclusion*

If the Crown is not prohibited from performing an act, then the Crown has a power to perform that act.

This is certainly a valid argument, so whether the Crown has a power to do what is not prohibited depends on whether the two steps of the argument are true.

There has been a great deal of criticism of *Crown's Freedom* and equivalent claims.<sup>28</sup> Some of this criticism misunderstands what that claim says, however. It does not say – as the so-called ‘Ram Doctrine’ does – that the Crown is permitted to do what is not prohibited by statute.<sup>29</sup> That is plainly false. What it says is that the Crown is permitted to do what is not prohibited *simpliciter*, ie, by statute or by the common law. *Crown's Freedom* has also been criticized on constitutional grounds. Lord Lester and Matthew Weait, for example, argue that it would be contrary to the rule of law for the Crown to be permitted to do what is not prohibited. It would amount to ‘constitutional and legal heresy’<sup>30</sup>, they say.

Constitutional objections are inapposite here, however, due to the nature of the rule that everyone is permitted to do what is not prohibited. That rule is known as the permissive ‘closure rule’ in jurisprudence.<sup>31</sup> The permissive closure rule is not a special part of any legal system, nor is it an optional part of any legal system. The rule is a necessary feature of *every* legal system, whatever the differences in their positive laws, and whatever the differences in their constitutions. That is because the rule is not a legal rule at all. It is simply an analytic truth based on the definition of a prohibition. As Alf Ross says, a ‘permission to do [an act] is ... *identical* with the negation of an

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<sup>28</sup> The opinion of Laws J. (as he then was) in *R v Somerset County Council, ex p Fewings* [1995] 1 All E.R. 513 is sometimes taken as a rejection of the notion that the Crown may lawfully do whatever is not prohibited. See, eg, Turpin and Tomkins (n 12) 103. That case was about what a statutory authority may do, however, not what the Crown may do, so the case is not directly relevant. At the end of this article I briefly consider whether statutory authorities possess powers not conferred by law.

<sup>29</sup> For a critical account of the Ram Doctrine and its origins, see Committee on the Constitution, *The Pre-emption of Parliament* (H.L. 2012-13, 165), [50]-[60]. On the difference between the Ram Doctrine and the claim in *Malone* and the tendency to equate them, see J. Simpson, ‘The Third Source for Government Action Misconceived’ (2012) 18 Auckland U.L. Rev. 86, 100.

<sup>30</sup> A. Lester and M. Weait, ‘The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine’ [2003] P.L. 415, 422.

<sup>31</sup> See, eg, J Raz, ‘Legal Reasons, Sources, and Gaps’ in *The Authority of Law* (Oxford, O.U.P. 1979) 78.

obligation to omit [to do that act]<sup>32</sup>, ie, the negation of a prohibition against doing that act. To say that the Crown is permitted to perform an act is just another way of saying that it is not prohibited from performing that act. It no more violates the rule of law for the Crown to be permitted to do what is not prohibited than it violates the rule of law for the Crown not to be prohibited from doing what is permitted.

So *Crown's Freedom* is true. What about *Harris's Assumption*, the claim that the Crown has a power to do what it is permitted to do? It is plainly false that *natural persons* always have a power to do what is permitted. Minors, for example, do not have a power to form binding contracts (and thus do not have the power to convey property or hire staff), even though minors are not prohibited from forming contracts. As H.L.A. Hart says, when a person 'who has no legal power to dispose of property or enter a contract purports to do these things by executing the standard forms' the purported disposition or contract will fail to be effective, 'though his acts may constitute neither a criminal nor a civil offense, and so may be legally permitted'<sup>33</sup>. This does not show that *Harris's Assumption* is false, because that claim is about the Crown, not natural persons. But it shows that this assumption is not entailed by a general truth about how powers and permissions are related (as *Crown's Freedom* is entailed by the permissive closure rule). The assumption must be justified on its own terms – a task that Harris does not attempt.

*Harris's Assumption* is not merely unjustified; it is actually false. Just as natural persons are permitted to do some things they have no power to do, the Crown is permitted to do some things it has no power to do. This is easy to show, in fact. Think of some of the things the Crown is not prohibited from doing: solving the Middle East crisis in a day, flying to Jupiter, repealing all the laws of France, making a will for you, giving itself the power to make a will for you, giving itself the power to give itself the power to make a will for you, and on and on.<sup>34</sup>

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<sup>32</sup> A. Ross, *Directives and Norms* (London, Routledge & Kegan Paul 1968) 124. For remarks to the same effect, see H. Kelsen, *The Pure Theory of Law* (2<sup>nd</sup> edn., translated by M. Knight, University of California Press 1967) 42, 243; Raz, 'Legal Reasons, Sources, and Gaps' (n 31) 77.

<sup>33</sup> H.L.A. Hart, 'Bentham on Powers' (1972) 81 Yale Law Journal 799, 816.

<sup>34</sup> The Crown giving itself the power to make wills on behalf of others might be considered a law-making act. As Harris says, '[i]t is clear from the decided authorities that the ... [Crown's] freedom to do that which is not prohibited does not extend to law-making power'. B. Harris, 'The "Third Source" of Authority for Government Action' (n 7) 634 (citing *The Case of Proclamations* (1611) 12 Co. Rep. 74 among other cases). From this fact Harris seems to draw the conclusion that law-making power is a kind of sui generis exception to the residual freedom account. To my mind this is ad hoc. There is no reason why law-making power would be special – why the absence of any prohibition would be enough to give the Crown the power to enter contracts, convey property, hire staff, etc., but not the power to make laws. Of course there are reasons why it would be undesirable for the Crown to have residual law-making authority, but desirability is not the issue here.

It follows from *Crown's Freedom* that the Crown is permitted to do all these things. Were *Harris's Assumption* true, it would follow that the Crown has the powers necessary to do these things. But plainly the Crown has no such powers, so *Harris's Assumption* must be false.

(There is a third problem with Harris's argument. Harris is not always clear about what kind of power or authority he has in mind. But it can only be a kind of *legal* power or authority, given that it is supposed to be the absence of any *legal* prohibition that generates the power or authority. In that case, Harris would seem to be committed to the claim that all the Crown's administrative powers are legal powers. I argue against that claim later.)

So, we should reject Harris's argument. Neither the permissive closure rule nor the Crown's residual freedom is the source of the Crown's administrative powers. That is reason enough to look for a better account. Later, I shall argue that the residual freedom account is also mistaken as to the extent of the Crown's administrative powers.

## THE COMMON LAW ACCOUNT

The second existing account of the Crown's administrative powers was put forward by the Court of Appeal in two recent cases. The first is *R v Secretary of State for Health, ex p C*<sup>35</sup>. At issue in *C* was the lawfulness of the Secretary of State's circulation of a list of people whose suitability to work with children was in doubt, based on information provided by employers and the police. The maintenance of this list was not authorised by statute, and there was no suggestion it came under the prerogative. That did not mean the Crown lacked the power to create the list, however. The Court held that the common law gives the Crown, as a corporation sole, 'the capacities of a natural person and thus the same liberties as the individual'<sup>36</sup>. In the Court's view, that left only one question: 'Could a private individual maintain a list such as this?'<sup>37</sup> Because private individuals *do* lawfully maintain similar lists, such as credit ratings, the Court held that the health department could, in principle, lawfully maintain and circulate its list. (I say 'in principle' because the department would have acted unlawfully had it operated its list in a way that was procedurally improper, irrational, etc.<sup>38</sup>)

The Court of Appeal applied its decision in *C* in *Shrewsbury & Atcham Borough Council v Secretary of State for Communities and Local Government*<sup>39</sup> (hereafter '*Shrewsbury & Atcham*'). In anticipation of being granted statutory powers to replace two-tier local governments with

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<sup>35</sup> *C* (n 4).

<sup>36</sup> *C* (n 4) 404-5.

<sup>37</sup> *C* (n 4) 405.

<sup>38</sup> The Court considered whether the manner in which the list was operated was procedurally improper, and concluded it was not.

<sup>39</sup> [2008] EWCA Civ 148.

unitary ones, the Secretary of State invited proposals from local government officials as to which two-tier governments ought to be replaced. The invitation was challenged on the ground that it required, but lacked, statutory authority. The Court of Appeal dismissed the challenge. According to Carnwath LJ, *C* had established that ‘the powers of the ... [Crown] are not confined by statute and the prerogative, but extend ... to anything which could be done by a natural person’<sup>40</sup>. Natural persons can consult with officials. Thus, the Secretary of State could do the same.

*C* and *Shrewsbury & Atcham* endorse what I shall call the ‘common law account’ of the Crown’s administrative powers. This account traces the source of these powers to the common law. It draws their boundaries by reference to what a natural person can do. One clarification is in order. The common law account does not claim that the common law gives the Crown the power to do *whatever* a natural person can do. I can bake a cake and run a race, but of course the common law does not purport to give the Crown the same abilities. Phrases like ‘anything which could be done by a natural person’ should be read as ‘anything which could be done by a natural person *by virtue of the common law*’, the idea being that the common law gives to the Crown the same powers it gives to natural persons. Thus clarified, the common law account can be stated like this:

*The Common Law Account*

The source of the Crown’s administrative powers is the common law. The Crown’s administrative powers extend to whatever a natural person has a common law power to do.

The common law account has never been endorsed by the highest level of court in this country, but the House of Lords’ decision in *R v Secretary of State for Work and Pensions, ex p Hooper*<sup>41</sup> lends support to it. A majority of their lordships described the Crown’s power to make ex gratia payments as a ‘common law power’<sup>42</sup>. Lord Hoffmann added that he saw a ‘good deal of force’<sup>43</sup> in the notion that, ‘as a corporation sole, the Crown has the same right to deal with property as any other legal person’<sup>44</sup>.

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<sup>40</sup> *Shrewsbury & Atcham* (n 39) [44]. Carnwath L.J. was doubtful as to the merits of *C*, but Richards L.J. and Waller L.J. did not share this view.

<sup>41</sup> [2005] UKHL 29.

<sup>42</sup> *Hooper* (n 41) [43] (per Lord Hoffmann), [78]-[82] (per Lord Hope), [94]-[96] (per Lord Scott), [116] (per Lord Brown). The power to make ex gratia payments was characterised the same way in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [54] (per Lord Carnwath and Lord Mance), [78] (per Lord Sumption).

<sup>43</sup> *Hooper* (n 41) [47].

<sup>44</sup> *Hooper* (n 41) [46].

### **Motivating the Common Law Account**

It is striking that the courts in *C* and *Shrewsbury & Atcham* did not offer any real reasons for the common law account. Nor did the court in *Hooper* attempt to do so. Instead these courts seemed to treat the common law account as an obvious consequence of the Crown's corporate status. Presumably the reasoning is that the common law gives ordinary corporations the powers of a natural person, and the Crown is a corporation, so the common law gives the Crown the powers of a natural person, too. However, as John Howell has recently explained at length, the Crown is unlike other corporations in many ways, and historically its corporate status was of very limited significance.<sup>45</sup> Given these facts, it cannot simply be assumed that the common law treats the Crown in the same way it treats ordinary corporations. (Even if that could be assumed, not all of the Crown's administrative powers could be conferred by the common law, as I explain in the next section.)

There is a simpler argument for why the source of the Crown's administrative powers is the common law, which as far as I know has not been made explicit before. It proceeds by process of elimination: there are only three original legal sources – statute, custom, and common law; we know the source of the Crown's administrative powers is neither statute nor custom; so, the source of the Crown's administrative powers must be the common law. There is something to this argument, but notice the implicit assumption that the source of the Crown's is a *legal* source. The crucial issue is whether this assumption is justified – whether, in other words, the Crown's administrative powers have a legal source. As I shall explain in the next section, some of the Crown's do have a legal source, yet most do not. The assumption is partly right, but mostly wrong.

If some of the Crown's administrative powers are not conferred by law, then the extent of those powers can hardly depend on what powers are conferred on natural persons by the common law. Thus, my reason for rejecting the common law account's claim about the source of the Crown's administrative powers will provide a reason for rejecting its claim about their extent.

### **THE TWOFOLD ACCOUNT**

In this section, I argue for an alternate account of the Crown's administrative powers. I want to begin by taking a step back and considering what it is to have a power. In its broadest sense, that one has 'power' to perform an act means that one 'can' perform that act or (to say the same thing) that one is 'able' or has the 'capacity' to

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<sup>45</sup> J. Howell, "What the Crown May Do" (2010) 15 J.R. 36, [24]-[27].

perform that act.<sup>46</sup> When lawyers refer to a 'power', they usually have in mind a legal power, like the power to make a will or Parliament's power to make laws. Not all powers are legal powers, however. Think of your ability to read English and my ability to write an essay. These are powers, but they are plainly not 'the work of the law'<sup>47</sup>, to use Hart's phrase. We all accept that natural persons have both legal and non-legal powers. The Crown also has legal and non-legal powers, and that fact, I shall argue, is the key to identifying the source – or, more precisely, the sources – of the Crown's administrative powers, as well as their extent.

### **The Sources of the Crown's Administrative Powers**

What is a 'legal power'? Sir William Wade's definition is a useful starting point. He says that a legal power is the 'ability to alter people's rights, duties, or status under the laws of this country which the courts of this country enforce'<sup>48</sup>. By 'alter' Sir William Wade includes, not just the modification of pre-existing legal rights, duties, and statuses, but also their grant and revocation; and by 'rights' he includes powers and permissions. To save words, let us say that, according to this definition, a legal power is the ability to change a person's legal position by performing a certain type of act. To perform that act is then to 'exercise' that power.

Definitions like this one suffer from a well-known flaw.<sup>49</sup> Suppose that I assault you. Now you have a right to compensation from me, and I have a duty to compensate you. My act changed your legal position, and mine as well. No one would describe my act as an exercise of a legal power, however. Something more is needed for a legal power, besides the ability to change a person's legal position. Scholarly opinion is divided as to what this missing element is, but the generally held view is that it is the dependence of the legal change on the decision or intention (actual or imputed) to bring that change about.<sup>50</sup> My assault changes our legal positions, but those legal effects

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<sup>46</sup> For a helpful comparison of the relevant concepts, see P. van Inwagen, *An Essay on Free Will* (Oxford, O.U.P. 1983), 8-13.

<sup>47</sup> Hart (n 33) 803.

<sup>48</sup> Wade (n 2) 46.

<sup>49</sup> R. Alexy, *A Theory of Constitutional Rights* (translated by J. Rivers, Oxford, O.U.P. 2002) 152; N. MacCormick, *HLA Hart* (2<sup>nd</sup> edn Stanford, Stanford University Press 2008) 98; Raz, *Practical Reason and Norms* (n 27) 98, 102.

<sup>50</sup> See, eg, N. MacCormick, *HLA Hart* (2<sup>nd</sup> edn Stanford, Stanford University Press 2008), at p. 74; T. Spaak 'Explicating the Concept of Legal Competence' in J.C. Hage, D. von der Pfordten (eds.), *Concepts in Law* (New York, Springer 2009) 77. Raz argues instead that an act is the exercise of a legal power only if one of the reasons the law treats that act as effecting legal change is that, if it is treated that way, that act will usually be performed only if a person desires to bring about legal change. Raz, *Practical Reason and Norms* (n 27) 102-103; for discussion, see M. Halprin, 'The Concept of a Legal Power' (1996) 16 O.J.L.S. 129, 143-7. Even if Raz were right,

do not depend on my intending them. You have a right to compensation whether or not I intended to generate such a right by assaulting you. Consider, by way of contrast, the legal power to make a will. To make a will is in part to grant certain legal rights by performing an act with the intention (actual or imputed) to bring about precisely those legal changes.

Legal powers are always – or, at least, almost always – conferred by legal rules. (The possible exceptions are supreme law-making powers. Such powers are conferred by rules, but whether these rules are legal rules is debatable and, for present purposes, unimportant.<sup>51</sup>) That matters because legal rules have legal sources. Legal powers therefore have legal sources.

With these points set out, let me return to the Crown's administrative powers. Some of the Crown's administrative powers are indeed legal powers. They include powers to:

- (1) form contracts<sup>52</sup>,
- (2) make ex gratia payments,
- (3) hire and fire staff,
- (4) establish trusts,
- (5) convey property, and
- (6) appoint agents.

By exercising these powers, the Crown changes its legal position (and possibly the legal positions of others) by performing an act with the intention to bring about those changes. Forming a contract, for example, places the Crown under a legal duty it chooses to adopt. Hiring staff and conveying property can be thought of similarly. Making an ex gratia payment amounts to giving a gift, which is (among other things) a way of deliberately relinquishing rights over property. By appointing an agent, the Crown deliberately grants the agent the power to bind it in certain respects.

The primary rules that regulate contract, gift, property, and agency are, of course, *common law* rules. Thus, it is plausible that powers (1)-(6) are conferred by common law rules, making them common law powers. It follows that there is an important element of truth in the common law account of the Crown's administrative powers. In addition to its statutory and prerogative powers, the Crown *does*

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my classification of the Crown's powers as legal and non-legal would remain the same, and so for present purposes I assume the more common view is correct.

<sup>51</sup> See: J. Raz 'Voluntary Obligations and Normative Powers' in vol 46 *Proceedings of the Aristotelian Society* (Oxford, Blackwell 1972) 84; Raz, *Practical Reason and Norms* (n 51) 104-106.

<sup>52</sup> The Crown may lack the capacity to enter contracts that would limit its ability to promote the welfare of the state, but (as the law stands now) it has the capacity to enter purely commercial contracts. See: *Rederiaktiebolaget Amphitrite v The King* [1921] 3 K.B. 500, 503; *Robertson v Minister of Pensions* [1949] 1 K.B. 227, 231 (per Denning J.); *Commissioner of Crown Lands v Page* [1960] 2 Q.B. 275, 287-88.

possess common law powers. This means, for example, that it was appropriate to invoke the notion of a common law power in *Hooper*, where the act at issue was the making of an ex gratia payment. This is not the whole truth, however, because powers (1)-(6) are not the Crown's only administrative powers.

Most of the Crown's administrative powers are not legal powers of any description, including common law powers. I have already mentioned some of these powers, including powers to:

- (7) circulate written material (as in *C*),
- (8) consult with officials (as in *Shrewsbury & Atcham*),
- (9) place wiretaps (as in *Malone*), and
- (10) adopt policies and guidelines (as in *New London College*).

There are other non-legal powers that I have not yet mentioned, including powers to:

- (11) make promises,
- (12) issue apologies to individuals and groups,
- (13) communicate with foreign governments, and
- (14) issue passports.

This list is not intended to be exhaustive.

The reason why powers (7)-(14) are not legal powers takes some explaining. Sir William Wade is one of the few commentators to explicitly claim that the Crown possesses non-legal powers. His favourite example is the power to issue passports:

‘A passport as such has no status or legal effect at common law whatever. It is simply an administrative document. ... A United Kingdom national's passport does not have the slightest effect upon his legal rights, whatever they may be, to go abroad and return. Those rights are a matter of common and statute law, which the Crown has no power to alter. ... Since it has no effect on legal rights, the grant or withdrawal of a passport is not an exercise of legal power .... Passports do not enter into the legal picture at all.’<sup>53</sup>

Sir William Wade says that a decision to grant or refuse a passport is not the exercise of a legal power because it has ‘no effect on legal rights’. I agree with his conclusion, but as the law stands now, the reason he gives is insufficient. Sir William Wade's own definition of a legal power (quoted above) includes the ability to change, not just legal rights, but also legal duties. So, at the least, his conclusion that the power to issue passports is not a legal power would be justified only if the exercise of that power affected neither legal rights nor duties. In fact, a passport decision has the potential to affect both legal rights and duties. Consider *R v Secretary of State for Foreign and Commonwealth Affairs*,

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<sup>53</sup> Wade (n 2) 51.

*ex p Everett*<sup>54</sup>. The Secretary of State refused Everett's application for a passport on the ground that there was a warrant outstanding for his arrest. The Secretary of State was entitled to make that decision, the Court of Appeal held, but in so doing he came under a duty to give reasons for his decision.<sup>55</sup> That duty is most naturally thought of as owing to Everett, who had a right to reasons. Thus, the Secretary of State's act affected the Crown's legal duties, and Everett's legal rights. There is nothing special about *Everett's* case: passport decisions trigger a variety of duty-imposing rules.

According to Sir William Wade's definition, then, passport decisions actually *are* exercises of legal powers.<sup>56</sup> However, as I said, his definition of a legal power is too wide. It omits the element of choice or intention to effect legal change. This omission is why his definition incorrectly includes the power to issue passports. The Crown did not come under a duty to give reasons in *Everett* because it *intended* to come under that duty. Duties of fairness (and more generally the duties imposed by the rules of administrative law) apply to the Crown whether it wishes them to apply to it or not. In this way, the Crown refusing Everett's passport application is analogous to me assaulting you. My assault makes applicable certain duty-imposing rules of tort law, but my assault is not the exercise of a legal power. Likewise, the Crown's decision to circulate a list makes applicable certain duty-imposing rules of administrative law, but it is not the exercise of a legal power. What is true of the power to issue passports is true, with appropriate modifications, of each of powers (7)-(14). These are not legal powers, though their exercise may change the Crown's legal position and the legal positions of others.

If powers (7)-(14) are not legal powers, then *a fortiori* they are not common law powers. The common law account, which says that all of the Crown's administrative powers derive from the common law, must therefore be rejected. The mistake is evident in the Court of Appeal's decisions in *C* and *Shrewsbury & Atcham*. The Court of Appeal said in those cases that the Crown could circulate lists and consult with officials because the common law gives it those powers. But these are non-legal powers, and no law confers them. There is an irony here. The common law account is partly correct, yet that account turns out to be irrelevant in both *C* and *Shrewsbury & Atcham* – the only two cases to rely on it. (*Malone*, on the other hand, does not invoke the notion of

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<sup>54</sup> [1988] 1 QB 811 (C.A. (Civ. Div.)).

<sup>55</sup> *Everett* (n 54) 818 (per O'Connor L.J.): '[T]he Secretary of State, in the fair exercise of discretion, was entitled to refuse the passport but to give his reason for so doing .... Once he has done that he has all but discharged his duty ....'.

<sup>56</sup> Sir William Wade's book *Constitutional Fundamentals* was published in 1980. In 1980 exercises of the Crown's non-statutory powers were not amenable to judicial review and *Everett* was not decided until 1988. So I do not mean to suggest that Sir William Wade, at the time he was writing, should have thought that passport decisions affect legal rights and duties in the way I have described.

common law powers – appropriately, because placing a wiretap is not the exercise of a legal power.)

At this point someone might object to my analysis. True, she might say, powers (7)-(14) are not ‘legal powers’ in the technical sense defined here. But does it really follow that these powers have no legal source? Could they not be instances of some more general capacity to act that the law – perhaps even the common law – gives to the Crown? The simplest reason for answering ‘no’ is that were powers (7)-(14) the ‘work of the law’ in any meaningful sense, the law could strip the Crown of these powers. Yet it is difficult to imagine what change in the law would make it impossible for the Crown to, for example, maintain a list. Prohibiting the Crown from maintaining lists would not be enough: that would make it unlawful for the Crown to maintain lists, not impossible for it to do so. Were the officials in the Department of Health to act again as they did in *C*, we would still say a list had been created and circulated; we would just add that the law had been broken in the process.

My imaginary objector might not be satisfied with this answer. The Crown in its modern form is a legal entity, she might point out. The Crown’s existence depends on the law. It survives only as long as the law wishes it. Does it not follow that the Crown owes all its powers to the law? Yes – if the Crown is indeed a creature of the law, then everything it does is only possible because of the law. In that loose sense, the law is the source of all of the Crown’s powers. But this is not an interesting or informative statement, and it departs from the sense of ‘source’ I have been implicitly relying upon. I have been interested in what makes it true that the Crown has certain powers and not others. What makes it true that the Crown has powers (1)-(6) is that the common law contains certain rules. What makes it true that the Crown has powers (7)-(14) is not that the Crown is a *legal* entity. We know that because non-legal entities such as natural persons have many of the same powers.

So what is the source of powers (7)-(14), if not the law? Ultimately, the Crown’s non-legal powers derive from our willingness as a community to attribute ordinary acts to the Crown. We are prepared to attribute to the Crown and not merely to particular officials the act of making a list, holding a meeting, or issuing an apology, to take just three examples; hence we attribute to the Crown the powers to perform these acts. This should not come as any great surprise. We say that corporations, charities, and teams can create lists, hold meetings, and issue apologies. Clearly that is not because corporations, charities, and teams have some innate capacity to act; they are non-natural entities. Nor is it because of what the law says; some of these may be non-legal entities. Rather, it makes sense to say that corporations, charities, and teams have these powers because we are prepared, under certain conditions, to recognize them as having

created a list, held a meeting, or issued an apology. Social recognition, not law, gives these entities, and the Crown, their non-legal powers.

In summary: The residual freedom account says that the source of the Crown's administrative powers is the rule that what is not prohibited is permitted. I rejected that claim in full. The common law account says the source of the Crown's administrative powers is the common law. I rejected that claim in part. The source of the Crown's legal administrative powers is indeed the common law. But most of the Crown's administrative powers are non-legal powers, and they derive from our willingness to recognize the Crown as performing ordinary acts. From now on, I will use 'common law power' to mean 'legal administrative power' and 'ordinary power' to mean 'non-legal administrative power'.

### **The Extent of the Crown's Administrative Powers**

Having explained that the Crown's administrative powers are of two types, I turn now to the extent of these powers. My claim is that the existing accounts accurately judge the extent of the Crown's common law powers, but misjudge the extent of its ordinary powers.

The residual freedom account says that the Crown's administrative powers extend as far as prohibitions are absent. That would mean the Crown has a power to do whatever is permitted— a claim I earlier said is false. It would also mean that the Crown lacks a power to do anything that is prohibited. There is more truth in this, but it takes some drawing out. A legal rule that confers a legal power on the Crown will set out conditions for that power's exercise. When an act of the Crown's meets these conditions, it is a *valid* exercise of that power: it successfully brings about the legal change the Crown intended. In principle, whether a purported exercise of a legal power is valid is a different issue than whether its exercise is permissible. In practice, however, the two are closely connected, because with rare exceptions administrative law treats legal permissibility as a condition of legal validity, ie, as a condition on the valid exercise of a legal power.<sup>57</sup> Thus, what is at stake in a dispute as to whether the Crown exercised a legal power permissibly is whether the Crown exercised that power at all. It follows that legal prohibitions *do* at least usually mark the outer extent of what the Crown has a common law power to do — as the residual freedom account suggests.

Contrary to what the residual freedom account suggests, however, the Crown sometimes has an ordinary power to do what the law does not permit. Recall *Malone*. In that case, Sir Robert Megarry said that

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<sup>57</sup> This has been the case at least since *Ridge v Baldwin* [1964] A.C. 40 (H.L.). However, courts have a discretion not to count an unlawful decision as a nullity. For discussion of the possible 'paradox' that results, see *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [122]; T Endicott, *Administrative Law* (2<sup>nd</sup> edn. O.U.P. 2011) 394-8.

the Crown was permitted to tap Malone's phone. Some scholars think the judge made a mistake and that the Crown in fact was prohibited from tapping Malone's phone. In this debate, there is no suggestion that what is at stake is whether the Crown actually or successfully tapped Malone's phone. It is clear that the Crown did so. Therefore the Crown must have had the non-legal power to tap Malone's phone and have exercised that power. The question is whether an acknowledged exercise of a power was prohibited – a question that would be paradoxical were this a legal power, but one that makes sense given it is a non-legal power.

Turning now to the common law account, this account says that the Crown's administrative powers are the same as a natural person's common law powers. Again, there is some truth in this. The Crown's *common law* administrative powers are indeed similar to a natural person's common law powers. I say 'similar' not 'the same' because the Crown is prohibited from using its common law powers in ways that are permitted to natural persons. Specifically, exercises of administrative powers are subject to judicial review, and as a result the Crown is prohibited from using its common law powers in ways that are procedurally improper, unreasonable, and so on.<sup>58</sup> Given that legal prohibitions mark the boundaries of legal powers, it follows that the Crown's common law powers do not extend as far as a natural person's.

The common law account goes wrong when it comes to the Crown's non-legal administrative powers. The Crown's non-legal administrative powers are obviously not the same as or similar to a natural person's common law powers. (How could a non-legal power be similar to a legal one?) Nor, for that matter, are the Crown's non-legal administrative powers the same as a natural person's non-legal powers. Earlier I gave some examples of the non-legal powers natural persons have that the Crown lacks (baking a cake, running a race). More interestingly, there are non-legal powers the Crown possesses that natural persons lack. Here it is useful to describe *New London College* in more detail. Lord Sumption described the power to create the immigration guidelines at issue in that case as an administrative power. But he doubted that a natural person could have created the guidelines. It is 'open to question', he said

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<sup>58</sup> See, eg, *C* (n 4) (decision to create a list reviewable on grounds of procedural impropriety), *Shrewsbury & Atcham* (n 39) (decision to consult with officials reviewable on grounds of bias and illegality). For useful overviews of judicial treatment of exercises of administrative powers, see Harris, "The 'Third Source' of Government Authority" (n 7) 639-47; Elliott (n 7) 186-91. For my own view on judicial review of exercises of common law powers, see \_\_\_\_\_.

whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do ....<sup>59</sup>

Surely this is right. Natural persons can perform 'managerial acts' like forming contracts and hiring staff. But it is very hard to imagine how a natural person like you or I could issue 'guidelines for the grant and retention of a sponsor license and Highly Trusted Sponsor status'<sup>60</sup>, as the Home Secretary did in *New London College*. This act is the exercise of an administrative power, yet it is too 'public' or 'governmental' to be sensibly attributed to a natural person.

In short, the residual freedom and common law accounts are both partly right and partly wrong about the extent of the Crown's common law powers. The Crown does have common law powers like a natural person's (as the common law account suggests), the use of which must be permissible to be successful (as the residual freedom account suggests). Yet the Crown has ordinary powers unlike a natural person's (contrary to what the common law account says), the use of which need not be permissible to be successful (contrary to what the residual freedom account says).

Failing to notice the different boundaries of the Crown's common law and ordinary powers can lead to real confusion. Here *C* is a cautionary tale. The Court of Appeal held that the Crown had the power to create a list of people unsuitable to work with children because natural persons can create similar lists. But the power to create a list is not a legal power; whether a natural person could perform the same act should have been irrelevant. The second error was more serious. The Court held that, since the Crown has the power to create lists, its use of that power was not per se unlawful or impermissible.<sup>61</sup> That inference would have been justified were the power to make a list a common law power or some other kind of legal power (because the Crown cannot have a legal power that it is never lawful to exercise). But the fact the Crown can perform an ordinary act does not say anything about whether it ever is or should be permissible for the Crown to perform that act. The Court should have simply asked, first, was the creation of the list attributable to the Crown? Second, was that act lawful? Structuring the analysis this way would have recognized that what the Crown has an ordinary power to do is a different issue – in principle and in practice – from what a natural person can do and from what the Crown is permitted to do.

The first question – was the creation of the list in *C* attributable to the Crown? – should of course be answered 'yes'. But it is worth reflecting on why that is. The extent of the Crown's common law

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<sup>59</sup> *New London College* (n 5) [28].

<sup>60</sup> *New London College* (n 5) [5].

<sup>61</sup> *C* (n 4) 406.

powers can be determined by comparisons with the powers of natural persons and by reference to legal prohibitions. Yet, as I have said, the same is not true with respect to the Crown's ordinary powers. The extent of these powers can only be determined by the conditions under which we as a community are willing to attribute ordinary acts to the Crown. But what are these conditions?

The topic is a neglected one, and unfortunately I do not have a full answer. It seems plausible that one condition is that appropriate agents of the Crown carry out the act in question. We are inclined to say that placing a wiretap is an act of the Crown's if the police place it; we would be less likely to do so if a rogue civil servant placed it. Another likely condition is that an act must be performed for, or in relation to, a public or governmental purpose. The creation of the list of people unsuitable to work with children in *C* was an act of the Crown's, for example, but a list created by the same civil servants for personal reasons might not have been. A third condition might be that the act was paid for, if necessary, by public money, appropriately authorised. If the action is the operation of a commercial enterprise, then, as Hans Kelsen notes, one difference between such an action 'attributed to the state and the analogous activity of private individuals' is that in the former case but not the latter 'the assets and liabilities of ... [the] enterprise belong to the state property'<sup>62</sup>. No doubt there are other conditions, too.<sup>63</sup>

### **Summary**

I have now rejected the two existing accounts of the Crown's administrative powers, and in their place I have argued for a different way of thinking about where these powers come from and what they allow the Crown to do. My overall account is as follows:

#### *The Twofold Account*

Administrative powers are of two kinds. Legal administrative powers have their source in the common law, and extend to what a natural person has a common law power to do and what the law permits. Non-legal administrative powers have their source in our willingness as a community to attribute ordinary acts to the Crown, and their extent is determined by the conditions under which we are willing to make such attributions.

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<sup>62</sup> Kelsen (n 32) 296-297.

<sup>63</sup> The question of when to attribute acts to non-natural entities also arises with respect to corporations. The legal rules regarding the attribution of acts to corporation might be a useful reference point in a fuller discussion of the attribution of acts to the Crown.

## ADMINISTRATIVE AND PREROGATIVE POWERS

With an account of the Crown's administrative powers in hand, I turn now to the distinction between the Crown's administrative and prerogative powers. The most obvious way of distinguishing these types of powers is in terms of *source*: the source of the prerogative powers is custom, whereas the sources of the Crown's administrative powers are as described above. There are three other ways of distinguishing administrative and prerogative powers, though only one is exact.

The first distinction is in terms of *legality* and *exclusivity*. The existence of the Crown's administrative powers means that, contra Dicey, there are non-statutory powers that are not prerogative powers. The traditional alternative to Dicey's view is Blackstone's, according to which the prerogative powers are the non-statutory powers the Crown 'enjoys alone'<sup>64</sup>. Blackstone's view implies that any non-statutory and non-prerogative power must be a power shared by the Crown with its subjects. In different ways, this is the view taken by proponents of both the residual freedom and common law accounts. Harris thinks that the Crown has the power to do what is not prohibited – just as its subjects do.<sup>65</sup> The Court of Appeal thinks the common law gives the Crown certain powers – namely, the ones it gives the Crown's subjects.

However, in the last section, I showed that the Crown has some ordinary powers that natural persons lack. This means that there are non-statutory and non-prerogative powers that are not shared but rather exclusive, contra Blackstone. Exclusivity still has a role to play, but that role is limited to distinguishing the Crown's prerogative powers from its legal administrative (or common law) powers. More precisely, the Crown's prerogative powers are non-statutory powers that are *both* legal *and* exclusive, whereas its administrative powers are non-statutory powers that are *either* non-legal *or* shared (or both).<sup>66</sup> This way of distinguishing the Crown's prerogative and administrative powers is interesting on its own terms, because it means the scope of the prerogative is different than both Dicey and Blackstone believed.

The second distinction is in terms of *subject matter*. I have been using the term 'administrative power' without commenting on the administrative character of the powers it applies to. It is striking, however, that all or nearly all of the Crown's non-statutory and non-prerogative powers have a common subject matter. Indeed, given

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<sup>64</sup> Blackstone (n 2) 239.

<sup>65</sup> More precisely, Harris's view is that a prerogative power is a power to do what is *prima facie* prohibited, because even the Crown's subjects are able to do what is not prohibited in any sense. Harris, 'The "Third Source" of Authority for Government Action' (n 7) 627.

<sup>66</sup> By 'prerogative power' I mean the ministerial prerogatives, not the personal prerogatives of the Monarch, some of which are non-legal.

their many differences – in terms of source, extent, relationship to legal prohibitions, exclusivity, and so on – their subject matter may be all that unites the Crown's administrative powers. By contrast, the Crown's prerogative powers are usually constitutional in character. This is only a rough distinction, though. There are prerogative powers that are not constitutional, eg, the power to impress men into the Royal Navy. There may also be administrative powers the uses of which are not administrative in character. Suppose the Crown issues a formal, public apology for an historic wrong.<sup>67</sup> This act is an exercise of (what I have been calling) a non-legal administrative power, but I do not think it is naturally characterized as 'administrative'. Is the apology then a constitutional act? No more so than impressing men into the Royal Navy is an administrative act. What these and other examples tend to show, to my mind, is that 'administrative' and 'constitutional' are vague terms, the boundary between which is not always clear.

The final distinction is based on the difference between *power* and *authority*. Many (though not all) of the Crown's prerogative powers are powers the Crown has *over its subjects*, ie, powers it can use to directly change the legal positions of its subjects without their consent. For example, the Crown can exercise the prerogative power of colonial governance to impose legal duties on certain of its subjects, even over their strenuous objections.<sup>68</sup> In times of grave emergency, the Crown has the power to enter, take, and destroy private property.<sup>69</sup> It seems the Crown can even use the prerogative power of mercy to pardon a person without their consent.<sup>70</sup> Power over others is authority.

Matters are different when it comes to the Crown's administrative powers. The Crown cannot, of course, use its *non-legal* administrative powers to directly change the legal positions of its subjects without their consent. More significantly, the Crown cannot use its common

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<sup>67</sup> In New Zealand, the Crown's apology to Ngai Tahu Whanui (the descendants of a tribe of the South Island) begins: 'The Crown expresses its profound regret and apologises unreservedly to all members of the Ngai Tahu Whanui for the suffering and hardship caused to Ngai Tahu' (quoted by M. Gibbs, 'New Zealand's Treaty of Waitangi Settlement Process' in M. Gibney (ed.), *The Age of Apology* (Philadelphia, University of Pennsylvania Press 2008) 157). See also N. Barber, *The Constitutional State* (Oxford, O.U.P. 2010) 113.

<sup>68</sup> See, eg, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61.

<sup>69</sup> There is some question whether this prerogative power has been replaced by statute: see Ministry of Justice, *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (October 2009) 19.

<sup>70</sup> The law in Britain is somewhat uncertain, but the better view is that one cannot refuse at least an unconditional pardon. See, eg, A.T.H. Smith, 'The Prerogative Power of Mercy, the Power of Pardon and Criminal Justice' [1983] P.L. 398, 422-23. The Canadian position is that one cannot refuse an unconditional pardon or the partial remission of a sentence: *Reference re the Effect of the Royal Prerogative of Mercy upon Deportation Proceedings* [1933] S.C.R. 269.

law powers to do so either. Unlike its prerogative powers, all of the Crown's common law powers are powers the Crown has *over itself*. When it uses these powers, the Crown directly changes its own legal position, usually by imposing a new duty on itself (eg, by forming a contract), or by relinquishing certain of its rights (eg, by giving a gift). It is true that when the Crown exercises one of its common law powers, it may affect the legal positions of certain of its subjects (the other contracting party, the recipient of the gift). However – and this is crucial – it will do so only with their consent (one does not have to contract with the Crown, one can refuse a gift). So, the Crown's common law powers are not like prerogative powers the Crown happens to share with its subjects. The common law gives the Crown the power to bind itself, not the power to bind us. It gives the Crown additional powers, not additional authority.

There are therefore two exact ways of distinguishing between the Crown's administrative and prerogative powers, in terms of source and a combination of legality and exclusivity. There are also two approximate ways of distinguishing them, in terms of subject matter and authority relations.

## NEW QUESTIONS

I started this article with the two 'controversial' questions about the Crown's administrative powers raised by Lord Sumption. I want to end by raising, though not answering, some new questions about administrative powers, specifically with respect to the rule of law and statutory bodies.

### **The Rule of Law**

The rule of law is a famously slippery concept, but at a minimum it demands two things: first, that the state should rule, ie, guide the conduct of its subjects, through law; and second, that the law should be such that it can actually guide the subjects' conduct.<sup>71</sup> One part of this second requirement is that the law not be applied unpredictably or arbitrarily.

Understood in this minimal sense, the rule of law is not especially threatened by the Crown's common law powers. These powers are legal powers. Their existence is no secret, their boundaries are reasonably clear, and their exercise (like the exercise of all the Crown's administrative powers) is subject to judicial review. Indeed, the Crown's common law powers would seem to pose less of a threat to the rule of law than the Crown's prerogative powers do. We worry

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<sup>71</sup> J. Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (Oxford, O.U.P. 1979) 211-216; A. Marmor, 'The Rule of Law and its Limits' (2004) 23 *Law and Philosophy* 1, 2.

more about arbitrary action when it affects our rights and duties as individuals than when it does not. Moreover, the Crown often uses its administrative powers to impose *additional* legal constraints on itself (eg, contractual constraints), which may serve to reduce the potential for future arbitrariness.

By contrast, the Crown's ordinary powers pose an unusual and serious threat to the rule of law.<sup>72</sup> The Crown's ordinary powers are not legal powers, and it is inconsistent with the rule of law for the Crown, and thus a part of the state, to rule using powers not conferred by law. The rule of law therefore gives us a reason to criticize the Crown's reliance on its ordinary powers in *C, Shrewsbury & Atcham, New London College*, and so forth. The nature of the criticism is important to see. We often say the Crown violates the rule of law because of *how* it uses its statutory, prerogative, or common law powers (eg, arbitrarily, capriciously). Such criticisms are based on the second branch of the rule of law. Here we are criticizing the Crown, not for how it uses its ordinary powers, but for the mere fact *that* it uses them. This criticism is based on the first branch of the rule of law. Put another way, the rule of law does not demand that the Crown only use its ordinary powers in ways that will effectively guide conduct; it demands it stop using those powers altogether.

This is a hard problem for the law to solve. The law can strip the Crown of its common law powers, but it cannot strip the Crown of its ordinary powers. Some commentators seem to imagine that the Crown's ordinary powers could be placed on a statutory footing<sup>73</sup>, but this is a mistake: ordinary powers are not legal powers, and they cannot be conferred by law any more than they can be taken away by law. The Crown could be prohibited from using its ordinary powers, and while this would not make it impossible for the Crown to use these powers, it might discourage it from doing so. But difficult issues lurk in the background. If the Crown did not rely on its ordinary powers, would it have to refrain from making lists, holding meetings, creating policies, and so on? Would that be desirable? If it is desirable to discourage the Crown from relying on its ordinary powers, are legal restrictions the right vehicle to achieve that goal, or would the mechanisms of political accountability be more appropriate? And perhaps the most difficult question: although we think of the rule of

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<sup>72</sup> Some commentators think the Crown's administrative powers are in conflict or in tension with the rule of law, eg, Lester and Weait (n 30); Turpin and Tomkins (n 12) 102-3; A. Le Sueur, M. Sunkin, J. Murkens, *Public Law* (2<sup>nd</sup> edn. Oxford, O.U.P. 2013) 337-8. Harris and Simpson both argue that there is no true conflict between the Crown's administrative powers and the rule of law: Harris, 'The "Third Source" of Authority for Government Action' (n 7) 630-33; Simpson (n 29) 109-12.

<sup>73</sup> Harris, 'The "Third Source" of Authority for Government Action Revisited' (n 18) 241-3. This is not an alternative that Harris recommends, but he seems to think it is possible in principle.

law as an ideal, what exactly is good about the state ruling through law, and can this good be achieved by other means?

### **Statutory Bodies**

My focus in this article has been the Crown, but I think my analysis has implications for other kinds of entities, in particular statutory bodies. Like the Crown, many statutory bodies, including local authorities, can make promises, circulate written material, and hold meetings. These are non-legal powers when the Crown has them, and they are non-legal powers when statutory bodies have them as well. Now, I said that the Crown's non-legal powers do not have a legal source. Can the same be said of statutory bodies' non-legal powers? One way to approach the question is to consider whether there is any legislative change that would render it impossible for, say, a local authority to make a promise, short of the authority's outright abolition. To my mind there is not. If that is right, it means the authority's power to promise does not depend on statute, and therefore does not derive from statute in any important sense. Presumably something similar could be said of statutory bodies' other non-legal powers.

Interesting questions then arise. How should we think of the common claim<sup>74</sup> that statutory bodies only have the power to do what is expressly authorised or what is incidental to or consequential upon what is expressly authorised? Perhaps we should interpret that claim as being about permissions rather than powers, such that while statutory bodies possess non-statutory powers, they are permitted to use those powers only in ways properly connected to their express (statutory) powers. This answer leads to more questions. Is the relevant permission simply the absence of a prohibition? Or is this permission in some sense granted by a body's authorising statute?<sup>75</sup> Another set of questions is about the extent of statutory bodies' non-legal powers. Do statutory bodies have the same non-legal powers as the Crown? If not, what explains the difference?

All these questions raise controversial issues, of course, but they are ones for a different article.

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<sup>74</sup> See, eg, *Attorney General v Great Eastern Railway Co* (1880) 5 App. Cas. 473 (per Lord Selborne L.C.). Cf Local Government Act 1972, s 111(1) (purporting to give local authorities the power to do anything 'which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions').

<sup>75</sup> The starting point here would be the literature on 'weak' and 'strong' permissions. See, eg, G von Wright, *Norm and Action* (London, Routledge 1963) 85-7; Raz, *Practical Reason and Norms* (n 27) 86-91; K Opalek and J Wolenski, 'Normative Systems, Permission and Deontic Logic' (1991) 4 Law and Philosophy 334.

## **SUMMARY**

The Crown's administrative powers underpin much of the ordinary business of government, but they are poorly understood. The residual freedom account conflates powers and permissions, and the common law account confuses various types of powers. The better approach is to sharply distinguish between legal and non-legal administrative powers, and to analyse their source and extent separately. The Crown's legal administrative powers derive from the common law; they extend to what natural persons can do and what the law permits. The Crown's non-legal administrative powers derive from our preparedness to recognise the Crown's ordinary acts; they extend beyond what natural persons can do or what the law permits. This twofold account of the Crown's administrative powers has wide implications. It means that orthodox accounts of the scope of the prerogative are mistaken, and that the Crown's administrative powers pose an unusual and serious threat to the rule of law.

Throughout this article, I have stressed three general points. First, to understand the source and extent the Crown's administrative powers, it is essential to start with the underlying legal concepts (ie, legal powers, permissions, prohibitions) and the relationships among them. Second, although the Crown's powers are a core topic in public law, we can benefit from drawing on discussions about the nature of permissions and powers in jurisprudence. Finally, and most importantly, the law is less important to what the Crown may and can do than is often supposed. The law does not settle what the Crown is permitted to do – because the permissive closure rule is not a law – or what the Crown has the power to do – because its ordinary powers are non-legal powers.