Honesty and Clarity in Judicial Review:

Shedding the Limitations of Sovereignty and

the Ever-Contentious Rule of Law

**I. INTRODUCTION**

In the final chapter of the most extensive debate on the constitutional foundations of judicial review so far (and likely, also, ever),[[1]](#footnote-1) Forsyth said that this particular point of academic debate, if continued, “will descend into trivial or arcane points of detail that are not of general interest and, in the end of little value”[[2]](#footnote-2). His desired departure as a participant in the debate was certainly well-founded even then, 18 years ago. He and Elliott[[3]](#footnote-3) had so thoroughly refined the *ultra vires* doctrine that it presented inescapable logic as long as one accepted that Parliament was sovereign. Or as he put it, “I wish to remark that I… will not be found in the last ditch defending parliamentary sovereignty… [However], [t]he United Kingdom has, at present, a sovereign parliament and that is the context in which a justification for judicial *must* be found.”[[4]](#footnote-4)

Although the *ultra vires* doctrine is certainly an elegant solution to the ‘constitutional foundations’ debate, its problem is that it contains little, if any “specific content”.[[5]](#footnote-5) What does it mean to say that Parliament implicitly grants an *imprimatur* to the courts to give effect to the rule of law? How do we determine the scope of the ‘rule of law” to which Parliament intends to be given effect? To what degree should that implicit intention outweigh the specific words chosen by Parliament, or vice-versa? What factors should be considered to determine if a rule of law principle has been breached or not? Craig strongly voiced these criticisms of *ultra vires*, calling it a “formal bow to general legislative intent”.[[6]](#footnote-6) Mere reference to what Parliament might have implicitly intend generally reveals little about the proper scope of review which should be conducted, and we are left to conclude that the courts are somehow developing the various principles of judicial review on their own accord. This is amplified by the development of the doctrine to avoid criticisms of artificiality, and is best gleaned from Forsyth’s own words about what the *ultra vires* doctrine is and is not:

It does not assert that every nuance of every ground of judicial review is to be found in the implied intent of the legislature… It simply asserts that when the courts do turn to common law principle to guide their development of judicial review they are doing what Parliament intended them to do. Parliament thus authorises the courts to develop the law in the way that they do.[[7]](#footnote-7)

Others commentators have also echoed this criticism, that “nothing of substance has been found in Forsyth’s account of *ultra vires*”.[[8]](#footnote-8) The circularity of saying the courts are doing what Parliament intends them to do is saying nothing more than administrative bodies are bound to obey the law—regardless of whether its sourced in legislation or the common law. Forsyth acknowledged some truth in these charges, but argues that it should not be exaggerated to “obscure the doctrine’s strengths”.[[9]](#footnote-9) Using Lord Bridges speech from Lloyd v McMahon[[10]](#footnote-10), he argued that the silence of a statute about the required standards of fairness is not a true impediment on the courts’ ability to determine the proper applicable standards. Rather, inferences drawn from the statutory scheme as a whole about the characteristics of the decision-maker and the framework under which he operats will colour the ultimate decision alongside other common law considerations.

Admittedly, this calls to attention the many useful considerations which may arise from legislation that can affect the way in which the courts enforce their own common law principles, but its indirect nature seems to render it entirely tautologous. What this is essentially saying is that the court will give effect to inferences which it draws from legislation, and the inferences it draw from legislation are determined pursuant to the rule of law. At the crux of it, the courts are giving effect to their understanding of the rule of law, whatever that may be,[[11]](#footnote-11) with little guidance as to what it should and should be, or even the factors which should push or pull future developments. So, although the *ultra vires* doctrine preserves sovereignty in the strict sense, the implied wide grant of judicial freedom to apply and develop the law of judicial review as it sees fit not only reduces the significance of sovereignty itself, but also avoids trying to articulate a more complex and meaningful relationship between sovereignty and the rule of law. Such a relationship will more likely be able to disclose the upper and lower limits of the principles of good administration,[[12]](#footnote-12) as opposed to relying heavily on the courts and the rule of law alone, with sovereignty taking a functional backseat.

However, the difficulty with this criticism is that it leaves us with nothing to turn to as an appropriate alternative—for ‘is not [the common law theorists’] reliance on such open-ended categories as ‘procedural impropriety’, ‘illegality’, and ‘irrationality’… not quite as futile and self-serving as the *ultra vires* defenders’ invocation of legislative intent?”[[13]](#footnote-13) Most common law theorists (regardless of where on the scale of common law theory they fall) recognise that many (if not most) of these common law principles of good administration are based in the rule of law. And although almost everyone will agree that it is a constitutional fundamental, few can agree on its nature—whether merely formal or substantive—or even if assumed to be substantive, on its exact content and scope.[[14]](#footnote-14) So yet again we run into the same problem *ultra vires* faces; an over-reliance on the indeterminate content of one doctrine to inform the also indeterminate scope of judicial review, which tends to result in the ‘rule of law’ being used as conclusory label following wide inquiries conducted based on what the individual court thinks is necessary in the interest of good administration in that case[[15]](#footnote-15) .

Whether we think this type of flexibility is undesirable or not largely depends on the faith one has the judicial system as a whole to correct individual mistakes judges may make in specific instances. And even if clearer guiding principles are developed, arguably erroneous or inconsistent decisions will continue to be made. So what is the point of trying to deal with these issues? There is no perfect system; the point is to strive for clarity in our view of the law beyond theoretical tidiness—to be able to *identify*, *organise*, and *prioritis*e considerations of written law, extrinsic principles, policies, pragmatism, as well as existing and evolving norms. Therefore, despite being at risk of contributing to Forsyth’s frustration, it seems necessary to re-examine these parts of the ‘constitutional foundations’ debate. Part I will examine the deficiencies of various conceptions of parliamentary sovereignty, the rule of law, and their relationship. Part II will propose an alternative mode of thinking about the relationship between the Parliament and the courts outside sovereignty and the rule of law. This will be applied to specific grounds of judicial review to demonstrate some analytical utility. Hopefully this framework will be useful for further and closer analyses of individual principles of judicial review to not only make sense of, but predict how the law will and should develop.

**II. SOVEREIGNTY AND THE RULE OF LAW**

This will not be a lengthy exposition on everything ever written on parliamentary sovereignty or the rule of law. Instead, the discussion here will focus on how the different sides of the ‘constitutional foundations’ debate, in seeking to maintain orthodoxy, have adopted conceptions of sovereignty which force them to turn to the rule of law to explain the practical conduct of judicial review. This runs into considerable uncertainty given the indeterminate nature of the rule of law. And even if we superimpose determinacy upon it, it embodiment of mostly general principles, values, and ideals still leaves us without a definitive explanation about the *scop*e of its application.

The starting point for this part of the discussion is the nature of sovereignity. Most of the debate fails to engage with, as Allan pointed out some two years after the Cambridge Conference on the Foundations of Judicial Review, not only the antecedent question of whether Parliament is actually sovereign, but even if we accept that it is, what exactly we mean by “sovereign”.[[16]](#footnote-16) If we pause and ask ourselves these questions, it seems more obvious why the early criticisms of *ultra vires* delivered by its staunchest opponents[[17]](#footnote-17) managed to possess both an undeniable logical appeal, while still appearing to misconstrue the point of the doctrine. They were quite simply working from different starting points.

The ultra vires theorists conception of parliamentary sovereignty is such that when Parliament grants public powers, it does so with definitive limits which the common law cannot legitimately supplement even if there is no express preclusion of the application of the common law.[[18]](#footnote-18) If sovereignty were to be defined more widely than this, it would beg the question whether *ultra vires* is even necessary to preserve doctrinal orthodoxy. Allan’s conception of sovereignty mirrors this —for him, sovereignty must be absolute; if not, there would be no need to speak in terms of ‘sovereignty’ at all. He argues that “[t]he idea of absolute legislative power is ultimately plausible only on the assumption that enactments can ( or should) be ‘literally’ applied, without interpretation—abstracted from the controlling influence of transcendent constitutional values.”[[19]](#footnote-19) We will refer to this as the ‘strong view’ of sovereignty. The trouble with this view is twofold: (a) it seems to take the Diceyan definition of sovereignty to the extreme;[[20]](#footnote-20) and (a) by placing sovereignty on a theoretical pedestal, it is challenging to account for and prioritise considerations outside of parliamentary intention and the abstract rule of law.

…

1. Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000) [↑](#footnote-ref-1)
2. ibid, Christopher Forsyth, ‘Heat and Light: A Plea for Reconciliation’ 393 [↑](#footnote-ref-2)
3. Especially in Mark Elliott, ‘The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ [1998] CLJ 129 (also included in op cit n1, ch 5); and in op cit n1, Mark Elliott, ‘Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-operative Endeavour’ [↑](#footnote-ref-3)
4. op cit n2, 394, he makes the same point in his earlier article as well, see Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review [1994] CLJ 122, 133 [↑](#footnote-ref-4)
5. See generally: Trevor R. S. Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (OUP 2001); and Trevor R. S. Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry’ [2002] CLJ 87 [↑](#footnote-ref-5)
6. Paul Craig, ‘Competing Models of Judicial Review’ [1999] PL 428, 431 [↑](#footnote-ref-6)
7. op cit n2, 397 [↑](#footnote-ref-7)
8. Helen Fenwick (eds), *Supperstone, Goudie, and Walker: Judicial Review* (LexisNexis, 6th edn, 2017), 6.83; [↑](#footnote-ref-8)
9. op cit n2, 408. [↑](#footnote-ref-9)
10. [1987] AC 625, 702-703 [↑](#footnote-ref-10)
11. op cit n 6 [↑](#footnote-ref-11)
12. The phrase “principles of good administration” is borrowed from Dennis Galligan, ‘Judicial Review and the Textbook Writers’ (1982) 2 OJLS 257. Galligan argues that these principles include the various grounds of review, including the requirements of fairness, the rule against bias, other procedural propriety, substantive legitimate expectations, rationality, and possibly proportionality. [↑](#footnote-ref-12)
13. op cit n5, CLJ, 100 [↑](#footnote-ref-13)
14. This article does not directly address the debate between the various conceptions of the rule of law, or even its substantive content (if any). Given its minimalistic propositions, the content of the formal conception is largely agreeable: see Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195. The difficulty arises with the substantive conception: for example, Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) espouses a rights-based conception which “assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole” (at 11); Trevor R. S. Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 Law QR 221, 223-224 in contrast, argues the rule of law contains not only certain substantive rights, but the ideals of equality, fairness, rationality, and proportionality which he says are

    part of any “liberal theory of justice”. [↑](#footnote-ref-14)
15. For example, in *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146, Lord Donaldson MR eschewed the application of the formalised category of “natural justice” as it may engage “several interlocking and mutually inconsistent considerations”. Instead, he seemed to suggest that the ultimate question which needs to be asked when fairness is concerned, is “whether something had gone wrong of a nature and degree which required the intervention of the court”. This illustrates how elastic grounds of review can be based on the quorum sitting. [↑](#footnote-ref-15)
16. op cit n5, CLJ, [↑](#footnote-ref-16)
17. Most notabl Paul Craig, ‘*Ultra Vires* and the Foundations of Judicial Review’ [1998] CLJ 63 and in [1999] PL 428 (op cit n6); Sir John Laws, ‘Law and Democracy’ [1995] PL 72; and Jeffrey Jowell, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ in op cit n1. [↑](#footnote-ref-17)
18. Or as Forsyth put it at op cit n2, 402, “The concept of *ultra vires* and *intra vires* are mutually exclusive… It is like pregnancy, you are either pregnant or you are not… the common law cannot impose [the principles of good administration] (see n12) without challenging parliament’s power to allow [the decision-maker] to make valid decisions… [Doing so] is imposing an additional requirement for validity. That is a challenge to parliamentary supremacy.” [↑](#footnote-ref-18)
19. op cit n5, *Constitutional Justice*, 203-204 [↑](#footnote-ref-19)
20. Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E. Michener ed, 8th edn, Indianapolis: Liberty Fund 1982), 3-4 : “The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, *the right to make or unmake any law* whatever; and, further, that n*o person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament*.” [Emphasis added] [↑](#footnote-ref-20)