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ARTICLES

ULTRA VIRES AND THE FOUNDATIONS OF JUDICIAL REVIEW

PAUL CRAIG*

THERE is a growing literature concerning the role of the ultra vires doctrine and its place within administrative law. For some the doctrine is the central principle of administrative law, without which judicial intervention would rest on uncertain foundations.¹ For others, it constitutes at best a harmless fiction, which is incapable of explaining all instances of judicial intervention, and at worst a device which allows the judiciary to conceal the real justifications for developments in judicial review.² Christopher Forsyth falls into the former camp. He has written a vigorous defence of the ultra vires principle, contending that “it remains vital to the developed law of judicial review”.³ The purpose of this article is to contribute to the debate on this issue by putting the opposing view. The article will be divided into four sections.

The first section will draw together the criticisms of the ultra vires principle. More specifically it will be argued that it is indeterminate, unrealistic, beset by internal tension, and that it cannot explain all instances where the judiciary has applied public law principles. The second and third sections will consider the arguments of those who believe that the ultra vires principle is indeed central to administrative law. Christopher Forsyth has helpfully articulated this position and has contended that certain undesirable consequences would ensue if we were to rest judicial intervention on

* Professor of Law, Worcester College, Oxford. I am grateful for the comments of Jack Beatson, Mark Freedland, Elizabeth Fisher, Sir John Laws, Dawn Oliver and Sir Stephen Sedley. I remain responsible for all errors.

¹ Wade & Forsyth, *Administrative Law* (7th ed., 1994), p. 41; Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review” [1996] C.L.J. 122.

² Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?” [1987] P.L. 543; Craig, *Administrative Law* (3rd ed., 1994), pp. 12–17; Sir John Laws, “Illegality: The Problem of Jurisdiction”, in Supperstone and Goudie (eds.), *Judicial Review* (1992), p. 67; Lord Woolf, “Droit Public—English Style” [1995] P.L. 57 at 66.

³ Forsyth, *op. cit.* n. 1, p. 122.

any other ground. It will be argued that these fears are misplaced and that those who are opposed to the ultra vires principle would not be forced to accept such undesirable consequences. The final section will develop the analysis in two related ways. It will be argued from an historical perspective that judicial intervention was not posited on the idea of effectuating the intent of the legislature, and that therefore to regard this as the classic theory underpinning judicial review is misconceived. It will be further argued from a conceptual perspective that it is possible to provide an alternative justification for judicial review which is sound, which fits with the seminal case law on the foundations of judicial review and which captures the proper relationship between the courts and the administration in a constitutional democracy.

It should be made clear at the outset that this article does not seek to address criticisms of the ultra vires principle which amount to direct challenges to the sovereignty of Parliament, what Christopher Forsyth terms “strong” criticisms of the principle.⁴ This is not because I disagree with such criticisms of the ultra vires principle. It is rather simply because of lack of space: discussion of sovereignty, and of possible changes to what is commonly perceived as the traditional doctrine of Parliamentary sovereignty, is a complex topic in its own right.⁵

It should also be made clear that references to judicial review refer to the substantive and procedural norms which comprise this topic, and not to the way in which a remedy is obtained.

I. THE CRITICISMS OF THE ULTRA VIRES DOCTRINE

The precise meaning of the ultra vires principle is, as will be seen below, more complex and contentious than is commonly acknowledged. This section of the article will, however, accept the meaning of the principle which is adopted by those who are minded to defend it as the only viable basis for judicial review in this country. The core idea can be expressed as follows.

The ultra vires principle is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions

⁴ *Ibid.* pp. 127–129.

⁵ My own views on this topic can be found in “Sovereignty of the United Kingdom Parliament after *Factortame*” (1991) 11 Y.B.E.L. 221 and “Public Law, Sovereignty and Citizenship”, in Blackburn (ed.), *Rights of Citizenship* (1993), chap. 16. Further development of these ideas can be found in “Three Conceptions of Sovereignty” forthcoming.

contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The ultra vires principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question: an institution given power by Parliament to adjudicate on employment matters should not take jurisdiction over non-employment matters. In a broader sense the ultra vires principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc.

The ultra vires principle thus conceived provided both the basis for judicial intervention and also established its limits. Judicial intervention was increasingly posited on the idea that the objective was to ensure that the agency did remain within the area assigned to it by Parliament. The limits to judicial review were also profoundly affected by the ultra vires principle. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature and hence not contravening the will of Parliament. Controls over the way in which the agency exercised its discretionary power had, therefore, to be framed with this in mind. The courts should not substitute their judgment for that of the agency. The controls over the way in which discretionary power was exercised were, moreover, justified by reference to legislative intent: it would be argued, for example, that Parliament did not intend the agency to make decisions based on irrelevant considerations or improper purposes.

The ultra vires principle is thus regarded as both a necessary and sufficient basis for judicial intervention. It is necessary in the sense that any ground of judicial review has to be fitted into the ultra vires doctrine in order for it to be acceptable. It is sufficient in the sense that if such a ground of review can be so fitted into the ultra vires principle it obviates the need for further independent inquiry.

When reading the criticisms of the ultra vires principle set out below it is important to bear two related points in mind in order to avoid confusion. One is that those who are critical of the ultra vires principle as the foundation of judicial review are not committed in any sense to regarding legislative intent as being irrelevant in determining the extent and incidence of such review. It is self-evident that the enabling legislation must be considered when determining the ambit of a body's powers. This is not, however, the same thing as saying that the heads of review, their meaning or the intensity

with which they are applied can be justified by reference to legislative intent. The other point to bear in mind is that critics of the ultra vires principle are of course concerned to keep bodies within their assigned spheres. The central issue is how far the relevant legal rules and their application can be satisfactorily explained by reference to legislative intent.

(a) The Indeterminacy of the Ultra Vires Principle

One potent critique of the ultra vires principle is its very indeterminacy. This can be exemplified by its application to judicial review of jurisdictional issues such as those presented in cases such as *Bolton*,⁶ *Brittain*,⁷ *Anisminic*⁸ or *Page*.⁹ A statute states, for example, that if an employee is injured at work then an agency may or shall grant compensation. It is clear from the face of the legislation that there are three conditions which must be satisfied before the agency can proceed further: the existence of an employee, an injury and the fact that the injury has occurred while at work.

It is indisputable as a matter of legal history that the courts in this country have adopted a number of different approaches to defining jurisdictional error. These have been considered in detail elsewhere,¹⁰ but suffice it to say for the present that three such approaches can be detected within the courts' jurisprudence: limited review, the collateral fact doctrine and the more modern test of extensive review under which all relevant errors of law are open to challenge.

It is equally indisputable that the ultra vires doctrine provides no guidance as such as to which of these standards of review ought to be applied. It does not tell us whether the correct standard of judicial review should be for the court to substitute judgment on the meaning of each of these conditions, or whether it should substitute judgment on certain of the conditions but not others, or whether it should adopt some other test. Any of these tests can be formally reconciled with the ultra vires principle. It can always be maintained that, for example, Parliament only intended that certain preliminary issues should be subject to judicial review, or by way of contrast that Parliament intended that the ordinary courts should substitute judgment on all relevant questions of law for that of the agency being reviewed. Courts which have been eager to promote a

⁶ *R. v. Bolton* (1841) 1 Q.B. 66.

⁷ *Brittain v. Kinnaird* (1819) 1 B. & B. 432.

⁸ *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

⁹ *R. v. Lord President of the Privy Council, ex p. Page* [1993] 2 A.C. 682.

¹⁰ Craig, *Administrative Law* (3rd ed., 1994), Chap. 10.

particular doctrine of jurisdictional error have sought to validate their chosen view by invoking Parliamentary intent in this manner.¹¹

The flexibility in the ultra vires principle can preserve the veneer that the courts are simply obeying the legislative mandate, but it is this very flexibility which ultimately robs the reasoning of any conviction. It is precisely because legislative intent can be used to legitimate almost all types of judicial control that it loses its potency to legitimate any particular one.¹² As Sir John Laws has remarked,¹³ the ultra vires principle in this area is simply a fig leaf which enables the courts to intervene to the degree to which they think is appropriate without too nakedly confronting the authority of the executive. How far the courts ought to be intervening in this area and the factors which are of relevance in this respect will be considered in more detail below. The ultra vires principle is capable of accommodating a variety of conclusions on this issue. It is not however able to provide any independent *ex ante* guidance.

(b) The Lack of Reality of the Ultra Vires Principle

Another telling criticism of the ultra vires doctrine is that it does not accord with reality. This can be exemplified by considering the controls which the courts have imposed on the exercise of discretion. The orthodox approach has been to legitimate these controls by reference to Parliamentary intent: the legislature only intended such power to be exercised on the basis of relevant considerations, reasonably and for proper purposes. There are two problems with this rationalisation of judicial behaviour.

First, the legislation which is in issue in a particular case will often not provide any detailed guide to the courts as to the application of these controls on discretion. There will be often be scant guidance to be gained from the enabling legislation as to what should be considered to be relevant as opposed to irrelevant considerations. Nor is it realistic to think of the legislative process being conducted in these terms.¹⁴ This is particularly so in relation to legislation which is framed in broad, open textured terms. The court will of necessity have to make its own considered judgment on such matters.

¹¹ See, e.g., *R. v. Commissioners for Special Purposes of Income Tax* (1888) 21 Q.B.D. 313; *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417; *Page* [1993] 2 A.C. 682.

¹² It is, moreover, even more difficult to conceive of intervention in this area being based on legislative intent determining the limits of validity if the courts employ a functional as opposed to an analytical sense of the term "error of law". See generally, J. Beatson, "The Scope of Judicial Review for Error of Law" (1984) 4 O.J.L.S. 22.

¹³ "Illegality: The Problem of Jurisdiction", in Supperstone and Goudie (eds.), *Judicial Review* (1992), Chap. 4.

¹⁴ Sir Stephen Sedley, "The Common Law and the Constitution", in Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the British Constitution* (1998), p. 16.

Secondly, the orthodox justification for the controls which exist on discretion makes little if any sense when we consider the development of these controls across time. The constraints which exist on the exercise of discretionary power are not static. Existing constraints evolve and new types of control are added to the judicial armoury. Changes in judicial attitudes towards fundamental rights, the acceptance of legitimate expectations, and the possible inclusion of proportionality as a head of review in its own right are but three examples of this process. These developments cannot plausibly be explained by reference to legislative intent. Let us imagine that, for example, the UK courts were to decide in 1998 that proportionality was an independent head of review. Can it plausibly be maintained that this is to be justified by reference to changes in legislative intent which occurred at this time? Would the legislature in some manner have indicated that it intended a new generalised head of review in 1998 which had not existed hitherto? The question only has to be posed for the answer to be self-evident.¹⁵ Sir John Laws captures this point when speaking of developments in judicial review,¹⁶

They are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig leaf to cover their true origins. We do not need the fig leaf any more.

(c) Tensions within the Ultra Vires Principle

A further problem with the ultra vires doctrine is that it is beset by internal tensions. These are most apparent in the context of statutory provisions which seek to exclude the courts from judicial review through the presence of preclusive or finality clauses. If the rationale for judicial review is that the courts are thereby implementing legislative intent this leads to difficulty where the legislature has stated in clear terms that it does not wish the courts to intervene with the decisions made by the agency. As is well known such clauses have not in fact served to exclude judicial review. The courts have used a number of interpretative techniques to limit the effect of such clauses, most notably in *Anisminic*¹⁷ where their Lordships held that

¹⁵ The same point can of course be made about other developments which have occurred in judicial review. For example, the expansion of the head of jurisdictional error cannot plausibly be explained by changes in legislative intent which occurred at the time of the decision in *Page* [1993] 2 A.C. 682.

¹⁶ "Law and Democracy" [1995] P.L. 72 at 79.

¹⁷ [1969] 2 A.C. 147.

the relevant provision did not serve to protect decisions which were nullities.

Various attempts can and have been made to square such decisions with the orthodox ultra vires principle. It might be argued that Parliament really did not intend such clauses to cover decisions which could otherwise be rendered null. It might alternatively be contended that Parliament acquiesced in the actual decision reached by the courts in the instant case. It might be further argued that in the future Parliament would know that any such clause would be interpreted in this manner and that it signalled its consent in this respect by its willingness to include such clauses in legislation while being fully cognisant of their limited legal effect.

While such arguments can be made they are susceptible to two complementary objections, one substantive, the other formal.

In substantive terms, arguments of this nature should not be allowed to conceal the reality of what the legislature was attempting to achieve, nor should it be allowed to mask the judicial response. Such clauses were clearly designed to exclude the courts. This might be for a "legitimate" reason, in the sense that the legislature was merely trying to signal that it preferred the view of a specialist agency to that of the reviewing court. It might be for a more "dubious" reason, as where the legislature was merely seeking to immunise the decisions of a minister from any challenge. We should be equally honest about the nature of the courts' response. Although it is capable of being reconciled with orthodoxy in the above manner, the reality is that the courts were reaching their decision by drawing upon a constitutional principle independent of Parliamentary intent. The essence of this principle was that access to judicial review, and the protections which it provides, should be safeguarded by the courts, and that any legislative attempt to block such access should be given the most restrictive reading possible, irrespective of whether this truly accorded with legislative intent or not.

The other objection to the arguments made above is more formal in nature. Even if one believes that the decisions in this area can be reconciled with ultra vires orthodoxy this reconciliation is only bought at a price. The price in this instance is the straining of the ultra vires doctrine itself. The malleability of the doctrine allows it to be formally stretched in the above manner. Yet the more contrived the search for the legitimisation of legislative intent, the more strained and implausible does the whole ultra vires doctrine become. This tension has indeed been exacerbated by more recent developments in judicial review. The House of Lords in *Anisminic* could at least contend that there was some space left for the ouster clause to operate on, given that they held that the concept of error of law

within jurisdiction still existed. The death knell of the idea of non-jurisdictional error of law which was sounded in *Page*¹⁸ has removed this line of argument.

(d) The Ultra Vires Principle and the Scope of Public Law

For all its difficulties it is at least plausible to think of the ultra vires principle as being the basis of judicial review in relation to those bodies which derive their power from statute. The courts have, however, expanded the principles of judicial review to cover institutions which are not public bodies in the traditional sense of the term, in circumstances where these bodies do not derive their power from statute or the prerogative. This trend has been more marked as of late because of reforms in the law of remedies.¹⁹ It would none the less be mistaken to think of this as a recent development. The courts have applied public law, or analogous, principles to such bodies for a very considerable period of time, irrespective of whether this was in the context of an action for judicial review as such. Trade associations, trade unions and corporations with *de facto* monopoly power have, for example, been subject to some of the same principles as are applied to public bodies *stricto sensu*.²⁰

It is difficult to apply the ultra vires principle to such bodies without substantially altering its meaning.²¹ These bodies do not derive their power from statute and therefore judicial control cannot be rationalised through the idea that the courts are delineating the boundaries of Parliament's intent. The very language of ultra vires can only be preserved by transforming it so as to render the principles of judicial review of generalised application to those institutions which wield a certain degree of power; these principles are then read into the articles of association or other governing document under which the body operates. While this step can be taken it serves to transform the ultra vires doctrine. It can no longer be regarded as the vehicle through which the courts effectuate the will of Parliament. It becomes rather a juristic device through which these private or quasi-public bodies are subject to the controls which the courts believe should operate on those who possess a certain type of power.

¹⁸ [1993] 2 A.C. 682.

¹⁹ Craig, *op. cit.* n. 10, Chap. 15.

²⁰ On some occasions the courts will justify this by reference to the supposed intent of the relevant parties; on others, they will impose the relevant obligation without reference to the parties' intent, see generally, D. Oliver, "Common Values in Public and Private Law and the Public Private Divide" [1997] P.L. 630.

²¹ Oliver, *op. cit.* n. 2.

II. THE DEFENCE OF THE ULTRA VIRES PRINCIPLE: THE DANGERS OF ITS ABANDONMENT

It is unsurprising, given the nature of these criticisms, that there should have been a defence of the ultra vires principle and Christopher Forsyth has made a valuable contribution to the debate by articulating this point of view. His defence in effect entails two complementary lines of analysis: one set of arguments is designed to show the dangers of abandoning the ultra vires principle; the other is designed to address and meet some of the criticisms of that principle. The first set of arguments will be considered within this section; the second in the section which follows.²²

(a) *The Particular Danger: Ouster Clauses*

One of the primary arguments advanced by Forsyth²³ is that if we abandon the ultra vires principle the courts will be unable to circumvent ouster clauses in the manner which they have done in cases such as *Anisminic*.

The argument is based on the decision of the South African court in the *UDF* case.²⁴ The case concerned judicial review of emergency regulations made by the State President which were designed to prevent the dissemination of information about "unrest". The UDF sought to challenge these regulations on the ground that the definition of unrest was so vague as to render the regulations void. The regulations were protected by an ouster clause, which would not have served to immunise them from attack had the court employed the type of reasoning used in cases such as *Anisminic*.

Rabie A.C.J. who gave the majority judgment in the Appellate Division of the South African court reasoned, however, that even if the regulations were vague they were still made pursuant to the legislation and hence still protected by the ouster clause. Rabie A.C.J. also rejected the ultra vires doctrine as the basis of judicial review, holding that it was Roman-Dutch common law and not the ultra vires doctrine which required that subordinate legislation should not be vague. While such regulations could in theory be struck down by the court in the exercise of these common law powers, the regulations were still made "under the Act" and thus were protected by the ouster clause.

Forsyth contends that if we abandoned the ultra vires doctrine then such results could happen here too, and that the reasoning

²² It should be pointed out for the sake of clarity that this method of dividing Christopher Forsyth's argument is mine and not his.

²³ Forsyth, *op. cit.* n. 1, pp. 129-133.

²⁴ *Staatpresident en andere v. United Democratic Front en 'n ander* 1988(4) S.A. 830A.

adopted by Rabie A.C.J. could be applied even if the ground of challenge was irrationality, procedural impropriety, or abuse of power. An ouster clause could operate to immunise such errors from attack. Judicial review would in Forsyth's words be "eviscerated" and this would be "the inevitable consequence of abandoning ultra vires", even though it was not the intended consequence.²⁵

Christopher Forsyth is clearly correct to alert us to the reasoning used in the *UDF* case, and to point out the consequences of abandoning the ultra vires principle which occurred in that case. The reasoning of Rabie A.C.J. is indisputable. It happened. It could therefore happen in another legal system which chose to reject the ultra vires principle.

Forsyth is however mistaken in contending that this is the inevitable consequence of abandoning the ultra vires principle, or even the likely consequence. The argument posits a link between the abandonment of the ultra vires doctrine and the treatment of ouster clauses which does not in reality exist. Let us imagine that a court is minded to abandon the ultra vires doctrine as the basis of judicial review and to maintain instead that the controls on the exercise of public power are based not on the will of Parliament, but rather on common law created doctrines and principles. It is important to recognise at this juncture that these common law created doctrines and principles will include not only the established heads of review, but also other principles of public law which are relevant, for example, to the treatment of fundamental rights and indeed ouster clauses. How does such a judge deal with a case in which there is an ouster clause? Is he or she forced to reason in the manner exemplified by Rabie A.C.J. and hold that the clause protects errors which would otherwise be susceptible to challenge under one of the established heads of review? No. Such a judge would reason as follows.

The judge would begin by making explicit and honest what is implicit in the current approach of the courts to ouster clauses. The limited effect to be given to such clauses would not be based on the strained idea that Parliament did not intend such clauses to protect nullities. It would rather be based on what is in any event the reality underlying the current law in this area. This is the existence of a common law constitutional principle to the effect that the inherent power of the courts should not readily be taken to be wholly excluded from review, a principle recognised and forcefully expressed by Professor Wade.²⁶ A clause which purported to do this would

²⁵ Forsyth, *op. cit.* n. 1, p. 131.

²⁶ See, H.W.R. Wade, *Constitutional Fundamentals* (1980), p. 66, stating that Parliament's attempts to exempt public bodies from the jurisdiction of the courts is tantamount to giving them

therefore be restrictively construed so as to apply only to decisions which were not vitiated by errors of the kind which could be challengeable under standard heads of review. A court could therefore in a case such as *UDF* or *Anisminic* proceed to consider the alleged error and strike down the regulations or government action if the error were proven to exist.

A final point on this topic is warranted here. Not only is the approach adopted in the *UDF* case not the logical or necessary consequence of abandoning the ultra vires principle. We should also recognise that the result reached in *Anisminic* was not a foregone conclusion, in some way logically derived from the very use of the ultra vires principle. In other words the mere fact that a legal system does employ the ultra vires principle does not mean that it will necessarily use it to interpret ouster clauses in the manner adopted by the House of Lords. We have already seen the strain which this very approach placed upon the ultra vires doctrine itself.

(b) The General Danger: The Analytical Impasse?

The second perceived danger of abandoning the ultra vires principle is captured in the following quotation from Christopher Forsyth's article.²⁷

Suppose that a Minister in the apparent exercise of a statutory power to make regulations, makes certain regulations which are clearly so vague that their meaning cannot be determined with sufficient certainty. Classic theory tells us that Parliament never intends to grant the power to make vague regulations—this seems an entirely reasonable and realistic intention to impute to Parliament—and thus the vague regulations are ultra vires and void: there would be no difficulty in the court striking down the regulations. But classic theory has been abandoned: the grounds of review derive, not from the implied intent of the legislature, but from the common law. It follows that although the regulations are intra vires the minister's powers, they are none the less invalid because they are vague.

The analytical difficulty is this: what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly. Thus, if the making of the vague regulations is within the powers granted by a sovereign Parliament, on what basis may the courts challenge Parliament's will and hold that the regulations are invalid?

The argument in this quotation is powerfully presented. It should

dictatorial power and is a constitutional abuse of power by Parliament; that judicial control over discretionary power is a constitutional fundamental, akin to an entrenched constitutional provision, p. 68; and that it ought not to be left to Whitehall to say how much judicial control will or will not be tolerated, p. 70.

²⁷ Forsyth, *op. cit.* n. 1, p. 133.

be noted at the outset that no such analytical impasse has ever in fact been perceived by the courts which developed review and did so independently of ideas of legislative intent. The argument must none the less be answered by those who seek to challenge the ultra vires principle as the basis of judicial review. It is however capable of being met.

The fact that some might choose to reject the ultra vires doctrine based on legislative intent as the justification for judicial review does not for any reason mean that the limits to an agency's powers thereby alter. The argument as put thus elides the existence of limits to an agency's power with the conceptual basis for those limits. The limit on power is that regulations should not be too vague, but it might equally be that they should not be manifestly unreasonable,²⁸ or that they should be interpreted so as not to infringe fundamental rights²⁹ etc. The live issue is whether one believes that such limits are really to be derived from legislative intent or more honestly from judicial creation through the process of the common law. Under the latter approach one would simply say that there is a common law principle that regulations cannot be too vague, that statutes which empower the making of regulations will be read subject to this principle and therefore that the minister did *not* have power to make such vague regulations.

It is no answer in this respect to state that what an all powerful Parliament does not prohibit it must authorise either expressly or impliedly. This is not in reality a problem. The orthodox reading of the ultra vires principle is itself based on the assumption that Parliament will be presumed not to have intended the making of regulations which are vague, unreasonable etc. The presumption is therefore that vague or unreasonable regulations are prohibited. There is no substantive difference in this respect with the alternative conceptual basis for judicial review, which sees the heads of review based on the common law. On this view there would be a common law presumption that the common law proscription against the making of vague or unreasonable regulations could be operative, and hence such regulations would be prohibited, unless there was some very clear indication from Parliament to the contrary.

Now of course if Parliament *were* to state explicitly in the enabling legislation that the minister should be thus empowered then judicial review would be correspondingly curtailed. But this would be equally true irrespective of whether one perceived review to be based upon legislative intent or the common law. If it were the

²⁸ *Kruse v. Johnson* [1898] 2 Q.B. 91; *McEldowney v. Forde* [1971] A.C. 632.

²⁹ *R. v. Secretary of State for the Home Department, ex p. Leech* [1993] 4 All E.R. 539.

former, and assuming that the courts really were seeking to apply such intent, then the minister would be empowered to make vague regulations. If the principles of review were seen to be based on the common law then these could be overridden by legislation which was sufficiently clearly phrased and which was inconsistent with the common law norm, unless of course one chose to mount a direct or "strong" challenge to the sovereignty of Parliament.

(c) The Symbolic Argument: The Utility of Fig-Leaves

Christopher Forsyth reinforces his analysis with an argument of a more symbolic nature. He takes Sir John Laws to task for misunderstanding the fig-leaf metaphor. The point about the fig-leaf metaphor is, says Forsyth, precisely that fig-leaves "do not deceive anyone as to what lies beneath them".³⁰ The fig-leaf, "like the swimming costume on a crowded beach, is to preserve the decencies".³¹ On this view the ultra vires doctrine plays a similar role in public law: while no one is so innocent as to deny the existence of judicial creativity in this area, the ultra vires doctrine serves to preserve the proper balance of power and the correct formal relationship between the judiciary and Parliament.

This is an interesting argument which undoubtedly contains an element of truth. There are however two counter arguments which are of relevance here.

The first is that the argument assumes a particular vision of the relationship between courts and Parliament, with the ultra vires doctrine based on legislative intent as the constitutional justification for judicial review. It is by no means self-evidently correct as the discussion in the last section of this article will reveal.

Secondly, we should in any event be mindful of the "costs" of the strategy which Forsyth advocates: fig-leaves are not harmless and do in fact naturally lead to concealment as to the proper basis for developments in judicial review. This can be exemplified by the changes in the law of jurisdictional error. The courts have, as we have seen, shifted ground on this issue over the years, moving from a doctrine of limited review, to the collateral fact doctrine and on to the present position which renders all relevant errors of law open to challenge. It is, at present, all too easy for the courts when minded to develop the law in a particular direction simply to "justify" this by some general invocation of legislative intent. Thus courts have said that they should, for example, review all errors of law because Parliament intends all such questions of law to be decided by the

³⁰ Forsyth, *op. cit.* n. 1, p. 136.

³¹ *Loc. cit.*

ordinary courts. Similar formal reliance on legislative intent served to justify the earlier legal positions on this topic.

This invocation of mystical legislative intent serves to conceal the much richer set of issues which are really at stake in this area concerning the appropriate balance of power between courts and agencies. It leaves entirely unanswered a whole series of significant questions. Why did the courts in the eighteenth, nineteenth and twentieth century persist with the other more limited doctrines of jurisdictional error? Was it simply because they felt in some way analytically constrained to do so? Was it because they were in some way under a mistaken impression about the possible limits of judicial intervention in this area? A close reading of the case law in this area would indicate a negative answer to all of these questions.³² Alternative doctrines of jurisdictional error were based rather on differing views about the proper balance of power between courts and agencies when interpreting the conditions of jurisdiction. Although this can be divined from some of the court's jurisprudence, many of the cases were simply content to rest their chosen conclusion behind the impenetrable formalism of legislative intent. The contrast between the level of judicial debate on this topic in Canada or the USA as opposed to the UK is marked indeed. The case law in these countries is replete with explicit judicial discussion of the real issues which do and should affect the legal doctrine which is applied in this area.³³ The outcome of such judicial discourse might be the same as the legal status quo as expressed in the *Page* decision. It might not. The answer either way is irrelevant to the point being made here. An important cost of using the ultra vires doctrine based on legislative intent is to conceal the true policy considerations which affect the law in this area.

III. THE DEFENCE OF THE ULTRA VIRES PRINCIPLE: MEETING THE OBJECTIONS

Christopher Forsyth does not merely point out what he perceives to be the dangers of abandoning the ultra vires doctrine. He also seeks to meet some of the objections which have been put in the first section of this article. Two arguments are advanced in this respect, one particular, the other general. They will be considered in turn.

³² The relevant case law can be found in Craig, *op. cit.* n. 10, Chap. 10, fns. 33 and 34.

³³ Madame Justice L'Heureux-Dube, "The 'Ebb' and 'Flow' of Administrative Law on the 'General Question of Law'", in Taggart (ed.), *The Province of Administrative Law* (1997), 308-330; Craig, "Jurisdiction, Judicial Control and Agency Autonomy", in Loveland (ed.), *A Special Relationship: American Influences on Public Law in the UK* (1995), Chap. 7.

(a) *The Particular Defence: The Exercise of Power by Non-Statutory Bodies*

Forsyth concedes that the ultra vires doctrine cannot explain all instances in which the courts exercise the power of judicial review. He accepts that "it is not meaningful, when a body lacks legal power, to talk about it acting in excess of its legal powers", and that therefore "some juridical basis, other than the doctrine of ultra vires, is needed to justify judicial intervention in such cases".³⁴ Forsyth is willing to accept that this juridical basis can be found in the common law. He draws upon work, including that of the present author,³⁵ which has shown that the common law imposed a duty to price reasonably on those who exercised monopoly power, even where that power existed *de facto* rather than *de jure*. Forsyth then seeks to generalise from this case law in order to sustain the proposition that the common law should impose a more general duty to act reasonably on such bodies, which would include an obligation not to act irrationally or to abuse their powers.³⁶

It would be surprising, given the views which I have expressed earlier, if I were to object to this line of argument. I do not, although there is considerable room for discussion as to which types of bodies should be subject to public law principles in this manner, and also as to which principles of public law should be applied to them. This is not the place for detailed discussion of such matters and my own views can be found elsewhere.³⁷

The following point is however of direct relevance to the present debate. Forsyth remains firmly of the belief that the ultra vires principle based on legislative intent should retain its central position so far as decisions made under statutory powers are concerned.³⁸ If we were to accept this view then we should be very clear of the consequences. We would be saying that the heads of review which could apply to bodies which do and which do not derive their power from statute would be generally the same, but that the conceptual basis for such review powers would be strictly distinguished. In relation to the former type of body, the traditional ultra vires doctrine would continue to provide that justification. In relation to the latter type of body, we would be willing to ground such controls on the common law's capacity to control public power.

This dichotomy does little service to a rational system of

³⁴ Forsyth, *op. cit.* n. 1, p. 124.

³⁵ Craig, "Constitutions, Property and Regulation" [1991] P.L. 538.

³⁶ Forsyth, *op. cit.* n. 1, p. 125.

³⁷ Craig, "Public Law and Control over Private Power", in Taggart (ed.), *The Province of Administrative Law* (1997), pp. 196-216.

³⁸ Forsyth, *op. cit.* n. 1, p. 126.

public law. This is in part for empirical reasons, in that the very dividing line between bodies which do and do not derive their power from statute can be difficult to draw. It is in part for conceptual reasons, in that it begs the central question: if the common law is to be regarded as the legitimate basis for controls on bodies which do not depend on statute for their powers, why then cannot it be so regarded for bodies which do derive their powers from statute? This question will be addressed in the final section of this article.

(6) The General Defence: Tacit Consent and Legislative Delegation to the Judiciary

Christopher Forsyth also seeks to reconcile the broader criticisms of the ultra vires principle with orthodoxy. He accepts that judicial review is a judicial creation. He recognises that the implied intent of the legislature cannot plausibly provide any significant guidance as to “the reach of the rules of natural justice or the fine distinctions to be drawn between decisions that are unreasonable but not irrational and the like”.³⁹ He argues however that these judicial developments did not take place in a constitutional vacuum, but rather against the background of a sovereign legislature that “could have intervened at any moment”, and sometimes did.⁴⁰ The fact that it generally did not do so is taken by Forsyth to be tacit approval by the legislature of the principles of judicial review, subject to the recognition of legislative supremacy. While the implied intent of the legislature cannot therefore provide the key to the precise application of the rules of natural justice, reasonableness etc. which will apply in a particular case, “the legislature is taken to have granted an *imprimatur* to the judges to develop the law in the particular area”.⁴¹

Proponents of the traditional ultra vires doctrine pay a heavy price for this mode of reconciliation. It is accepted that legislative intent provides no sure guide as to the precise application of the heads of review in a particular case. It is acknowledged that the general meaning to be ascribed to an established head of review, such as jurisdictional error, is similarly to be decided by the judiciary. It would seem also to follow that legislative intent can furnish no adequate explanation for the introduction of a new head of review at a particular time. In truth, this mode of reconciliation robs the traditional orthodoxy of virtually all content. On this view the only relevance of legislative intent comes in the form of tacit approval by the legislature for the principles of judicial review developed by the courts and tacit consent for the continuance of this judicial role. On

³⁹ *Ibid.* p. 134.

⁴⁰ *Ibid.* p. 135.

⁴¹ *Loc. cit.*

this interpretation the ultra vires doctrine becomes a mere shadow of its former self, capable only of performing a residual role by implicitly legitimating what the courts have chosen to do, while being incapable of providing any more specific guidance.

Even this residual role can be questioned. While Parliament could in theory choose to intervene and overturn a development of which it disapproved, thereby giving positive life to the residual notion of legislative intent, this could be more difficult than might initially be imagined. If the courts were, for example, to recognise proportionality as an independent head of review, and the legislature disapproved of this step, could the legislature enact a general statute which prohibited its use? In theory yes, subject of course to more general discussion of the sovereignty of Parliament. But even accepting traditional notions of sovereignty can one realistically imagine such a statute being drafted and enacted?

IV. THE FOUNDATIONS OF JUDICIAL REVIEW

The discussion thus far has been concerned with the current debate concerning the relevance of the ultra vires doctrine as the foundation for judicial review. This section of the article will seek to broaden the discussion both historically and conceptually. It will be argued that in historical terms judicial review was not originally founded on the idea of effectuating legislative intent, and that this only became a central focus in the nineteenth century. The analysis will then shift to the conceptual level, and it will be argued that there are valid reasons for basing the principles of judicial review on a common law foundation.

(a) The Historical Perspective

The very meaning of the ultra vires doctrine is more complex than often thought and the foundations for judicial review have varied across time. This will become apparent from the historical discussion. It may be helpful at the outset to exemplify this in a modern context before considering the historical materials.

The decision of the House of Lords in *Page*⁴² is cited by those who seek to defend the ultra vires doctrine as support for their position.⁴³ Lord Browne-Wilkinson who gave the leading judgment based the court's power squarely on the ultra vires principle. His Lordship stated that *Anisminic*⁴⁴ had rendered obsolete the distinction

⁴² [1993] A.C. 682.

⁴³ Forsyth, *op. cit.* n. 1, p. 123.

⁴⁴ [1969] 2 A.C. 147.

between errors of law on the face of the record and other errors of law and that it had done this by extending the *ultra vires* doctrine. Thenceforth it was to be taken that "Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis"⁴⁵ with the consequence that a misdirection in law when making the decision rendered the decision *ultra vires*. This passage clearly does provide support for the *ultra vires* doctrine as articulated earlier: judicial review is explicitly posited on the assumption that Parliament intended that all errors of law should be open to challenge. A rather different reading of the *ultra vires* doctrine is however to be found but a page later in Lord Browne-Wilkinson's judgment. His Lordship was once again considering the rationale for judicial control over all errors of law, in order to determine whether the same degree of control should be applied to a University Visitor. Here a rather different meaning was ascribed to the *ultra vires* doctrine.⁴⁶

... the constitutional basis of the courts' power to quash is that the decision of the inferior tribunal is unlawful on the grounds that it is *ultra vires*. In the ordinary case, the law applicable to a decision made by such a body is the general law of the land. Therefore, a tribunal or inferior court acts *ultra vires* if it reaches its conclusion on a basis erroneous under the general law.

On its face this dictum provides a different foundation for judicial review: *ultra vires* is equated with the general law of the land, which clearly includes the common law. On this view the *ultra vires* doctrine is no longer based exclusively on legislative intent. It simply becomes the vehicle through which the common law courts develop their controls over the administration. Whether Lord Browne-Wilkinson actually intended this result is unclear.

What is clear is that uncertainty as to the precise foundation of the courts' review powers is not new and that the effectuation of legislative intent was not an important feature in this respect until the nineteenth century.

The history of judicial review is inextricably bound up with the development of remedies as opposed to the creation of new heads of review. The elaboration of grounds for review took place within, and was framed by, the evolution of adjectival law. We must therefore look to the prerogative writs in order to understand the foundations of judicial review. Space precludes a detailed analysis of this topic which could easily occupy a book let alone an article. The established

⁴⁵ [1993] A.C. 682, 701.

⁴⁶ *Ibid.* p. 702F.

case law and literature⁴⁷ can none the less be drawn on to provide a general picture.

Mandamus was the earliest of the prerogative writs to be transformed into a more general purpose tool for the remedying of administrative error. *Bagg's* case⁴⁸ was the seminal judgment in this respect. Henderson captures the importance and novelty of the decision.⁴⁹ A "writ of restitution" existed prior to *Bagg's* case. Its primary focus was, however, to protect the privilege of a claimant who had been deprived of an office so as to ensure that he or she could consult with a King's Bench counsel. If such a person was therefore arrested while attempting to exercise this right a writ would be sought to command the prison to release the person thus detained. By 1613–15 the writ had been transformed and *Bagg's* case was of central importance in this respect. The colourful case concerned the disenfranchisement of James Bagg who had been a burgess of Plymouth. He had made a succession of abusive comments about the mayor and other burgesses. Coke in the King's Bench found for Bagg: the offensive words were an insufficient cause for disenfranchisement from a freehold office. This conclusion on the facts was buttressed by a more important finding as to the general jurisdiction of King's Bench. It was held that this court had the authority "not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of the peace, or oppression of the subjects, or to the raising of faction, controversy, debate or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law".⁵⁰

The decision was of far reaching importance both in terms of the development of the remedy itself, and also because of the types of error which were now said to be reviewable. Henderson captures the former point well.⁵¹

... by 1613–15 a new writ had appeared with a definite though potentially very flexible form. Moreover, by this writ King's Bench did something quite different from its traditional activities. It was not addressed to the sheriff or any other law enforcement official ... Nor was it directed to other judicial authority like the writs of prohibition, error and some of the medieval forms of certiorari. By this new writ a public official *outside* the normal

⁴⁷ Henderson, *Foundations of English Administrative Law* (1963); Rubinstein, *Jurisdiction and Illegality* (1965); de Smith, "The Prerogative Writs" [1951] C.L.J. 40 and "Wrongs and Remedies in Administrative Law" (1952) M.L.R. 189; Jaffe and Henderson, "Judicial Review and the Rule of Law: Historical Origins" (1956) 72 L.Q.R. 345.

⁴⁸ (1615) 11 Co. Rep. 93b.

⁴⁹ Henderson, *op. cit.* n. 47, pp. 46–58.

⁵⁰ (1615) 11 Co. Rep. 93b, 98a.

⁵¹ Henderson, *op. cit.* n. 47, pp. 61–62. Italics in the original.

law enforcement system was required to do something ... All this was a very far-reaching departure from tradition. Yet as may be seen, the writ as it was now worded said nothing to explain why King's Bench could do this, beyond the bare generality that an injustice had been done and that it ought to be set right.

The significance of the latter point, the scope of errors which King's Bench could address, was not lost on those who read the judgment. Thus in the *Observations on the Lord Coke's Reports* Lord Ellesmere,⁵² having noted that the case was simply concerned with the legality of removal from an office, had this to say about the broader dicta concerning the scope of the King's Bench power.⁵³

Herein (giving excess of authority to K.B.) he hath as much as insinuated that this Court is all-sufficient in itself to manage the State; for if the King's Bench may reform any manner of misgovernment (as the words are) it seemeth that there is little or no use either of the King's Royal care and authority exercised in his person, and by his proclamations, ordinances, and immediate directions, nor of the council table, which under the King is the chief watch tower for all points of government and besides the words do import as if the King's Bench had a superintendency over the government itself, and to judge wherein any of them do misgovern.

Theoretical justification for the expansive power arrogated by King's Bench was not immediately forthcoming. We can none the less draw some conclusions both negative and positive from the existing materials.

In *negative* terms, there was no attempt to legitimate this exercise of judicial power by reference to *ultra vires* in the sense of legislative intent, howsoever it might be defined. This is clear in part because of the very absence of any such indication in the judgment of *Bagg's* case which might suggest this as the foundation for review. This conclusion is reinforced by the fact that Parliament was not at this time the fount of all authority. Power was divided between the King and Parliament, and it was to take a civil war and consequent settlement before it would even begin to become meaningful to speak of a Parliament which had truly sovereign capacity in the modern sense of the term. Yet one suspects that even if Parliament had attained this status at the time of *Bagg's* case it would not have suited Coke's temperament and intellectual leanings to rest judicial review on the foundation of legislative intent. It is of course true that Coke was a real supporter of Parliament in its struggles with

⁵² The observations are attributed to Lord Ellesmere, although Henderson, *op. cit.* n. 47, p. 70, questions whether he was indeed the author.

⁵³ The quotation can be found in (1615) 11 Co. Rep. 93b, 98a fn. B.

the King, as manifested in the seminal decisions concerning the prerogative.⁵⁴ Yet his enduring belief was in the power of the common law itself. Given that this was so, it is doubtful in the extreme if Coke would have been content to rest judicial intervention on the vindication of Parliamentary intent.

One hundred and fifty years later the “parties” have changed but the story remained the same. Parliament’s position had improved considerably during this time, although the monarch still exercised real power. The leading judicial decisions declined none the less to rest review powers on ideas of legislative intent. What was true of Coke in this respect was true also of Mansfield. It was Lord Mansfield in *R. v. Barker*⁵⁵ who produced the seminal eighteenth century rationalisation of mandamus.

The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Nor should we forget in this respect that even in the nineteenth century, when it was more common for judges to invoke legislative intent as the justification for review, there were still notable instances where the courts would honestly admit that the common law was supplying the omission of the legislature.⁵⁶

In *positive* terms a number of possible justifications for the newly created judicial power were advanced. Coke himself sought to rest it in part upon Magna Carta and the protections for freehold offices derived therefrom, although as Henderson has pointed out it was by no means self-evident that a municipal alderman did possess such a freehold in his office.⁵⁷ More generally, Coke advanced a theory of delegation, whereby the King was taken to have committed all his judicial power to the courts, including in this respect the power to do justice.⁵⁸ There are however both empirical and conceptual difficulties with this explanation.⁵⁹ In truth, we would do well to pay attention to the actual language used by both Coke and Mansfield, and to acknowledge that both jurists based their conclusions on the capacity of the common law to control governmental power. Indeed,

⁵⁴ *Prohibitions del Roy* (1607) 12 Co. Rep. 63; *Case of Proclamations* (1611) 12 Co. Rep. 74. For a discussion see, Craig, “Prerogative, Precedent and Power”, in Forsyth and Hare (eds.) *The Golden Metwand and the Crooked Cord* (1998), 65–90.

⁵⁵ (1762) 3 Burr. 1265, 1267.

⁵⁶ *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.

⁵⁷ Henderson, *op. cit.* n. 47, pp. 77–78.

⁵⁸ Coke, *The Fourth Part of the Institutes of the Laws of England* (1648), p. 71, cited by Henderson, *op. cit.* n. 47, pp. 70–71. See also, Jaffe and Henderson, *op. cit.* n. 47, p. 361.

⁵⁹ Henderson, *op. cit.* n. 47, pp. 71–72.

as Jaffe and Henderson aptly remark,⁶⁰ Coke's doctrine of irrevocable delegation was in truth but a corollary of "his boldest and most spacious notion", the autonomy of the common law. This conceptual justification for judicial review will be considered more fully below.

The evolution of certiorari into a generalised remedy capable of catching a variety of governmental errors was to post-date the developments in mandamus which have been charted above. While there was therefore a temporal difference in the elaboration of the remedies, the conceptual foundation for the expansion in the remit of certiorari paralleled that which we have identified in the context of mandamus.

Certiorari certainly existed during the medieval period, and was used for many purposes, most notably as a means for calling up the record on a particular matter. Certiorari to quash emerged rather later. The judgment in *Commings v. Massam*⁶¹ was of central importance. It arose out of a decision by the Commissioners for Sewers to charge the cost of repairs to a sea wall to the lessee of the land. The court was divided as to whether certiorari would lie or not. Mallett J. was of the view that it would not, but Heath J. and Bramston C.J. held to the contrary. Heath J. was firmly of the opinion that certiorari would lie since there was no court which could not be corrected by King's Bench.⁶² It seems that this newly created remedy of certiorari to quash was originally only available against courts of record.⁶³ It was Holt C.J. who built on these foundations to fashion a remedy of more wide ranging application. In the *Cardiff Bridge* case⁶⁴ he held that certiorari would lie whenever a new jurisdiction was created, whether by private or public Act of Parliament. This same theme was developed in *Groenvelt v. Burwell*⁶⁵ where Holt C.J. held that where any court was created by statute, certiorari would lie, for it was a consequence of all jurisdictions to have their proceedings examined by King's Bench. Moreover, although the statute did not "give authority to this Court to grant a certiorari", this was not conclusive since "it is by the common law that this Court will examine if other Courts exceed their jurisdictions".⁶⁶

The concept of jurisdiction was then to be the touchstone through which King's Bench controlled the inferior bodies which it had bought within its purview. This is not the place for any general

⁶⁰ *Op. cit.* n. 47, p. 362.

⁶¹ (1643) March N.C. 196.

⁶² *Ibid.* p. 197.

⁶³ Henderson, *op. cit.* n. 47, p. 112.

⁶⁴ (1700) 1 Ld. Raym. 580.

⁶⁵ (1700) 1 Ld. Raym. 454.

⁶⁶ *Ibid.* p. 469.

exegesis on the meaning ascribed by the courts to jurisdiction. This can be found elsewhere.⁶⁷ What is of importance for the purposes of the present discussion is to be clear how far the particular meaning accorded to jurisdiction was determined by reference to legislative intent, and how far it was the result of a choice made by the reviewing court of its own volition in the exercise of its inherent common law power.

There is no doubt that in one sense the determination of jurisdiction must necessarily make reference to the enabling legislation. It is only by doing so that one can begin to determine the ambit of authority given to any particular body. In this sense the legislation provides a necessary focus for judicial review. This bears out the point made earlier, that those who are opposed to the traditional ultra vires doctrine as the basis for judicial review, none the less accept that the enabling legislation will always be of relevance.⁶⁸ There is however a world of difference between acknowledging that the legislation is of relevance in this respect, and accepting that the intent of the legislature can provide any real guidance as to, for example, the scope of jurisdictional error or the types of control which should exist over the exercise of discretion.

It is clear that the varying answers which were given to these latter questions in the seventeenth and eighteenth centuries were not generally based upon legislative intent. Nor was any general theory of jurisdiction provided by Coke, Blackstone or Hale.⁶⁹ It was left to individual courts to reach decisions which they felt expressed the appropriate standard to be imposed pursuant to the common law power of judicial review. Not surprisingly views differed on this, in much the same manner as they do in the modern day. Some such as Heath J. in *Commins*⁷⁰ expressly acknowledged that the court could intervene to examine jurisdiction and not justice, but then so applied jurisdiction so as to embrace in effect any error of law. Others, such as those who gave judgment in *Woodsterton*,⁷¹ construed the concept of jurisdiction more narrowly. It is in the nineteenth century that we begin to see the courts more commonly seeking to justify their chosen interpretations of jurisdiction by reference to legislative intent, in order thereby to imbue them with greater legitimacy.⁷² Yet as we have already seen, it was the very malleability of legislative intent which rendered it capable of legitimating virtually any of the chosen

⁶⁷ Craig, *op. cit.* n. 2, chap. 10; Rubinstein, *op. cit.* n. 47; Henderson, *op. cit.* n. 47.

⁶⁸ See above, pp. 65–66.

⁶⁹ Henderson, *op. cit.* n. 47, pp. 126–127.

⁷⁰ (1643) March N.C. 196.

⁷¹ (1733) 2 Barnard K.B. 207.

⁷² See above, n. 11.

meanings of jurisdiction adopted by the courts, thereby robbing it of the capacity to legitimate any particular one.

(b) The Conceptual Perspective

We have already seen that proponents of the traditional ultra vires doctrine defend it on the ground, *inter alia*, that it legitimates judicial review, by making it referable to Parliamentary intent. They question whether any other conceptual justification for the courts' powers of judicial review could be found, and maintain this position even while acknowledging some of the shortcomings of the ultra vires doctrine. This is an important argument which must be directly addressed.

The most dramatic way of doing so is, of course, to attack the foundations of the argument directly, by challenging established ideas of Parliamentary supremacy. This is a possible line of argument and as indicated earlier I believe that there are indeed strong reasons for rethinking traditional ideas of Parliamentary supremacy. The justifications for altering our constitutional foundations must however be addressed in their own right, and the detailed historical, legal and conceptual parts of the analysis cannot be examined here.⁷³

It will however be argued that a sound conceptual foundation for judicial review can be found even if Parliamentary supremacy remains unaltered. The essence of the argument can be put quite simply.

It is common for lawyers to think in the pigeon-holes represented by their specialty. We all try to compensate for this and broaden our horizons, but exigencies of time and the growing sophistication of differing legal disciplines render this increasingly difficult. Testing the fundamental assumptions which underlie one area against accepted judicial behaviour in other areas can however be rewarding. This is particularly true when we consider public and private law. Important work has been done on the differences and similarities between the two fields, but a significant difference has not been noted.

In public law, the view is, as we have seen, that controls on public power must be legitimated by reference to legislative intent. In private law, there is no such assumption. It is accepted that constraints on the exercise of private power can and have been developed by the common law in and of itself, and that there are numerous examples of this in contract, tort, restitution and property law.⁷⁴

⁷³ See above, n. 5.

⁷⁴ In the law of tort see, *e.g.*, the economic torts which place limitations on the legitimate scope of competitive activity in the market place or the way in which the courts have limited the *volenti* doctrine so as to render it inapplicable where real free choice is not available. In the law of contract see, *e.g.*, the common law rules which condition the acceptability of exemption clauses, or the rules concerning illegality which relate to the restraint of trade doctrine. In the law of restitution see, *e.g.*, doctrines such as duress. On some occasions, limits are rationalised

When we consider the matter in this light the historical material considered above appears less surprising. The absence of any formal divide between public and private law helps us to understand why it would not have appeared at all odd to a Coke, Heath, Holt or a Mansfield to base judicial review on the capacity of the common law to control public power. It is the very same absence of a formal divide which can help us to understand the willingness of the courts to extend common law created doctrine to bodies which possessed a *de facto* monopoly.

There are consequential interesting differences in the sense of legitimation which operates in the two areas. In public law, the traditional *ultra vires* model sees legitimation in terms of the *derivation* of judicial authority, flowing from legislative intent. The prime focus is not on the *content* of the heads of review. We are of course concerned about content, but this is not the primary focus when we are thinking about the legitimacy of judicial review itself. This is in part a consequence of the fact that, as we have seen, the *ultra vires* doctrine is capable of vindicating virtually any chosen heads of review. In private law, by way of contrast, we tend to think of legitimation in terms of the *content* of the common law norm which the courts have imposed, and more specifically about its *normative justification*. We ask whether certain constraints imposed on the exercise of private power in, for example, contract and tort, are sensible, warranted and justified in the light of the aims of the particular doctrinal area in question. It should be made very clear at this juncture that no claim is being made either way as to whether the *content* of the constraints imposed on public and private power should be the same or different. It is the *approach* to this topic which is in issue here.

An important consequence of conceiving of judicial review in this manner is that it better expresses the relationship between courts and legislature in a constitutional democracy. The fact that the legislature could ultimately limit review, given traditional notions of sovereignty, does not mean that the institution of review has to be legitimated by reference to legislative intent in the absence of any such limits being imposed. The constitution assigns a role to the courts as well as the legislature. This latter point has been powerfully captured by Professor Wade.⁷⁵

by reference to the supposed intent of the parties, on others the courts will openly impose the limits. It is of course the case that Parliament could overrule common law norms created by the courts related to private law. This does not alter the point being made in the text: neither the courts, nor writers seek to deny that some of these controls are common law creations in the manner described above.

⁷⁵ *Constitutional Fundamentals*, *op. cit.* n. 26, p. 70.

If we respect what little is left of our own constitution, it ought not to be left to Whitehall to say how much judicial control they will or will not tolerate. It is just as much for the judges to say how much abuse of power they will or will not tolerate. This is the part that the constitution assigns to them and they should be allowed to play it, free from threats and accusations and without talk of government by judges.

The challenge can then be presented squarely. Why is it that some now feel that judicial review can only be properly grounded on legislative intent, given that this was not felt to be so for public law by earlier jurists, and given also that controls on private power are not perceived to operate in this manner? Three different answers might be suggested.

The first possible response is that we must preserve the ultra vires doctrine since we would otherwise encounter problems with ouster clauses and be faced with analytical difficulties. This argument has been addressed above.⁷⁶

The second is that to rest judicial review on the common law would still constitute a challenge to sovereignty, since these controls on the exercise of public power would always be operative. This will not withstand examination. There is nothing in principle inconsistent in positing the existence of judicial review on the capacity of the common law to control public power, while accepting at the same time that Parliament might, with sufficiently clear words etc., limit such common law constraints. In historical terms it has been convincingly argued that this is in fact what Coke had in mind in *Dr. Bonham's Case*,⁷⁷ rather than the more radical idea of overturning legislation.⁷⁸ Even when construed in this manner Coke's doctrine did lay the foundation for a "highly autonomous and powerful judiciary", which would insist that "legislation would be interpreted in the light of 'reason' and the 'common law', that official action would be subject to legal control, and that the authority of courts would be accepted by Parliament and Crown".⁷⁹

The third possible argument is that we must preserve the idea of ultra vires based on legislative intent, since otherwise there would be no limits as to the types of common law constraints which the courts could impose. Even leaving aside the residual capacity of Parliament to intervene, this argument is still open to two counter objections. On the one hand, the ultra vires doctrine itself has never, as we have seen, provided any meaningful guidance concerning the heads of review, their limits or their precise content. On the other hand, if we

⁷⁶ See above, pp. 71–75.

⁷⁷ (1610) 8 Co.Rep. 107.

⁷⁸ Gough, *Fundamental Law in English Constitutional History* (1955), pp. 43–45.

⁷⁹ Jaffe and Henderson, *op. cit.* n. 47, p. 362.

accept that such review powers rest on the common law we can then employ the same approach which we bring to bear in the context of private law. The focus would be where it ought to be, on the existence of a reasoned justification, which was acceptable in normative terms, for the particular head of review which was in question. Thus, for example, rather than “justifying” a particular reading of jurisdictional error by reference to legislative intent, there should instead be a reasoned argument as to why this view of jurisdictional error was felt to be correct.

V. CONCLUSION

Debate about the foundations of a body of law is important in any legal system. This is especially so in relation to public law, given the importance of the subject matter. Few would doubt that a democratic polity requires some measure of judicial review. For some the primary focus may be on the need to constrain public power. For others it may be directed towards ensuring that affected interests are represented in the administrative process. Other views are clearly possible.

When we think about the foundations for this body of law we should be mindful of the analytic consequences of adopting a particular view, and mindful also of our historical heritage. Both have been addressed in this article. Christopher Forsyth is clearly correct to point out the analytic consequences which have, for example, attended the demise of the ultra vires doctrine in South Africa. We do however differ markedly as to whether these are necessary or even likely results of departing from established orthodoxy. Our historical heritage is equally important. An appreciation of the historical foundations for judicial review can prevent a potent form of “temporal parochialism”. It can help us to understand that the orthodoxy of today is less permanent and more ephemeral than might have been imagined. The ultra vires doctrine conceived in terms of legislative intent, which is now regarded as the unshakeable foundation for review, would never have appeared so to Coke, Heath, Holt or Mansfield, nor to many of the other judges who participated in the development of review during this period. There is little doubt but that these judges would have felt more at home with the vision of dual constitutionalism or bi-polar sovereignty articulated by Sir Stephen Sedley,⁸⁰ and also with the autonomous capacity of the common law to develop review advanced in the work of Sir John Laws.⁸¹ Important traces of similar ideas are also to be

⁸⁰ “Human Rights: A Twenty-First Century Agenda” [1995] P.L. 386.

⁸¹ See above, nn. 2 and 14.

found in the work of those associated with the traditional ultra vires doctrine, such as Professor Wade.⁸²

There is no doubt that the institution of judicial review must be justified, as too must the heads of review and the particular meaning accorded to them. The ultra vires doctrine conceived in terms of legislative intent cannot provide this. We should recognise what was self-evident to our intellectual ancestors that review is the creation of the common law. We should recognise also that the ambit of review can only be legitimated in the same way as other common law powers, by asking whether there is a reasoned justification which is acceptable in normative terms for the controls which are being imposed. The institution of judicial review both demands and deserves legitimation in this manner. This is the proper way to conceive of judicial review in a constitutional democracy.

⁸² *Constitutional Fundamentals*, *op. cit.* n. 26, pp. 66, 68, 70–71.