NON-STATUTORY EXECUTIVE POWERS: ASSESSING GLOBAL CONSTITUTIONALISM IN A STRUCTURAL-INSTITUTIONAL CONTEXT

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Abstract This article analyses the source, nature, and use of unilateral, non-statutory executive powers, frequently employed as a governance tool but rarely studied in a comparative context. Exercised in the absence of direct statutory authorization, such powers are often invoked by executives in emergency and foreign affairs contexts, but are equally central to domestic policy-making. Unilateral executive power challenges two central democratic values that support the separation of powers ideal: representation and deliberation. Different structural treatments of these powers are considered through a comparison of three constitutional regimes, those of the United States, the United Kingdom and Israel. Despite material structural differences between these systems, the emerging patterns are similar enough to support the argument that direct law-making by the executive is an unavoidable element of the political sphere. Developing a template for comparison analysis, this article shows that a pattern of functional convergence has emerged, unsupported by overt transplantation or borrowing between these systems. The results set a possible challenge to the growing recognition of global world constitutionalism, at least in structural-institutional contexts.

Keywords: comparative public law, convergence, divergence, executive power, global constitutionalism, legal transplants, non-statutory power, prerogative, presidential power.

I. INTRODUCTION

On 16 January, 2013, about a month after the shooting at the Sandy Hook school in Newtown, Connecticut, the recently re-elected President Barack Obama and Vice President Joe Biden held a press conference announcing the launch of a nationwide gun control programme. The President declared that '[a]s soon as I finish speaking here I will sit at that desk and I will sign a directive giving law enforcement, schools, mental health professionals and the

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public health community some of the tools they need to help reduce gun violence'. President Obama further announced he was taking '23 executive actions', and urged Congress to act.[1] Media reports that 23 executive orders had been signed that day were greatly exaggerated, or published too soon. The president did sign three memoranda containing directions to the administration but no executive orders were issued, and none have been issued since. The memoranda did not directly affect the public, but their actual impact on the management of gun control, a cause that some considered to be deeply linked to individual autonomy, is yet to be measured.[2] The failure to pass a bi-partisan bill in the Senate that was to introduce some of these measures[3] may lead to further presidential reliance on the unilateral option.

This event is not unique. Consider the British *Bancoult* affair, entirely generated by unilateral executive action. No statute directly authorizes the British government to enter into treaties. Under the British constitutional structure, this power is exercised by the government in the name of the Crown, as an exercise of the historical Royal Prerogative, the remaining field of unilateral extra-statutory action formally in the hands of the Monarch.[4] The affair concerns the British Indian Ocean Territory, an overseas territory consisting of several islands (also known as the Chagos Archipelago), located halfway between Africa and Indonesia. The archipelago's location at the centre of the Indian Ocean renders it a strategic asset in high international politics. In the 1960s, the British and American governments signed a bilateral agreement concerned with the future of the territory, under which the local inhabitants, of Mauritian and Seychellian origin, were to be removed from the territory to enable the United States to establish defence facilities on Diego Garcia, the largest island. The evacuation of all inhabitants was finalized by 1973; it was originally effected by an ordinance made under the local constitution, and was later ratified under a new constitution that squarely denied the inhabitants' right of abode. This constitution, and other constitutions penned by the British for colonies and other protectorates, were introduced by the British government as orders in council, semi-formal written measures made under the Royal

[1] 'President Obama's remarks on new gun control actions, Jan. 16, 2013 (transcript)', *Washington Post*, 16 January 2013.

[2] The first memorandum directs all Federal law enforcement agencies to trace all firearms recovered in the course of criminal investigations and taken into custody through the Justice Department's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); the second reinforces, and formalizes, the duty of agencies to share information about individuals with the National Instant Criminal Background System (NICS); the third directs the Secretary of Health and Human Services to conduct or sponsor research into the causes of gun violence. For links to the memoranda see <http://www.whitehouse.gov/briefing-room/presidential-actions/presidential-memoranda?page=1>.

[3] J Weisman, 'Senate Blocks Drive for Gun Control', *New York Times*, 17 April 2013.

[4] Part 2 of The Constitutional Reform Act 2010 replaces the constitutional convention best known as the Ponsonby Rule with a requirement to lay certain international agreements before Parliament prior to ratification, but the authority of the government to sign treaties is only implied by the requirement that the process be initiated by a Minister. On the prerogative see Part IIIA below.

Prerogative. The US facilities on the island, currently named Navy Support Facilities Diego Garcia, were extensively relied upon during the Gulf War and continue to play a role in US military post-9/11 operations.[5]

Part of the struggle of a group of Chagossians to be reinstated in the territory was fought in courts. The challenge to the legality of the order and the evacuation reached the House of Lords in 2008. Deciding the appeal, the House of Lords was required to rule upon several difficult issues. The question of the government's authority to sign bilateral accords was not one of them, as the British constitutional structure enables this practice; but questions regarding the authority to deny abode by a unilaterally made order in council, and the subjection of this measure to judicial scrutiny, were central to the decision.[6]

These examples raise questions that resonate across other systems. President Obama, the British government, and others, have drawn on traditions of unilateral making of measures in the foreign and domestic fields that have had at least a semi-legal impact, despite the absence of a clear authorization to do so. None of these traditions settles comfortably with modern constitutionalism. Framers and developers of constitutional frameworks confront an inherent tension between the need to grant powers to the executive and the competing interest in limiting the extent of such powers in the name of the rule of law. Solutions to this tension may differ, as do the lives of constitutions. Formal constitutional arrangements may evolve, through implementation, into materially different constructs; in a comparative context, convergence of constitutional solutions can occur, but it is not a necessary feature of the global constitutional sphere. This article treats the intersection of these two characteristics of constitutional life, design and evolution, through a study of solutions for this single constitutional problem: the shared need to both uphold and constrain unilateral, extra-statutory powers.

My comparative analysis addresses the following questions. How have systems approached the question of unilateral executive action? Can similarities be found, or has this issue, so strongly linked with domestic politics and power structures, developed independently, thereby challenging the discourse of globalized constitutionalism?

To address these questions, Part II provides a short exposé of the constitutional problem embodied in the invocation of non-statutory powers. Under a purist vision of the separation of powers ideal, the executive executes statutes enacted by the legislature and faithfully exercises only the additional powers granted to the office by the constitution; the government is thereby bound by the principles of legality and constitutionality, both embedded in the democratic values of representation and deliberation. Nevertheless, governments

[5] JF Burns, 'British Territory Used in 2 Renditions Flights', *New York Times*, 1 December 2008. See also Lord Hoffmann's reference to the Foreign Secretary's admission of the above, in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] 3 WLR 955, 969.

[6] For the decision see text to n 45.

tend to invoke such powers on a regular basis under limited judicial and political constraints. This problem exemplifies the more general dilemma over the proper scope and limits of governmental power. Such power is justified in the liberal democratic context as a means for achieving the common good. Effective power, however, embodies a threat to the very ideals it is meant to serve. The subject of general powers thus proves to be a 'hard case' of the larger question of the legitimacy of government power.

This article offers a comparative analysis of three prototypical solutions that range from ambiguity to recognition, as adopted in the constitutional structures of the US, the UK, and Israel. Despite substantial structural differences at the design stage of these constitutional structures, the emerging frameworks recognize and uphold some forms of unilateral non-statutory powers, under similar constraints, reflecting a shared mixed vision of the executive as formally submissive to the legislature but simultaneously enjoying political dominance and some legal dominance.

The comparison is directed by a nuanced version of the well-worked distinction between convergence and divergence. First, I distinguish between functional convergence and transplant-derived convergence. Much of the attention to convergence is linked with transplantation processes, but convergence may be the result of independent, unlinked processes driven by shared exigencies. My findings in this case study point at the latter pattern. Further, attempting to explain these findings, I question the value of universal arguments for the globalization of constitutional law. Transplant-derived convergence may well have occurred in human-rights contexts, but the force of universalism in structural-institutional contexts requires further attention. A tentative explanation for the unique development of the treatment of non-statutory executive powers is advanced in the concluding part.

II. NON-STATUTORY POWERS: AN ACUTE DEMOCRATIC DEFICIT

Executive action in the absence of an authorizing statute challenges the democratic legitimacy of modern democratic government. Constitutions may grant the executive original, specific powers, but apart from such authorizations, the separation of powers principle in all its versions confers on the executive branch the role of executing statutes.[7] This secondary role, under which the executive branch is subject to the legislature, relies on two important democratic values: representation and deliberation.[8] Representing the people

[7] MJC Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967).

[8] On these values see eg H Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967); J Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press 1991). One may argue that in presidentialist regimes, the direct election of the head of the executive cancels out the representation deficit. However, unilateral presidential action still suffers from the absence of formal deliberation, inherent to the legislative process. On other differences between presidential and parliamentary regimes see Part IIB below.

through elections, rules made by legislators are the result of a potentially lengthy deliberative process, often enabling participation of actors in the public sphere. Both elements are compromised when the executive is the rule-maker.[9]

Despite their problematic nature, non-statutory powers have always been on the menus of executives in democratic Western States. Such powers have gone by different names: prerogative, residual, inherent, autonomous, general, unilateral presidential . . . . These names do not reflect distinctive and separate constructs, and are largely interchangeable (subject to necessary national adjustments). In this study of such powers I choose the neutral term 'non-statutory powers' deliberately, as it does not reflect any *a priori* attitude towards the invocation of such powers, nor does it imply preconceptions about the supremacy of any of the two contesting sources of powers—legislative and non-legislative.

In constitutional monarchies, such powers may rely on historical constructs that are relics of former Crown omnipotence, as in the case of the United Kingdom. Further, written constitutions may be originally ambiguous, either due to disagreement on the proper extent of executive powers, lack of time or inattention; in any such case, the constitution provides a fertile, if fuzzy, ground for the growth of non-statutory executive powers doctrines, as in the United States. Such historical bases set the ground for the development of these doctrines, but the presence of such powers in modern democracies is ahistorical, and derives from several features of the modern State. The arguments for broad and flexible executive power draw on law's limitations and on expediency. Essentially, no text can supply a basis for all possible contingencies, unless its language is generalized to the point of loss of concrete meaning. Further, executives are best placed to respond to fast-moving, ever-changing realities; legislatures, in comparison, are too burdened by politics to answer pressing challenges.

Non-statutory powers can also be invoked in response to changes in politico-economic climates. Over the past century, States have broadened and diversified the range of their involvement in the social and economic spheres.[10] Executive power in the modern State necessarily requires constant retuning in order to accommodate rapid cultural and social changes and technological innovation. Thus, the 'administrative state' discourse stresses statutes' inadequacies as sole organizers of government action.[11]

[9] Of course, legislation is not necessarily a better governance tool. Vague statutes and broad delegations may grant executive action a façade of legality while containing no substantive constraint. This type of 'grey hole' or 'fuzzy legality' merits further attention elsewhere.

[10] The literature depicts a transformation from the Minimal State, through the Welfare State to the current Neo-Liberal State. Roughly, this corresponds to visions of the State as peacekeeper, through welfare-advancer, to regulator. See K Polanyi, *The Great Transformation* (Rinehart 1944); G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 JPubPol 139.

[11] This extensive debate points at an ever-growing volume of rules pertaining to an ever-broadening scope of government involvement; to fast-changing conditions that require responsive

Indeed, literature on flexible and informal modes of policy implementation abounds.[12] These directions of research question the traditional views on the role of executives.

Finally, governments are often likely to prefer non-statutory powers to legislation. Informal rule-making bypasses the arduous legislative process that provides potential entry-points for interest groups and other participants in the public sphere. Non-statutory rules, independently formed by executives, are both more pliable and amenable to further change by the same informal measures. Once instated, an unwritten arrangement could be more elusive, rendering review and other modes of accountability more difficult to maintain.[13]

Beyond war powers and powers in the international arena, non-statutory powers are regularly applied in domestic fields. British examples that have received judicial and academic attention include non-statutory *ex gratia* compensation schemes,[14] the passport regime,[15] contracts and other types of market transactions employed as policy instruments,[16] and dissemination of information.[17] Other legal systems provide their own examples. To name but a few: the use of 'executive agreements', international agreements signed by US Presidents in the absence of the advice and consent of the Senate, required in Article II's treaty-making clause; American temporary withdrawal of private use of oil-rich public lands due to the depletion of natural sources;[18] and government financing of municipal religious services in Israel.[19] All these were implemented in the absence of statute and were judicially upheld when challenged in court; they are analysed in Part IV in the context of their respective systems.

and flexible management; and to professionalization of many monitored areas, that cannot be met by legislative texts. See eg RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 HarvLRev 1667; K Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969); DJ Galligan, *Discretionary Powers* (Clarendon Press 1986).

[12] For the classics see eg E Bardach and R Kagan, *Going by the Book* (Temple University Press 1982); K Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press 1984).

[13] For a parallel argument that addresses the 'incompleteness' of law see K Pistor and C Xu, 'Incomplete Law' (2003) 35 International Law and Politics. 931, 938–44. See also the literature on delegation and discretion (n 11).

[14] *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864.

[15] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811.

[16] On the non-statutory nature of such powers see T Daintith, 'Regulation by Contract: The New Prerogative' (1979) 32 CLP 41; M Freedland, 'Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Sphere' (1998) PL 288.

[17] *Jenkins v AG* (1971) 115 Sol J 674.

[18] *US v Midwest Oil*, 236 US 459 (1915).

[19] HCJ 282/61 *El Saruji v Minister of Religion*, 17 PD 188 (English translation at <www.court.gov.il>.

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III. CASE SELECTION

This article compares non-statutory executive powers in three regimes: the United Kingdom, the United States and Israel. Each of these systems offers a different structural solution to the shared problem of the recognition of non-statutory powers. The combination of these prototypical cases offers a blueprint for the construction of a multidimensional study that addresses and tests entirely different frameworks against each other.[20]

In line with comparative methodology, the analysis is not limited to constitutional design. Following the paradigm of a 'living constitution', the evolution of constitutional practice and its application over time are considered just as crucial to the understanding of the studied constitutional frameworks.[21]

The choice of the systems was directed under three parameters. First is the familiar distinction between formal (written) and informal (unwritten) constitutions. The United States constitution, with its rigid and cumbersome process of amendment, is usually posited as the antithesis of the British collection of statutes and unwritten constitutional conventions which comprise an important part of its constitution. The impact of constitutional interpretation and judicially-led evolution on written constitutions cannot be ignored; yet the existence of a written text does reflect a distinct attitude towards constitutional-type issues, one that is seemingly committed to explicit, consensus-based and relatively rigid formulations of the tenets of the regime it creates.

The second parameter, applicable when the system contains a written constitution, pertains to the text of the constitutional solution. The language of constitutional provisions is typically open-ended, but different degrees of vagueness can be found. At one extreme are provisions intended to provide a clear, unambiguous framework, at the other, constitutional lacunas. Provisions vague enough to support competing, even contradictory, interpretations would be positioned closer to the latter pole.

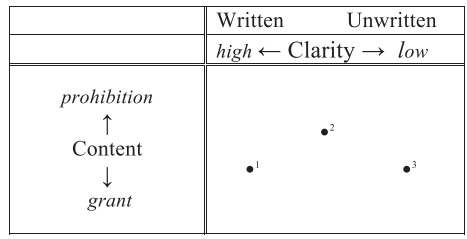
The third parameter is concerned with content. In the context of allocation of powers, solutions can range from absolute prohibition of a certain power, through limited authorization, to a full grant of a broad ambit of powers.

Constitutional frameworks reflect a variety of combinations of these dimensions. This article discusses three distinct combinations. For a graphic representation of possible combinations, which also identifies the national arrangements discussed in this article, see Figure 1.

[20] For comparative research using 'prototypical cases' see R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 AJCL 125, 142–44 (posited as one of five modes of case selection).

[21] For a general emphasis on 'functionality', that implies the need to consider reality, rather than merely formal rules, see K Zweigert and H Kötz, *Introduction to Comparative Law* 38 (3rd rev edn, T Weir trans, Clarendon Press 1998).

Dimension 1: Form: written/unwritten.
Dimension 2: Clarity: high ↔ low
Dimension 3: Content: grant of powers ↔ prohibition of powers.



1. Written constitution, clear provision, grant of powers under constraints: Israel.
2. Written constitution, ambiguous provision: United States.
3. Unwritten constitution, ambiguous grant of some powers: United Kingdom.

Figure 1: Constitutional Structural Solutions: A Three-Dimensional Grid

IV. CONSTITUTIONAL SOLUTIONS: THREE EXAMPLES

A. An Unwritten Ambiguous Arrangement: The United Kingdom

I begin with the oldest constitution, under which non-statutory powers seemingly receive full constitutional sanction through the Royal Prerogative, a long-standing tenet of the British constitutional framework. The Prerogative, as defined after the 1688 Glorious Revolution, pertains to those powers retained by the Crown and not taken away by Parliament, and is part of the compromise forced on the Monarchy at the end of the seventeenth century.[22]

For centuries, prerogative powers remained strongly tied with the eminence of the Monarch, an attitude echoed in Blackstone's eighteenth-century definition:

> By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.[23]

The rise of elected politics and parliamentary power, coupled with the gradual evolution of the Crown into a largely symbolical figurehead, are both expressed in Dicey's late nineteenth-century definition:

[22] See WS Holdsworth, *A History of English Law* (Methuen & Co. 1924) vol VI, ch IV.
[23] W Blackstone, *Commentaries on the Laws of England* (8th edn, Clarendon Press 1778) bk I, ch 7, 239.

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> The prerogative appears to be both historically and as a matter of fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.[24]

This definition emphasizes one important aspect of prerogative: its continuing existence depends on the absence of legislation: no non-statutory powers, even lofty prerogatives, can be exercised when a statute governs the same field. This residuality rule has retained its status as the principal constraint on the prerogative. Hence the idea of a 'shrinking' residue of powers.

Historically, 'prerogative' refers to a list of specific powers, largely acknowledged by courts but not dependent on their recognition. Some are irrelevant to this article—prerogatives pertaining to parliament and legislation, Crown immunities and Crown privileges.[25] I focus on prerogatives that are purely executive in nature, for example, the waging of war, the conduct of foreign affairs, the grant of pardon, the administration of the passport regime, and some high-level appointments.

In the British context of an unwritten constitution, almost no one (at least since Chitty)[26] has dared to present a complete list of prerogatives. Lists are carefully supplemented by a caveat such as 'it is not possible to give a comprehensive catalogue of prerogative powers', followed by a discussion of the classically acknowledged ones.[27] The legitimacy of its exercise remains a constitutional convention, one of the constitutional rules which are considered part of the unwritten constitution of the United Kingdom.

Despite the historical link to the Crown, all 'executive' prerogatives, from war powers via the pardon power to the grant of passports, are entrusted entirely in the hands of the executive, with a symbolic assertion of the Crown. Here, then, is the first constitutional source of current non-statutory powers.

The natural 'shrinking' of the prerogative due to the general expansion of legislation over the past two centuries has been twinned with a strengthened commitment to legality, under the principles of the sovereignty of parliament and the rule of law, all anathema to arbitrary prerogative. Dicey does hint at the problem of retention of the prerogative—it offers the government 'large powers which … are constantly exercised free from Parliamentary control',[28] but he refrains from calling for its removal. Instead, his emphasis is on constitutional

[24] AV Dicey, *An Introduction to the Law of the Constitution* (8th edn, Macmillan 1915) 282.

[25] The Crown officially summons, prorogues and dissolves Parliament as well as affixes his or her assent to bills passed by Parliament—since 1967, under the Royal Assent Act. For a general overview see eg AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson Longman 2011) 249–54.

[26] J Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth 1820).

[27] See eg Bradley and Ewing (n 25) 246–54; *Burmah Oil v Lord Advocate* [1965] AC 75 (PC), 145. But see GS McBain, 'Expanding Democracy – Transferring the Crown Prerogatives to Parliament' (2014) 6 Review of European Studies 1.

[28] Dicey (n 24) 310.

conventions that determine, and constrain, the exercise of the prerogative.[29] Twentieth-century harsh criticism of executive discretion under legislation, notably Lord Hewart's influential *The New Despotism*,[30] has further strengthened the critical attitude, leading to modern-day escalation of reform.

Some prerogatives have thus been duly legislated, as in the earlier case of the Crown prerogative of coinage. Counterfeiting and other such offences were consolidated in the Coinage Offences Act 1832; the current Coinage Act 1971 replaces the Coinage Act 1870, which places all powers in this field in the hands of the Crown, but under statute.[31] The most recent reform, the Constitutional Reform and Governance Act 2010, regulates the civil service and legislates the Ponsonby rule. Still, the prerogative remains central in some fields: the passport regime remains prerogative-based, and the recently declared convention requiring a parliamentary debate and vote prior to committing troops to armed conflict has not fully removed government prerogative in this field.[32]

The pairing of 'non-statutory' powers with 'prerogative' powers is unsurprising, since the prerogative does not derive from statute. Prerogative, nevertheless, is really something else. It connotes a shrinking reservoir of powers, deeply embedded in the unwritten framework of the English constitution, and should therefore be viewed as equivalent to powers that draw directly from a written constitution. In their true form, non-statutory powers feed on unexpected futures and statute's intrinsic eventual failings. Indeed, many non-statutory powers currently invoked in the United Kingdom cannot be linked to this historical source of power. Such identified powers include

[29] ibid ch XIV. [30] Lord Hewart, *The New Despotism* (Ernest Benn 1929).

[31] Section 3, Coinage Act 1971; section 11, Coinage Act 1870. Similarly, the Territorial Waters Jurisdiction Act 1878, which fixed British territorial waters under the three nautical-mile rule, was mainly concerned with criminal jurisdiction; the Territorial Seas Act 1987 not only quadrupled the extent, but also legislated the prerogative to change the extent. The power is granted to the Crown, but now under statute.

[32] Since parliament's vote on the deployment of forces to Iraq in 2003, the government has recognized this convention, expressed *inter alia* in the Cabinet Manual and reaffirmed in subsequent government representations. The failure of such a vote regarding intervention in Syria in 2013 and the subsequent reversion of government policy have reinforced this substantive political constraint on this prerogative power. See Cabinet Manual (1st edn, 2011) para 5.38; House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Forces, 2nd Report of Session 2013–14*, HL Paper 46 (July 2013); C Mills, *Parliamentary Approval for Deploying the Armed Forces: An Update*, Commons Library Standard Note SN05908 (December 2013). This important development has yet to lead to legislation, which is not currently forthcoming; the deployment of personnel for non-combat purposes, as in the Case of Mali in 2013, remains, under government policy, free from the constraint; and, generally, policy decisions are still made under the prerogative. See eg G Phillipson. '"Historic" Commons' Syria vote: the Constitutional Significance', Parts I and II, <http://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/> and <http://ukconstitutionallaw.org/2013/11/29/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-ii-the-way-forward/>; S Wilks-Heeg, A Blick and S Crone, 'Despite David Cameron's Defeat in Syria, the UK Parliament Actually Has Relatively Weak War Powers Compared to Legislatures in Other Democracies' <http://blogs.lse.ac.uk/europpblog/2013/08/30/despite-david-camerons-defeat-on-intervening-in-syria-the-uk-parliament-actually-has-relatively-weak-war-powers-compared-to-legislatures-in-other-democracies/>.

the creation and operation of ex gratia payment schemes,[33] the issue of governmental pamphlets,[34] and government policy-making by contract.[35]

These powers have now been titled the 'third source' of power, but not all of those who recognize the existence of such powers have found a source of constitutional legitimacy for their exercise. Certain commentators revert—some with reservations, some quite happily—to an analogy between the State and the powers of a legal person.[36] The court has joined in,[37] while the government has unearthed a 1945 legal memorandum and argues that it has always provided a basis of power that is equivalent to these inhered in an individual.[38] Whether this indeed is the established understanding of such powers is a matter of debate.[39]

Returning to the prerogative, the main constraint set on their invocation, mentioned above, is the residuality rule. Formalized in *De Keyser's Royal Hotel*, the rule was applied as the main ground for deciding that the prerogative powers to seize property in wartime without compensation could no longer be invoked, even if it had existed, since statutes in force granted compensation in such cases. The rule seems simple enough:

> if the whole ground of something which could be done by prerogative is covered by statute, it is the statute that rules. . . [t]he Royal Prerogative has been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion.[40]

This constraint, however, has always been amenable to manipulation: statutes have been interpreted as open-ended enough to accommodate parallel arrangements, or were altogether ignored.[41]

[33] For example, the Criminal Injuries Compensation Scheme, non-statutory for more than two decades. Challenged in *Lain* (n 14), the court reaffirmed its legality under the prerogative.

[34] Jenkins (n 17). Reliance on the prerogative as basis for executive power is cited in HWR Wade, *Constitutional Fundamentals* (rev edn, Stevens 1989) 61.

[35] See further M Cohn, 'Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive' (2007) 97 OJLS 118.

[36] G Winterton, 'The Prerogative in Novel Situations' (1983) 99 LQR 407; BV Harris, 'The "Third Source" of Authority for Government Action' (1992) 109 LQR 626; D Gladstone, 'What Shall We Do with the Crown Prerogative?' (1998) 4(3) JLS 1; Cohn (n 35).

[37] See *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344; *R v Secretary of State for Health ex parte C* [2000] HRLR 400.

[38] A Lester and M Weait, 'The Use of Ministerial Powers without Parliamentary Authority: The Ram Doctrine' (2003) PL 415. For critique of this direction see also Gladstone (n 36); Cohn (n 35).

[39] See eg the 2013 report of the House of Lords' Select Committee on the Constitution, which *inter alia* concludes that '[t]he so-called "Ram doctrine" is misleading and inaccurate, and should no longer be used'. House of Lords Select Committee on the Constitution, 13th Report of Session 2012–13, *The Pre-emption of Parliament*, HL Paper 165, 4.

[40] *AG v De Keyser's Royal Hotel* [1920] AC 508, 528, 568 (1920).

[41] See *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] QB 26 (CA), 59 (power of central government to supply anti-riot equipment to local police stations in the argued absence of such authority in the Police Act. The Court of Appeal found sufficient basis in the statute, but addressing the question of the continued existence of a prerogative to maintain 'the peace within the realm', the court adopted the lower court's reasoning that the Act

The most far-reaching reform in this field has been judicial readiness to subject the exercise of the traditional prerogative to review. Initially, the courts intervened only when the challenged executive action should have been exercised under existing statute, as in the *De Keyser* case.[42] In addition to the application of this residuality rule, the courts were only ready to decide the question of whether the challenged executive action was indeed part of the prerogative. If it were, that was the end of the matter: a general immunity from review derived from the remaining link between these powers and the Crown. The full subjection of the prerogative to run-of-the-mill judicial review was gradual. Initial judicial dicta, first expressed in the 1960s and 1970s,[43] were the harbingers of the House of Lords' groundbreaking declaration in the mid-1980s that prerogative powers, exercised under modern constitutional convention by the government rather than the Crown, were subject to the same review applied to statute-based power.[44] In *GCHQ*, the court was concerned with a delegated power under a prerogative-based order in council; the amenability of review of an order in council itself, the legal status of which remains unclear, was affirmed in *Bancoult 2*.

The reasoning in both decisions was functional rather than historical. Consider Lord Hoffman's opinion in the latter decision:

> It is true that a prerogative Order in Council is primary legislation in the sense that the legislative power of the Crown is original and not subordinate . . . But . . . [t]he principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone . . . I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.[45]

Still, both applications failed for non-justiciability. Since *GCHQ*, review of the prerogative, now seemingly equal to statute-based powers in this context, 'depend(s) on the subject matter of the prerogative power which is exercised'.[46] In *GCHQ*, review of a decision concerning an intelligence agency was barred for national security reasons; *Bancoult* was inextricably linked with

did not create a 'monopoly' that excluded central government action in this field); *Lain* (n 14) (no discussion of the existence of parallel, statutory victim compensation schemes).

[42] *De Keyser* (n 40).

[43] *Chandler v D.P.P.* [1964] AC 763, 810 (per Lord Devlin: courts will intervene to correct excess or abuse); *Lain* (n 14) 881 (review of quasi-judicial action); *Laker Airways v Department of Trade* [1976] 1 QB 643, 705 (per Lord Denning: improper or mistaken discretion in the exercise of prerogative powers is examinable in courts).

[44] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 400, 407, 410, 417–18, 423–24 (1984) (*GCHQ*) (per Lord Fraser, Lord Scarman, Lord Diplock, Lord Roskill and Lord Brightman, respectively).

[45] *Bancoult 2* (n 5) 969.

[46] *GCHQ* (n 44) 418.

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national security and foreign affairs elements, the two main fields deemed non-justiciable.

In sum, British courts no longer award non-statutory powers, even those with the 'prerogative' imprimatur, special immunity from review, but such powers remain one of the governance tools available to the executive. Some are granted the grand title of 'prerogatives', others may have a lesser pedigree. The residuality rule may limit their application, but in principle, the system recognises their existence. When pertaining to non-justiciable fields of action, judicial review will be barred, but this hurdle applies both to statute-based and non-statutory powers.

B. A Written Ambiguous Arrangement: The United States

As in the case of the UK, true US non-statutory powers are powers that derive neither from statute nor from a clear authorization in the constitution. While the main causes for ambiguity in the UK are history and the absence of a written constitution, in the US the vagueness is contained in Article II of the Constitution. This vagueness has helped to fuel a series of ongoing disputes, against which presidents have been able, legally or at least with sufficient political backing, to wield non-statutory powers in certain fields without paying a political price.

A survey of the rich literature on the framing process and the ratification years leads to one certain conclusion: beyond the commitment to the democratic ethos, no clear vision of the extent of such powers can be safely garnered. The shared allegiance to the constitution as the primary element of the new polity, and to the ideal of separation of powers in its checks and balances version was a constant guiding light, but the contours of the constitutional structure were originally fuzzy.

The Philadelphia Convention's mandate 'to render the Constitution of the Federal Government adequate to the exigencies of the Union'[47] was directed by two forces. Looming in the background was the colonial legacy: in the newly independent nation, popular understandings found any form of monarchy abhorrent. However, the Annapolis resolution was generated by the virtual breakdown of the Confederation structure as a framework strong enough to resolve the problems facing the new nation in the absence of a national executive. The decision to move ahead was, thus, designed to resolve the domestic problems created by former arrangements.[48]

[47] As per the Annapolis Convention resolution, text in M Jensen, JP Kaminski and GJ Saladino (eds), *The Documentary History of the Ratification of the Constitution, Vol. I: Constitutional Documents and Records, 1776–1787* (Wisconsin Historical Society Press 1976) 184.

[48] See eg M Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913); CC Thach, The Creation of the Presidency, 1775–1789 (Johns Hopkins Press 1922); C Fatovic, *Outside the Law: Emergency and Executive Power* (Johns Hopkins University Press 2009) ch V.

Accounts of the long, sometimes tortuous weeks that led to the finalization of the text show that initial drafts were in fact starting points for the overturning, reintroducing, and otherwise turning around of the key elements of Article II. The framers argued long and hard over the Presidential election process, but the minutiae of Article II powers received much less attention and were finally settled by the Committee of Detail and Committee of Style. One telling example: the final wording of the vesting clauses, to which I return below, was the product of the committee of style.[49] The retention of an open-ended Article II may have been driven by certain members, generally supporting an 'energetic' executive, but the final version cannot be described as the product of open and detailed reasoning.[50]

Underlying this seemingly surprising marginalization of the treatment of executive powers was deep ideological disagreement. The battle between Federalists and Anti-Federalists, who pushed for distinctly different constitutional structures,[51] was waged alongside a parallel dispute within the Federalists. Both factions, led by Hamilton on one side and Jefferson and Madison on the other, supported an executive that could rise above normal law in emergencies, but the differences between the theories on the nature of the constitution at large, and executive powers in particular, were far from marginal. These views were fully exposed during the post-ratification era in several famous disagreements. I focus on the 1793 *Publius-Pacificus* debate.[52] Hamilton strongly supported a powerful presidency: at an earlier point, he advocated the instatement of a hereditary monarch, a suggestion removed later, but his general support of a strong president remained.[53] In the debate over George Washington's neutrality proclamation, Hamilton found both functional and textual bases for his support of the legality of the proclamation, arguing *inter alia* that the enumeration of presidential powers in Article II did not derogate from the broad authority granted in the vesting clause; therefore,

[49] On the contribution of the Committee of Style in this respect see Thach, ibid 139.

[50] But see accounts that emphasize consensus, eg TE Cronin and MA Genovese, *The Paradoxes of the American Presidency* (OUP 1998) 2–3 (claiming that 'the founders purposely left the presidency imprecisely defined. This was due in part to their fears of both the monarchy and the masses, and in part to their hopes that future presidents would create a more powerful office than the framers were able to do at the time. They knew that at times the president would have to move swiftly and effectively, yet they went to considerable lengths to avoid enumerating specific powers and duties in order to calm the then widespread fear of monarchy').

[51] On the Anti-Federalists see eg S Cornell, *The Other Founders; Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (University of North Carolina Press 1999).

[52] The others were the debate in Congress over presidential removal power, and the debate on the constitutionality of a national bank, held in 1789 and 1791. See generally on the first, Thach (n 48) 140–65; on both, and other disagreements, NE Cunningham Jr (ed), *Jefferson vs. Hamilton: Confrontations That Shaped a Nation* (Bedford St. Martin's Press 2000); C Fatovic, 'Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives' (2004) 48 American Journal of Political Science 429.

[53] Brief of Speech on Submitting His Plan of Constitution, *The Works of Alexander Hamilton* (HC Lodge ed, Putnams 1904) vol 1 370, 376. See also eg Thach (n 48) 92–4; Farrand (n 48) 87–9.

'the *executive power* of the nation is vested in the president; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument'.[54] Madison's opposing, clause-bound interpretation led to the rejection of unilateral presidential power in the issues at stake, the signing of treaties and war powers; if at all, they could have been linked with prerogative, which was clearly not part of the constitutional framework.[55] Jefferson's strict constructionist stance was equally opposed to Hamilton's political theories.[56]

These disagreements on function and text set the tone for the future. Indeed, each and every theory of the role of the presidency advanced since, from a limited vision of the president as presider/moderator to the full-fledged version of a post-9/11 imperial ruler, have found basis in the text, in different understandings of original intent, and in constitutional history. In addition to reliance on the vesting clause, echoing the 1793 debate, Sections 2 and 3 of Article II enumerate a renowned list of powers, including the command of the armed forces, the grant of pardons, the making of treaties under Senate advice and consent, and the ambiguous 'take care that the laws are faithfully executed' clause. All are open for interpretation, notably the 'take-care' and commander-in-chief clauses, which offer promising bases for expansionist visions.[57]

Moving from textualism to original intent, the underlying disagreement on the nature of the executive, discussed above, belies any attempt to reach a clear answer. Supporters of both camps have relied on original intent to buttress their normative arguments;[58] original intent, then, also seems to lie in the eyes of the beholder.

A similar result emerges when history is chosen as the guiding methodology. Here, I do not refer to the evolution of executive powers via 'historical gloss'—this is treated further below—but to reliance on history and practice to support normative arguments over the proper extent of unilateral presidential powers, by showing that the proposed vision is not only superior, but is in fact

[54] Italics in the original. Pacificus I, in A Hamilton (Pacificus) and J Madison (Helvidius) *Letters of Pacificus and Helvidius on the Declaration of Neutrality* (Gideon 1845) 9–10. The argument was both functional and textual, the latter referring to the language of the vesting clauses of Articles I and III, which both explicitly defined the enumerated powers as a closed list: '[t]he difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms … The different modes of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference'. ibid 10. [55] Helvidius I–IV, ibid 53–92. [56] Fatovic 2004 (n 52).

[57] For examples of textual normative analysis (sometimes coupled with history and/or intent) see SG Calabresi and KH Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 HarvLRev 1155; H Monaghan, 'The Protective Power of the Presidency' (1993) 93 YaleLJ 1; SG Calabresi and SB Prakash, 'The President's Power to Execute the Laws' (1994) 104 YaleLJ 541; AM Froomkin, 'The Imperial Presidency's New Vestments' (1994) 88 Northwestern University Law Review 1346.

[58] Prime examples are L Lessig and CR Sunstein, 'The President and the Administration' (1994) 94 ColumLRev 1 and Calabresi and Prakash (n 57), major participants in one of the flare-ups of the debate over the proper role of the presidency, the 1990s dispute over the 'unitary presidency', concerned with the power of the president over administrative agencies.

deeply embedded in the history of the nation. In this respect, too, interpretations of history seem to support members of all camps.[59]

Beyond text, intent, and history, scholars have offered functionalist bases for the varying understandings of the nature of the executive in general. The constitution remains important here, though less as a clear authorization and more as a guiding light; a return to the basic reliance on democracy and the separation of powers is evident, alongside arguments concerned with the promotion of values such as accountability, effectiveness and consistency.[60] Yet the same arguments support various normative stances, from ambitious regime change proposals to calls for enhancing presidential centralism.[61]

The general pattern on the ground has been that of aggrandizement. President Lincoln's actions during the Civil War were retrospectively approved by Congress; his, and President Theodore Roosevelt's 'stewardship' theory developed in 1913, laid the ground for subsequent calls for presidential dominance, particularly at times of grave national emergency.[62]

Yet presidents have never limited invocation of non-statutory powers to emergencies. Non-statutory presidential impoundment of funds, used to impose policy directions through presidential refusal to activate budget items, was prohibited by statute in 1974, after a marked rise in the practice.[63] Signing

[59] The 'unitary presidency' debate was sometimes couched with historical analysis in addition to reliance on other methodologies. In addition to the sources cited in nn 57–58, see MS Flaherty, 'The Most Dangerous Branch' (1996) 105 YaleLJ 1725 for a general, nuanced view.

[60] Lessig and Sunstein (n 58); E Kagan, 'Presidential Administration' (2001) 114 HarvLRev 2245.

[61] Suffice to cite two recent opposing contributions: Bruce Ackerman, *The Decline and Fall of the American Republic* (Belknap Press 2010); EA Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP 2011).

[62] For Lincoln's justifications of his actions during the Civil War, which included the suspension of *habeas corpus*, see RP Basler (ed), *Abraham Lincoln, The Collected Work* (Abraham Lincoln Association 1953–1955) vol VI 300, 302–3, vol VII 281. For Theodore Roosevelt's doctrine see Theodore Roosevelt, *An Autobiography* (2nd edn, Macmillan 1914) 372. For references to the series of challenges to the legality of war-making and the deployment of military forces, which did not follow the War Powers Resolution, see esp n 79. See also the so-called 'torture memos', *inter alia* expressing government's arguments that the president draws this power from the commander-in-chief clause, and that any application of the criminal statute that would interfere with his power would be unconstitutional. JS Bybee, 'Memorandum for Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 USC §§2340–2340A', 1 August 2002, <http://dspace.wrlc.org/doc/bitstream/2041/70964/00355_020801_001display.pdf>) 31–9. But see the 2004 repudiating memo that reinterprets the statute as a constitutional prohibition of torture and fully eliminates the discussion of the commander-in-chief power (D Levin, 'Legal Standards Applicable under 18 USC §§2340–2340A', 10 December 2004, <http://www.justice.gov/olc/18usc23402340a2.htm>. Indeed, since *Hamdan v Rumsfeld*, 548 US 557 (2006), the 'war on terror' is largely waged under statutes, rendering unilateral law-making of lesser importance in this context. On this decision see text to n 71.

[63] See AJ Mikva and MF Hertz, 'Impoundment of Funds: The Courts, the Congress and the President: A Constitutional Triangle' (1974) 69 ULRev 335. For a more recent assessment see RE Brownell II, 'The Constitutional Status of the President's Impoundment of National Security Funds' (2001) 12 SetonHallConstLJ 1.

statements, pronouncements of disagreement with elements of a statute signed into force, have replaced this practice.[64] Presidential executive agreements supplement, if not materially replace, the constitutional arrangement that involve the Congress in the process of treaty-making.[65] Presidents unilaterally requisitioned lands through the nineteenth century and the early twentieth-century.[66] Many of these actions were authorized by executive orders, a well-established semi-formal mode of presidential policy formation, which often does not rely on statute. Other forms, such as proclamations and the memoranda referred to in the introduction, grant the presidential message special weight, but when no statute is involved, they are pure expressions of unilateral power.[67]

As for judicial stances towards such powers, it should first be noted that, in comparison with the other common law systems analysed in this article, the president of the United States enjoys exceptional insularity from review in all areas non-constitutional, (that is, when public acts are challenged at the administrative law level), an insularity supported by a strong culture of judicial deference. Paradoxically, despite the fact that, from inception, the president as the head of State was not protected by the aura of monarchy, no move for equating direct presidential action to run-of-the-mill output of administrative agencies, traced above in the context of the UK,[68] can be discerned.

This is not to say that courts have not reviewed presidential non-statutory powers. For some, the now-accepted maxim that 'the president's power …

[64] See PJ Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (University Press of Kansas 2002) ch 7; CA Bradley and EA Posner, 'Presidential Signing Statements and Executive Power' (2006) 23 Constitutional Commentary 307.

[65] See eg PJ Spiro, 'Treaties, Executive Agreements, and Constitutional Method' (2001) 79 TexasLRev 961; BR Clark, 'Domesticating Sole Executive Agreements' (2007) 93 VaLRev 1573.

[66] Affirmed in *US v Midwest Oil* (n 18).

[67] George Washington's proclamation of neutrality of 1793 is usually cited as the first proclamation. Declaring the neutrality of the United States in the war between France and Great Britain, the proclamation orders the prosecution of citizens violating the law of nations, Ordering gave rise to the first dispute over the proper extent of presidential powers. *See A Proclamation*, 22 April 1793, in JR Richardson (ed), *A Compilation of Messages and Papers of the President 1789–1897* (Government Printing Office 1896–1899) vol I, 156–7. The most notable executive orders ordered the requisitioning of lands (affirmed in *US v Midwest Oil* (n 18)), the interning of Americans of Japanese ancestry during World War II (later legislated, and affirmed in *Korematsu v US*, 323 US 214 (1944)), and the subjection of government contractors to anti-discrimination policies after efforts to apply them at the national level failed (the first of the series being EO 11246, 'Equal Employment Opportunity', 24 September 1965, 30 FR 12319). (executive orders available at <http://www.archives.gov/federal-register/executive-orders/disposition.html>; <http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders>. The infamous 'torture memos' (n 62) exemplify the possible weight of such measures. For some of the rich literature on the subject, which has grown exponentially since 2001, see WD Neighbors, 'Presidential Legislation by Executive Order' (1964) 37 UColoLRev 105; K Mayer, *With a Stroke of a Pen* (Princeton University Press 2002); Cooper (n 64); TL Branum, 'President or King? The Use and Abuse of Executive Orders in Modern-Day America' (2002) 28 JLegis 1.

[68] See *GCHQ* (n 44) and *Bancoult 2* (n 5).

must stem either from an act of Congress or from the Constitution'[69] reflects a general judicial tendency to invalidate presidential non-statutory power that cannot be linked with the constitution. However, a closer consideration of the jurisprudence shows that here, too, interplay between different attitudes exists; in fact, a general pattern of accommodation is dotted with singular cases that trace the limits of presidential power.

First, courts have sometimes found sufficient statutory basis for presidential action, even when no specific statute was originally cited, thereby fully legitimizing the challenged action and extracting it from the realm of the unilateral.[70]

Moving to powers that found no statutory base, the spectrum of judicial stances leans towards endorsement of the president's powers. I begin with the restrictive end of this spectrum. Some cases involve the invalidation of unilateral action, as in the *Hamdan* affair, in which the court found that no statute authorized the government to convene the challenged military commissions, and that the rules governing those commissions violated the Uniform Code of Military Justice.[71] Further, the court's readiness to strike down statutes that were found to grant excessive powers to the president more than indicates that limits to presidential powers also draw on the separation of powers principle as designed in the constitution. In *Clinton v New York*, the Supreme Court invalidated the Line Item Veto Act, which empowered the president to cancel specific spending provisions, for violating the presentment clause, being in effect a grant of power to amend or repeal legislature.[72]

Youngstown, the most famous decision in this context, should be positioned slightly closer to the accommodation pole of this spectrum. On its surface, the decision should be read as a reinforcement of the residuality principle. Rejecting arguments that relied on 'the aggregate of the [president's] powers under the Constitution', that is, the vesting clause, the take-care and the commander-in-chief clauses, Justice Black's ruling that the president could not seize steel mills in order to prevent an industrial action, since an impressive body of statute-law offered channels of action, is a clear expression of the residuality rule.[73] However, the complex web of opinions conveys more.

[69] *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 585 (per Justice Black); see also eg *Minnesota v Mille Lacs Band of Chippewa Indians*, 526 US 172, 189–90 (1999); *Medellin v Texas*, 552 US 491, 524 (2008).

[70] As in the case of the series of executive orders that subjected government contractors to non-discrimination and other social policies: see eg *Farmer v Philadelphia Electric Co*., 320 F2d 3 (3d Cir 1964); *Farkas v Texas Instrument*, 375 F2d 629 (5th Cir 1967); *Contractors Association v Secretary of Labor*, 442 F2d 159 (3d Cir 1971); *AFLCIO v Kahn*, 618 F2d 784 (DC Cir 1979). For a more sceptic view see *Chrysler v Brown*, 441 US 281, 304–5 (1979) (origin of order obscure, no need to decide whether authorized by statutes).

[71] *Hamdan* (n 62). See also *Chamber of Commerce v Reich*, 74 F3d 1322 (DC Cir 1996) (executive order with no specific statutory base found contrary to legislation).

[72] *Clinton v City of New York*, 118 SCt 2091 (1998).

[73] Opinion of the Court, *Youngstown* (n 69) 582–589.

The most memorable and frequently used part of the decision is contained in Justice Jackson's concurring opinion. In the first of his three 'practical situations', Justice Jackson reminds his readers that executives often act under statute, a truism that could have been excluded from our analysis but for Justice Jackson's readiness to consider implied statutory authorization as a sufficient basis.[74] In his third category, Justice Jackson reiterates the residuality principle, but with a triple twist. His focus in this category is on action that is 'incompatible with the expressed or implied will of Congress', a formulation that may further constrain the president, when his actions only impliedly contradict statute. Yet, when such contradiction occurs, Justice Jackson considers the president's power to be 'at its lowest ebb', a sufficiently neat formulation for potential future manipulation. Finally, as befits the system, Justice Jackson returns to the possibility of direct authorization by the constitution, a parallel source of authority that offers a broad scope of interpretation that may accommodate presidential action.[75]

Justice Jackson's second category offers a rich repository for potential aggrandizement of unilateral executive power. Alongside the president's own independent powers (under the constitution) there exists 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain'. In these cases, acquiescence and other modes of Congressional inertia may 'enable, if not invite', independent presidential action.[76] Justice Frankfurter's equally famous reference to historical gloss further embeds this mode of aggrandizement:

> a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by S.1 of Art. II.[77]

In another concurring opinion, Justice Clark finds that the Constitution does grant the President unilateral powers 'in times of grave and imperative emergency';[78] in effect, he joins the dissenters in this matter. The decision, then, cannot support the rejection of all emergency powers. In conclusion, the overall meaning of this decision is, as many have noted, sufficiently open to accommodate differing applications.

Then there are cases in which the courts decide not to decide, using non-justiciability doctrines (such as the political questions doctrine, lack of standing, mootness and ripeness), often used in challenges to the exercise

[74] ibid 636–637.

[75] In Justice Jackson's words, 'he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter'. ibid 637.

[76] ibid.

[77] ibid, 610–611. On the issue see CA Bradley and TW Morrison, 'Historical Gloss and the Separation of Powers' (2012) 126 HarvLRev 411 (2012). For analysis of this mode of accommodation see below.

[78] *Youngstown* (n 69) 662.

of war powers,[79] and by denying certiorari, which, *inter alia*, enabled the Supreme Court to remove itself from the debate over the constitutionality of the Vietnam war and participation in other hostilities, unilaterally initiated by the president.[80] In all of these cases, non-intervention in the decisions of lower courts that upheld the challenged measures could promote consecutive reliance on such modes of action. Other forms of non-interference are found in cases decided on the basis of non-reviewability due to the lack of 'force of law' of the challenged measures.[81]

Nearer to the other end of the spectrum are decisions that uphold non-statutory presidential action by reference to sources beyond the text of the constitution. First in line are the 'historical gloss' decisions. Decades before *Youngstown*, the Supreme Court found long-standing practices, supported by judicially recognized congressional acquiescence evident in oblique references to the said practice, appropriation of funds for its continuation, or simple inaction, to be sufficient justification for upholding unilateral presidential action. In *Midwest Oil*, the court upheld the decision to temporarily deny access to and use of oil-rich public lands due to a shortage of natural sources, contrary to a statute that enabled free use of land. The court relied on the decades of practice, never challenged by Congress, to uphold this one example of a decades-long practice.[82] Upholding an action that contradicted statute, this decision, then, does not conform to the residuality principle. Subsequent decisions in this vein pertain to foreign affairs.[83]

The most permissive decisions recognize inherent powers that do not directly originate in the constitution, and hence may be free of its constraints. The typical decision is *Curtiss-Wright*, decided in the 1920s. The case involved the presidential setting of an embargo under and in accordance with statute, but in his opinion, Justice Sutherland supported all forms of executive power in foreign affairs as sufficiently deriving from the sovereignty of the

[79] For reliance on the political questions doctrine see eg *Da Costa v Laird*, 471 F2d 1146 (2d Cir 1973) (operations in North Vietnam); *Crockett v Reagan*, 558 F Supp 893 (DDC 1982) (military aid to El Slavador). For denial for lack of standing see *Raines v Byrd*, 521 US 811 (1997); *Campbell v Clinton*, 203 F3d 19 (DC Cir 2000). See also *Conyers v Reagan*, 765 F2d 1124 (CADC 1985) (mootness); *Doe v Bush*, 323 F3d 133 (1st Cir 2003) (ripeness). cf *Massachusetts v Laird*, ibid, (decision on the merits: steady Congressional support found sufficient). Decisions on statute-based action are excluded from citation.

[80] See *DaCosta v Laird*, cert den 405 US 979 (1972); *Holtzman v Schlesinger*, cert den 416 US 936 (1974).

[81] See eg *Independent Meat Packers v Butz*, 526 F2d 228, 236 (8th Cir 1975) (executive order requiring agencies to conduct impact analysis prior to the making of regulations was primarily 'a managerial tool', not enforceable by private civil action).

[82] *Midwest Oil* (n 18).

[83] See *Massachusetts v Laird* (n 79) (the waging of prolonged hostilities was shared by both government branches, and the executive had acted 'not only in the absence of any Congressional conflicting claim of authority but with steady Congressional support'); *Dames & Moore v Regan*, 453 US 654 (1981) (concerned with presidential signing of executive agreements and other compacts made between governments; all upheld despite arguments for unconstitutionality for breach of the treaty-making clause, with references to 'practice' and 'acquiescence').

State.[84] Whether this stance would support similar action today is doubtful, but the above survey shows sufficient bases for accommodation.

In sum: without settling the ambiguity inherent to the text of the constitution, presidents continue to enjoy some freedom to act in the absence of statute. Nothing in the written constitution prohibits the exercise of such powers; the system more than tolerates some of them, and the limits on their exercise have yet to be doctrinalized. Two constraints on the exercise of these powers have emerged, albeit in a diluted form. A general residuality principle does exist, but exceptions and competing older rulings challenge its robustness. Secondly, the recent jurisprudence, mainly *Hamdan*, seem to constrain reliance on unilateral power in cases involving a direct breach of a human right.[85] These constraints, however, are at their lowest ebb in two contexts: when presidents are involved in the making of general social and economic policy, which, *inter alia*, limits if not eradicates standing of most, if not all, interested parties, and, very much like British courts, when subject-matter sensitivity is likely to enjoin courts from intervention by using non-justiciability doctrines.

C. A Written Balanced (?) Arrangement: Israel

On its establishment, Israel preserved former Mandate law,[86] and could have followed Great Britain in basing its solution to the question of non-statutory powers on the historical prerogative. The possible absorption of the Royal Prerogative by way of inheritance of colonial law was discussed in academic circles,[87] but was never judicially adopted. Non-statutory powers received a somewhat weak base of legitimacy, drawing on a functional basis, in the 1963 *El Saruji* case. Deciding upon the authority of the Minister of Religious Affairs

[84] *US v Curtiss-Wright*, 299 US 304 (1936). See, in the same vein, *US v Belmont*, 301 US 324 (1923); *US v Pink*, 315 US 203, 223–224 (1942).

[85] For additional analysis of the human rights constraint see text to n 122.

[86] Section 11 of the Law and Administration Ordinance of 1948 stipulated that 'the law which existed in Palestine on … 14th May 1948 … shall remain in force, insofar as there is nothing repugnant to this Ordinance or to other laws which may be enacted … and subject to other modifications as may result from the establishment of the State and its authorities'. Other relevant provisions in this Ordinance are section 12(a), declaring all privileges granted to the Crown or British officials and subjects to be null and void, and section 14, vesting all Royal powers in the Provisional Government, unless otherwise stipulated by Israeli statute. Further, under Article 46 of the Palestine Order in Council 1922–1947, which was formally repealed only in 1980, courts were required, in case of lacunae in the law, to decide in civil matters 'in conformity with the substance of the common law, and the doctrines of equity in force in England', subject to a local conditions proviso.

[87] B Akzin, 'The Prerogative in the State of Israel' (1950) 7 HaPraklit 566, 590; R Lapidoth, 'The Power to Sign International Agreements in the Name of the State of Israel' in N Feinberg (ed), *Studies in Public International Law in Memory of Sir Hersch Lauterpacht* (Magnes Press 1961) 210; A Rubinstein, 'The Prerogative in Israel' (1967) 23 HaPraklit 329, 465; A Rubinstein, *The Constitutional Law of the State of Israel* (Schocken 1969) 223–30 (in this first edition, extensive attention was granted to the prerogative and its possible legacy).

to appoint and fund a religious Muslim committee in the town of Acre in the absence of an enabling statute, the High Court of Justice ruled that

> in its activities, the Ministry of Religion does not act on the basis of an explicit statute, rather on the basis of the general governmental powers in the hands of the government and its ministries, within the confines of the national budget approved by the Knesset.[88]

Using a similar functional reasoning a few years later, the court ruled that the government was empowered to ratify international treaties, again despite the absence of legislative (or constitution-based) authorization. The court relied on canons of international law and on a functionalist ruling that 'the creation and existence of international relations … are a clear matter for the executive branch'.[89] Two Justices criticized arguments that based this power on Mandate law, emphasizing the independence of the State and its disassociation from the British constructs existing in this field. One of the justices opined that

> [I] do not believe that in the matter of the general and basic powers of government authorities, it is required or necessary to search for parallel powers in the hands of British or Mandate rulers from the pre-State era and rely on their legacy – this would be wrong.[90]

Formal treatment of the issue was introduced in 1968, in the Basic Law: The Government, a semi-constitutional statute that was later recognized judicially, with all other Basic Laws, as enjoying constitutional status.[91] The Basic Law includes a short provision that both allows and limits the invocation of non-statutory powers:

> The Government is competent to do in the name of the State, subject to any law, any act the doing of which is not enjoined by law upon another authority.[92]

[88] *El Saruji* (n 19) 191.

[89] CrimA 131/67 *Kamiar v The State of Israel*, 22(2) PD 85, 97 (per Justice Cohn).

[90] ibid, 97 (per Justice Cohn). See also ibid, 112 (Per Justice Landau).

[91] A few words about Basic Laws are necessary. In 1948, on independence of the State, no formal constitution was introduced, although a written constitution was part of the new State's credo and was also in the basis of international consensus, embodied in the 1947 UN partition decision. Two years after its inception, Israel postponed the idea of enacting a full formal written constitution. Instead, the Knesset decided to enact, piecemeal, Basic Laws that would eventually become chapters in the Constitution. The first basic law, related to the Knesset (the Israeli Parliament) was enacted in 1958. To date Israel has 11 Basic Laws, two of which incorporate some human rights and liberties. The Government received its Basic Law in 1968, 20 years after independence of the State. Between 1948 and 1968, the executive acted on the basis of scattered provisions found in different statutes. None of these referred to the invocation of non-statutory powers. The normative status of Basic Laws, until 1995, was akin to other statute-law pending later constitutionalization. Since the landmark decision of *Bank Ha-Mizrahi* and other decisions, Basic Laws are generally viewed as pertaining to the constitutional level: CA 6821/*93 United Mizrahi Bank v Migdal Cooperative Village*, PD 49(4) 221 (English translation at <www.court.gov.il>).

[92] This provision remains identical in all three versions of the Basic Law: The Government, enacted in 1968, 1992 and 2001 (numbered 29, 40 and 32, respectively). Reference relies on year of invocation or discussion of the section.

The provision was intentionally designed to provide a final and definite answer to the problem of non-statutory powers. No information on the inspiration for the drafting is available.[93] Since 1968, then, non-statutory executive powers are exercised under a formal source that seems to offer a structured solution.

As in the other studied systems, reliance on non-statutory powers in Israel is not a rarity. State funding discussed in *El-Saruji* is but one example. Several government ministries rely extensively on non-statutory powers. For example, the Ministry of Immigrant Absorption, the Ministry of Housing and the Ministry of Foreign Affairs, largely allocate their resources without any legislative mandate.[94]

Assessment of judicial treatment of the provision shows a gradual internalization of both the authorization to act and its restriction, but here, too, some weakening of the restrictions is evident. During its first two decades, the section was rarely relied upon and recognized only when transnational elements were involved: three decisions concerned disputes over religious sites, and one referred to section 28 as the source of the exercise of military power in the Occupied Territories, which did not rely on domestic statute-law.[95] Courts did not rely on the provision in the context of more mundane usages of non-statutory powers, such as those discussed in the pre-Basic Law *El-Saruji*. This changed in the early nineties: since then, courts have relied on the provision, recognizing the breadth of areas in which non-statutory powers are invoked.[96]

Alongside the recognition of these powers, the court has developed five constraints on their exercise. First, the residuality principle, central to the law of the royal prerogative, was traced to the proviso 'subject to any law'.[97] Yet the impact of the residuality constraint is limited. It has aided applicants only once, and then, in conjunction with the human rights constraint, discussed below. In some cases, the statute allegedly covering the subject matter was

[93] As the Minister of Justice declared in the Israeli Parliament during the first reading of the Bill: 'The experience of Israel and other nations shows that in allocation of functions and powers within the broad framework of political life, some areas may remain borderlike or constitute "no man's land". Until now, Israeli governments have solved such problem in the spirit of the unwritten English Constitution. A comprehensive statute must determine once and for all that these undefined areas are handed to the executive, since these are matters of execution.' 46 Divrei Ha-Knesset 2054. No information on the source, or process of the formulation of the provision can be found: both the debates in the Knesset plenary and the proceedings of the Knesset standing committee divulge nothing.

[94] I Zamir, *Administrative Power* (Nevo 1996) 334, 339–40.

[95] HCJ 222/68 *Nationalist Circles v Minister of Police* 24(2) PD 141; HCJ 109/70 *Coptic Patriarchate v Minister of Police* 25(1) PD 225; HCJ 302/72 *Hilou v Government of Israel* 27(2) PD 169, 176; HCJ 188/77 *Coptic Patriarchate v Government of Israel* 33(1) PD 225.

[96] Four of the post-1990 cases involved non-statutory subsidies, one referred to government action in absorption of new immigrants, and the other two discussed security issues and foreign relations.

[97] First clearly expounded in HCJ 2918/93 *Kiryat-Gat Municipality v State of Israel*, 47(5) PD 832. In the 2001 version of the Basic Law, the title of the provision was changed to 'residual powers', further reflecting the recognition of the centrality of this constraint.

narrowly construed, excluding the challenged action from its remit.[98] The court has also been ready, in more than one case concerned with a statute granting benefits and subsidies, to recognize the legality of supplementary benefits and subsidies *beyond* statute, as well as interim benefits granted before the entry into force of the statutory arrangement. Both types of programmes were recognized as 'parallel tracks' available in addition to the statute-based payments.[99] This more than echoes other systems' readiness to uphold action beyond the law as long as it does not contradict statute law.

The second limit has been read into the text of section 28, but draws on Israel's well-established judge-made 'principle of legality', under which action affecting a right or a liberty must be based on a statutory authority that explicitly authorizes interference with the right; general statutory delegation does not suffice.[100] In *Kiryat Gat*, a case in which a nationwide non-statutory subsidy scheme was challenged, the court interpreted the term 'law' to include judge-made law, thus introducing the principle of legality in this context. In this case, the court invalidated the subsidy scheme for blatantly discriminating between Jewish and Arab settlements, in the absence of a clear statutory authorization.[101] Since 1992, the principle is also constitutionally embedded in two basic laws protecting human rights, under which interference with a protected right must be, *inter alia*, made 'by law' or 'by regulation enacted by virtue of express authorisation in such law'.[102]

A third substantive constraint relies on the recently developed doctrine of 'primary arrangements', under which long-standing arrangements that are socially important, publicly debated, involve a high public expense, or otherwise substantially impact on the public sphere, cannot be sustained under the provision and require legislation.[103] However, the post-decision dynamics

[98] HCJ 5128/94 *Federman v Police Minister*, 48(5) PD 547 (dispatch of policemen to Haiti as part of International task force was not based on the Police Act, and pertained to the field of foreign affairs rather than internal security; hence, no residuality).

[99] HCJ 381/91 *Gross v Ministry of Education and Culture* 46(1) 53; HCJ 5062/97 *Israel Loss Adjusters Association v The State of Israel* 55(1) PD 181; HCJ 8600/04 *Shimoni v The Prime Minister* 59(5) PD 673.

[100] This rule was formulated early on, and remains one of the mainstays of Israeli administrative law. See HCJ 1/49 *Bejerano v Minister of Police* 2 PD 80; A Zysblat, 'Protecting Human Rights in Israel without a Written Constitution', in I Zamir and A Zysblat (eds), *Public Law in Israel* (Clarendon Press 1996) 47.

[101] *Kiryat Gat* (n 97).

[102] Basic Law: Freedom of Occupation, section 4; Basic Law: Human Dignity and Liberty, section 8. For post-1992 decisions see HCJ 5100/94 *Public Committee against Torture in Israel v The Prime Minister of Israel*, 53(4) PD 817 (action of Secret Service that included torture was not based on statute and was therefore *a priori* illegal); HCJ 11163/03 *Supreme Monitoring Committee for Arab Affairs in Israel v The Prime Minister* (27 February 2006) (assistance plan that discriminated between Jewish and Arab localities). English translations of both decisions at <www.court.gov.il>. The strict rule requiring explicit authorization has recently moved towards establishing a more relative rule, according to which the degree of detail required in authorizing statute depends on the context, and other aspects of the case. HCJ 6824/07 *Manaa v Israel Tax Authority* (20 December 2010). Still, a statutory authorization is required.

[103] HCJ 3267/97 *Rubinstein v Minister of Defense*, 52(5) PD 481, English translation at <www.court.gov.il>; *Supreme Monitoring Committee* (n 101).

of the two cases in which this rule was applied show weak promise: in our context, one non-statutory arrangement was replaced, after years of foot-dragging, by an open-ended empowering statute, which offers only nominal direction.[104]

Finally, two other constraints on the exercise of non-statutory powers limit actions to those 'administrative' in nature, precluding exercise of inherent judicial-type action; and public expenditure under such powers require a basis in the annual appropriation law. Neither has been central to the limitation of non-statutory powers.[105]

V. COMPARISON: A TEMPLATE FOR THE ANALYSIS OF CONVERGENCE/DIVERGENCE

> . . . the process of comparison proper starts only when the reports on the different legal systems have been completed.[106] (K Zweigert and H Kötz, 43)

For Zweigert and Kötz, the authors of the definitive work on comparative law, comparison begins with the juxtaposition of the different solutions found in country studies through an analysis of differences and similarities, and leads to a normative assessment of the 'best' solution or solutions. Unlike Zweigert and Kötz, I do not enter normative waters; I am concerned with developing the conceptual framework of comparison. I advance a nuanced blueprint for comparison under the convergence/divergence template, a central stream in comparative law study. Rather than merely note similarities and differences under the convergence/divergence discourse, analysts should be aware of two further distinctions: the distinction between functional and transplant-derived convergence, and, in public law, the contextual distinction between human-rights and institutional fields of action. These additional levels of comparison offer a nuanced framework that can better support analyses of both the nature of national arrangements and the reasons for their evolution on the ground. At the end of this part, I tentatively consider the reasons for the type of divergence found in this case study.

One caveat: two of the three solutions analysed in this article, the UK and the US, are 'ancestor systems'—members of a small group of legal systems that have inspired other, mostly newer, systems.[107] The findings may therefore not be indicative of the patterns found in other systems. Consider, for example, Günter Frankenberg's 'IKEA theory' of constitutional transfer, under which 'standardized constitutional items', stored in a sort of 'supermarket', are 'available, *prêt-à-porter*, for purchase and reassembly by constitutional makers

[104] *Supreme Monitoring Committee* (n 101).

[105] The first constraint drew on section 1 of the Basic Law: The Government, under which 'the Government is the executive authority of the State'. Both constraints were discussed in *Public Committee against Torture* and *Supreme Monitoring Committee* (n 101).

[106] n 21.

[107] For the concept see C Saunders, 'A Constitutional Culture in Transition' in M Wyrzykowski (ed), *Constitutional Cultures* (Institute of Public Affairs 2000) 37.

around the world'.[108] Following this image, the arrangements analysed in this article could in fact be the 'constitutional items' available for possible purchase and assembly by other systems. Therefore, a full consideration of cross-system influence requires the analysis of non-descendant systems, especially those that have no historical colonial link with an ancestor system. For example, the preservation of some form of the Royal Prerogative in Commonwealth countries is easy to explain as the outcome of the retention of the Crown; more to the point would be a study of constitutional monarchies that were never part of the British Empire. Only one of my studied systems, Israel, is a non-ancestor, post-colonial system, which rejected its British legacy; as a single example, the data cannot support a universal argument regarding the relatively limited transplantation processes in institutional-structural contexts.

Still, the three-system comparison to which this article is dedicated carries several benefits. I have chosen three dissimilar arrangements: the first is based on history; the second is the outcome of vague constitutional engineering; the third, an attempt to squarely address the issue. The emergence of similarity is, in itself, an interesting outcome that requires explanation. Further, the study offers insights on the types of items that can find themselves on the shelves of the law supermarket, ready to be picked and transplanted. Assuming that some of these items were not adopted by other systems—to the best of my knowledge, no other system has introduced an arrangement similar to the current Israeli formula—analysis of the reasons some arrangements have remained unique would contribute to the limited literature on this negative form of (non) transplantation. Finally, the three-system study offers sufficient ground for the conceptual analysis of the comparison stage, developed in this part.

A. Divergence or Convergence?

Comparison is concerned with identifying patterns of both similarity and diversity between compared units. The convergence thesis, central to comparative law scholarship, focuses on the similar, as in Zweigert and Kötz' claim that

> one can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation.[109]

[108] G Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 ICON 563. See also G Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer' in G Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar 2013) 1 (additional focus on the stage of re-contextualization, during which transferred items are adapted and reshaped, and on 'non-marketable items').

[109] Zweigert and Kötz (n 21) 39.

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Under this thesis, legal systems tend to offer functionally similar legal solutions to shared problems. The similarity is found at the law-in-action level; formal solutions are only the starting point.

A competing important group of comparatists argues that the convergence thesis is a dangerous myth that plays into the hands of politicians who wish to present so-called 'transition States' as partaking in the Westernisation game. Frankenberg offers a scathing critique of classical comparatists who embrace a sunny, but false, view of the globalization of constitutional law. One of his examples is the futile comparison of the regulation of abortion in China and various Western States, which is influenced by culture and politics.

Frankenberg's call for forsaking '[a]nalogies and presumptions of similarity' in favour of 'a rigorous experience of distance and difference'[110] is echoed in Legrand's argument that law is a cultural (that is, domestic) construct, and that the classical comparatist's 'inherence in his (domestic) law' renders comparison-as-harmonization impossible.[111] Here, comparative study is not rejected, but difference is prioritized.

My analysis in Part IV offers a good example of convergence. Starting out from entirely different points of departure, three executives—a president and two prime ministers—exercise a similar non-statutory core of powers, supported, or at least tolerated by their systems. The discourses are clearly different, and some variations are evident, but the similarities are notable: despite substantial structural differences, the evolution of each of the solutions has led, to a great extent, to the convergence of a vision of an office that retains both its dominance, legal and political, but also a degree of submission to parliament and to judicial review.

First, the three examined regimes, as evolved, have never completely prohibited the invocation of non-statutory powers, despite their shared adherence to the rule of law. The core subject-matters recognized as legitimately regulable under unilateral action, or at least tolerated through the absence of judicial interdiction, are shared: emergency/national security, police, and the formation and implementation of economic policy which involves the powers of the purse. Recognition of powers in these subject matters has relied on explicit constitution-type texts, as in the case of Israel, on well-established but unwritten tenets of the constitution, as in the UK, or on open-ended interpretable constitutional provisions, as in the US. Judicial doctrines, built on the basis of texts or beyond them, have further supported the legitimacy of these powers. These include judicial recognition of inherent

[110] G Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 HarvIntlLJ 411, 456. See also G Frankenberg, 'Stranger than Paradise: Identity & Politics in Comparative Law' (1997) UtahLRev 259.

[111] eg P Legrand, 'The Same and the Different' in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 240. On the debate in general see G Danneman, 'Comparative Law: Study of Similarities or Difference?' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 383.

powers, as in early US and Israeli decisions;[112] the US recognition of 'historical gloss';[113] creative interpretation of statutes to ensure that the challenged action escapes the residuality net, as in some Israeli cases;[114] and a general legitimation of action beyond statute, as opposed to action that contradicts statute.[115] Finally, deference doctrines and denial of review for non-justiciability have been employed to block challenges to the invocation of some similar non-statutory powers.[116]

Moving to the evolving constraints on the exercise of non-statutory powers, here, too, similarity can be discerned. Two constraints on the exercise of non-statutory powers seem to be shared: a doctrine of diluted or tempered residuality and a rule prohibiting action in human-rights contexts. The residuality principle has remained a key feature of the British prerogative since 1688; this mainstay of the British constitution also applies to so-called 'third source' powers.[117] Residuality is also central to Israel's written arrangement,[118] and is the cornerstone of *Youngstown*, the basis for the now-established US rule that the president must rely on either the constitution or statute to invoke enforceable powers, applied *inter alia* in *Hamdan*.[119]

Still, when intent on upholding powers despite the parallel existence of statute, the courts of these three systems have created bypasses that weaken the residuality constraint. Parallel action beyond statute is allowed virtually universally in Israel, as long as no individual rights are affected.[120] Further, some statutes have been interpreted very broadly, to authorize action that initially did not rely on legislation, or narrowly, in order to classify the challenged action as pertaining to a different subject matter.[121] The outcome, then, is a shared commitment to the primacy of statute-law, but a far from absolute one, which is overtaken when so expedient.

The human rights constraint is only impliedly shared. Originally, only Israeli courts squarely require that an interference with rights and liberties must be authorized by a detailed, explicit statutory authorization; under this constraint, non-statutory powers affecting rights cannot be the source of such action. None of the other systems studied in this article expressly recognize this constraint; for this reason, this aspect is not discussed in detail in the respective analyses of the other two systems. Indications for the existence of such an implied constraint can be found in both systems. In the US, evidence to the contrary does exist: in *Midwest Oil*, the court upheld the withdrawal of access and use of lands by presidential order; in the 1980s, the 'historical gloss' doctrine, expressed in congressional inaction and some implied recognition,

[112] For the US see *Curtiss-Wright* (n 84); for Israel see *El-Saruji* (n 19).
[113] Text to n 83.
[114] Text to n 98.
[115] For Israel see *Gross* and *Shimoni* (n 99); for the UK see *Northumbria* (n 27); for the US see *Youngstown* (n 76) (implied in Justice Jackson's second 'practical situation').
[116] eg text to n 79. For the UK see *Bancoult 2* (n 5).
[117] Text to n 40.
[118] Text to n 97.
[119] Text to n 73.
[120] Text to n 99.
[121] For the UK, see *Northumbria* (CA) (n 27); for Israel, see *Federman* (n 98).

was still found sufficient to authorize the nullifying previous freezing of Iranian assets.[122] Yet the American system cannot be blamed for marginalizing the commitment of the system as a whole to the protection of recognized rights; since *Hamdan*, anti-terrorism measures are all legislated, and administrations now recognize that absent legislative or constitutional authority, the President cannot invade private rights.[123]

In the UK, historically recognized prerogative powers can affect the rights of individuals, as in the case of the exercise of war powers and the issuance of passports. In *Entick v Carrington* (1765), Lord Camden famously ruled that the Earl of Halifax's messengers held no power to search and seize personal papers in the absence of law: 'if this is law it would be found in our books, but no such law ever existed in this country'.[124] However, this decision, one of the mainstays of British constitutionalism, did not address prerogative powers, which were not affected by this ruling. Further, British governments were not enjoined from interfering with unrecognized rights, protected in other constitutional systems, as long as no statute prohibited such interference, as in the case of privacy, a right recognized only in 2000.[125]

This is no longer the case. Domestic law was transformed after the entry into force of the Human Rights Act 1998, which incorporated substantive parts of the European Convention of Human Right into domestic law, and now offers British courts distinct mechanisms of review of statutes when a breach of Convention rights is found.[126]

Most rights protected under the convention can be compromised if the conditions set in 'limitation clauses' are met. One of the conditions set in these clauses is that the interference be 'in accordance with the law' or 'in conformity with the law'.[127] These interchangeable terms[128] could be read as requiring legislation for any breach of a protected right, but the European Court of Human Rights has advanced a different, looser interpretation. The 'law',

[122] *Dames and Moore* (n 83).

[123] For an earlier call for the adoption of this constraint see Monaghan (n 57).

[124] 19 How. St. Tr. 1030, 2 Wils KB 275, p 807 [1765].

[125] *Douglas v Hello!* [2001] QB 967 (CA), decided a few weeks after the entry into force of the Human Rights Act. Note, also, that the 'principle of legality' expounded in *Simms* (2000), according to which 'fundamental rights cannot be overridden by general or ambiguous words' is a rule of statutory interpretation, and does not directly affect non-statutory powers. At the time of the decision, the HRA had been legislated and was just to enter into force; the rule was about to change, as acknowledged in the decision and explained below. *R* v *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

[126] These include the making of a declaration of incompatibility (section 4), after which several results are possible, from government inaction to executive amendment of the incompatible provision by an order (section 10), and an authorization to liberally interpret statutes, to a certain extent against their text, to realign them as confirming with the protection of the rights under the ECHR (section 3).

[127] eg art 8.2, Right to Respect for Private and Family Life, provides that '[t]here shall be no interference by a public authority with the exercise of this right except such as is *in accordance with the law* . . .' (italics added).

[128] *Silver v United Kingdom* (1983) 5 EHRR 347, 371.

under the Court's jurisprudence, must be sufficiently clear and accessible,[129] but this does not mean that it must be primary legislation. *Inter alia*, the Court has recognized, in suitable cases, common-law contempt of court rules and international communications agreements.[130] Still, some form of explicit authorization of a legal nature must be found.

Israel's additional constraint, under which primary arrangements are to be regulated under statute-law, has no equivalent in the other studied systems; applied only twice in its mother system, its actual force is challenged by the post-decision dynamics of these two affairs.[131]

B. Two Further Distinctions: Functional/ Transplant-Derived Convergence in a Context-Based Framework

The juxtaposition of several solutions discussed in this article offers a pattern of convergence, but proper understanding of this convergence requires further analysis. Similarity on-the-ground can be the outcome of two parallel processes. A system may knowingly adopt a foreign legal construct, but similarity may also be the outcome of separate evolutionary processes, in the absence of trans-border influence. Advocates of transplantation obviously view the former as dominant, yet the coupling of convergence with transplantation is too easily made.

The study of legal transplants and the adoption of foreign law and legal constructs by legal systems worldwide has become one of the most influential streams of the comparative law discipline.[132] The early literature revolved around a controversy between 'transferists' and 'culturalists'.[133] Heading the 'transferist' camp, Alan Watson celebrated the pervasiveness of legal transplants, a universal process repeatedly occurring since Roman times, irrespective of the possible 'fit' between the donor and receiver.[134] In the opposing camp, substantializing his theory of divergence, Pierre Legrand argued that transplantation is impossible, due to ingrained differences between

[129] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271 ('the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct').

[130] *Sunday Times*, ibid; *Groppera Radio v Switzerland* (1990) 12 EHRR 321

[131] Text to n 103.

[132] A Watson, *Legal Transplants: An Approach to Comparative Law* (1974). A large number of synonyms, such as 'borrowing' and 'cross-fertilization', are interchangeably used; for recent lists see eg V Perju, 'Constitutional Transplants, Borrowing, and Migration' in *Oxford Handbook* (n 111) 1304, 1306; M Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?' (2013) ICLQ 1, 3–4. The term 'foreign law' connotes all legal sources that originate beyond the national borders and are not directly or indirectly applicable; this excludes reliance on European law in EU countries and international law when considered binding.

[133] For the terms see N Foster, 'Transmigration and Transferability of Commercial Law in a Globalized World' in A Harding and E Örücü (eds), *Comparative Law in the 21st Century* (Kluwer Law 2002) 55.

[134] Watson, *Legal Transplants* (n 132). See also W Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants* (1995) 43 AmJCompL 489.

the systems involved. A legal rule is 'necessarily an incorporative cultural form', and its meaning is found through essentially subjective interpretative processes, which are historically and culturally conditioned. Therefore, transplants do not occur at all: the product of moving a rule elsewhere is always something else, 'not the same rule'.[135]

The general tone of the literature is a shared wary recognition of transplantation processes: many authors reject both the sunny aspects of Watson's world of ever-flourishing transplants and Legrand's rejection of that vision. Yet much of the general transplant literature is not contextual: it rarely distinguishes between fields or sub-fields of law.[136]

Celebrating the rise of global liberal democracy, many comparative constitutional studies focus on the judicial protection of rights under Bills of Rights. Public law comparatists usually point to the movement of the written constitution template between Western States, and from mature to new democracies, and at the global rise of judicial power and judicial review, both main elements of constitutionalism.[137] But are these insights valid in the context of the so-called minutiae of regime structures? Can the same pattern be found in institutional-structural contexts, and, particularly, in the context of executive powers?

Research in this direction is limited. Scholars of comparative politics focus on the global diffusion of the two distinct templates—presidentialism and parliamentarism and their hybrids—paying limited attention to the wedding of these two templates;[138] none are concerned with non-statutory powers and their transplantation. Comparative law studies of the executive branch are scarce.[139] This article thus enters relatively uncharted territory.

[135] P Legrand, 'What "Legal Transplants"'? in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 55, 58, 59, 61; P Legrand, 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52. See also O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1. For recent overviews see M Cohn, 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom' (2010) 58 AJCL 583; Chen-Wishart (n 132) 1–4.

[136] For the exception, see T Groppi and MC Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

[137] For examples of the rich literature see B Ackerman, 'The Rise of World Constitutionalism' (1997) 83 VaLRev 771; A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000); R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006); V Jackson, *Constitutional Engagement in a Transnational Era* (OUP 2010); DS Law and M Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 CLR 1163; Frankenberg *Order from Transfer* (n 108).

[138] See eg A Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press 1984) 68–74; JJ Linz, 'Presidential or Parliamentary Democracy: Does it Make a Difference?' in JJ Linz and A Valenzuela (eds), *The Failure of Presidential Democracy* (Johns Hopkins University Press 1994) vol 2, 3, 6. But see M Foley, *The British Presidency* (Manchester University Press 2000); G Allen, *The Last Prime Minister: Being Honest about the U.K. Presidency* (Politico 2002); R Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 AJCL 531.

[139] One notable edited comparison is P Craig and A Tomkins (eds), *The Executive and Public Law* (OUP 2006) (surveying 11 systems).

Searches for evidence of transplants should focus on two stages: design and evolution through interpretation and application. Transplantation during the design stage, either with the creation of a constitution or in a subsequent amendment, occurs when its designers are positively or negatively inspired by foreign designs. Post-design interpretation (by courts) and application (by governments) further shape the contours of the framework, and may be similarly influenced. During all stages, transplantation can be overt, expressed in explanatory documents and judicial decisions, or covert, in the absence of open evidence of reliance on foreign law.[140] In the context of this article, I assess the existence of transplantation by considering accessible and formal evidence; further study of the secret life of transplantations is required for a complete assessment.

I found no evidence of overt trans-border inspiration in this case study. In fact, a different pattern is evident here. The designers of the constitutional arrangements studied in this article were intent on rejecting previous *domestic* arrangements, considered as failed or lacking. Direct rejection of an external solution may be imputed to the Founding Fathers, committed to reject all notions monarchical. Yet even here, the US Convention's formal mandate was originally fuelled by the failure of the former domestic structure.[141] Israel and the UK offer different patterns, but in both, no direct external influence at the design stage is discernible. The British evolving law of the prerogative was, and remains, an innovation. As for Israel, the enaction of the Basic Law: The Government in 1968 was not part of a regime change; rather, the Basic Law aimed to codify and rationalize the law of the executive. The provision delineating executive powers was designed to fill a lacuna, which had been judicially filled in the early sixties by vague reference to 'general government powers'.[142] Further down the constitutional history of the State, this lacuna emerged once the courts had rejected the adoption of the English prerogative; the design, then, was fuelled by an aversion to the prerogative, which had been removed from the constitutional framework.[143]

Moving to the evolution stage, explicit evidence of transplantation could have been found in domestic courts' reliance on foreign sources.[144] Studies of judicial citation of foreign law have not been directly linked with the transplantation literature; many are part of the growing body of empirical research of the judiciary. Yet there is an obvious affinity between the study of citation practices and transplantation studies: the more common the citation of foreign sources, the higher the incidence of transplantation, at least on the record.

[140] On 'implicit' reliance see Groppi and Ponthoreau (n 136) 6–7, 426–8.
[141] Text to n 48. [142] Text to n 88. [143] Text to n 87.
[144] Other types of evidence of transplantation may be useful for this assessment, for example explanatory notes appended to policy decisions or protocols of parliamentary proceedings. Space constraints do not permit me to expand the analysis in these directions.

Consideration of this form of transplantation in the context of this article requires a comparison between the general citation practice in each of the studied systems and the particular pattern found in decisions concerned with non-statutory executive powers. A full appraisal of this aspect of transplantation requires sufficient quantitative-empirical data on the general systemic tendencies of foreign-source citation. Groppi and Ponthoreau's recent edited book offers a comparison of reliance on foreign precedents by the constitutional courts of 16 legal systems, distinguishing between national courts that often cite foreign precedents and those that rarely do so. In conclusion, the book offers an interesting insight: all studied constitutional courts cite foreign citations less frequently in institutional issues; judicial opinions on human-rights issues tend to be more reliant on foreign law.[145]

Two of the systems analysed here, those of Israel and the US, are included in Groppi and Ponthoreau's collection, but the country analyses are general and do not offer direct evidence in the context of executive powers. I build on these analyses and on the few additional quantitative studies of citation practices in these systems, by comparing the reliance patterns in the context of non-statutory powers with the limited general findings.

The question of the constitutional propriety of citing foreign sources has been hotly debated in the United States,[146] but I am less concerned here with the normative aspects of this practice. US-centred empirical studies of judicial citation practices that have isolated foreign sources from domestic ones reach one conclusion: citation of foreign jurisprudence in US courts is negligible.[147] Only two of the key Supreme Court decisions on presidential unilateral power cite foreign sources; in both, the contexts have no bearing on the legitimacy or source of non-statutory powers.[148]

[145] Groppi and Ponthoreau (n 136). See generally ibid 416. In nine of the eleven analyzed systems, the majority of studied decisions that cited foreign sources were concerned with human rights issues rather than institutional issues, inter alia 100% of such decisions in Russia, 97% in Austria, 78% in Germany, 65% in Israel, and 55% in Japan. Ibid 368, 222, 245, 144, 283–89, respectively. Data on this pattern in India was unavailable, and Australia was excluded due to the absence of a written bill of rights.

[146] The Supreme Court Justices' conflicting positions are best exemplified in the opinions of Justices Kennedy and Scalia in *Lawrence v Texas*, 539 US 558 (2003), 572–73, 576–77 (per Justice Kennedy), 598 (per Justice Scalia) (2003), and in *Roper v Simmons*, 543 US 551 (2005), 575–78 (per Justice Kennedy), 622–28 (per Justice Scalia). For recent contributions that also survey the field see Jackson (n 137); M Rosenfeld, 'Comparative Constitutional Analysis in United States Adjudication and Scholarship' in *Oxford Handbook* (n 111) 38; G Halmai, 'The Use of Foreign Law in Constitutional Interpretation' in *Oxford Handbook* (n 111) 1328.

[147] WH Manz, 'Citations in Supreme Court Opinions and Briefs: A Comparative Study' (2002) 94 LawLibrJ 268, 270 (0.2 per cent of the decisions delivered in 1996); A Sperti, 'United States of America: First Cautious Attempts of Judicial Use of Foreign Precedents in the Supreme Court Jurisprudence' in Groppi and Ponthoreau (n 136) 393. For empirical studies that have not isolated foreign sources from domestic ones see WM Landes and RA Posner, 'Legal Precedent: A Theoretical and Empirical Analysis' (1976) 19 L&Econ 249; FB Cross *et al.*, 'Citations in the Supreme Court: An Empirical Study of Their Use and Significance' (2010) UIllLRev 490 (2010).

[148] For my purposes, the key decisions are *Midwest Oil* (n 18); *Curtiss-Wright* (n 84), *Youngstown* (n 69); Dames and Moore (n 83) and *Hamdan* (n 62). The sole citation of a foreign

The general citation practices in Israel are materially different. Two large-scale quantitative studies of thousands of Supreme Court decisions show a relatively high reliance on foreign precedents.[149] Against this pattern, eight of the thirteen Israeli decisions cited in this article that address the invocation of non-statutory government powers contain citations of foreign sources, but with the exception of one case, none of these foreign precedents are concerned at all with the source, legitimacy or nature of such powers. In *Kiryat-Gat*, Justice Goldberg curtly cited *Youngstown* to support his argument for the application of the residuality principle.[150] In all other decisions, citations support a variety of issues, from police powers to the political questions doctrine. Some of these decisions are laden with references to foreign jurisprudence; the silence in the context of the legitimacy of the Israeli solution is especially telling.[151]

British large-scale quantitative study of citation practices is still lacking. In an admittedly small sample of cases concerned with the right to liberty and fair trial in the context of anti-terrorism measures, Ian Cram finds a recurring pattern of reliance on foreign sources. This indication of citation practices in a distinct human-rights context is currently the best available comparator.[152] By comparison, citation of foreign sources in key non-statutory powers decisions is limited: three of the nine decisions cited in this article contain references to foreign case-law, but once again, none of these sources are concerned with the source and nature of the challenged executive power.[153]

source in *Youngstown* is Justice Jackson's, who refers to William Holdsworth's comment on the powers of legislation by proclamation when in the hands of the Tudors. *Youngstown* (n 69) 876, n 16. In *Hamdan*, Justice Steven's, and other Justices' reference to the Nuremberg trials is part of the judicial reasoning about the nature of conspiracy as a war crime. *Hamdan* (n 62), 2784–5.

[149] The first study, focusing on judicial output between 1948 and 1994, shows that 14 per cent of all case citations in public law decisions (constitutional and administrative) were foreign. Y Shachar, R Harris and M Gross, 'Citation Practices of Israel's Supreme Court: Quantitative Analysis' (1996) 27 Mishpatim 119, 208. The second, assessing decisions delivered between 1994 and 2010, distinguishes between constitutional issues and other public law issues; the average of constitutional cases citing foreign precedent is high, no less than 28 per cent. S Navot, 'Israel: Creating a Constitution—The Use of Foreign Precedents by the Supreme Court' (1994–2010) in Groppi and Pontoreau (n 136), 129. 'Constitutional cases' were narrowly defined, excluding for example local elections and extradition; in these and other contexts, such as criminal procedure and emergency powers, only cases found to be 'essentially constitutional' were included. ibid, 140–1.

[150] *Kiryat-Gat* (n 97) 844.

[151] For example, in *Hilou* (n 95), a case concerned with the legitimacy of seizure of lands in the occupied territories, the court identified section 29 as the domestic authorization for the deployment of the military in the territories; this part of the decision contains no foreign references. No less than seven decisions, one British and the others from the US, are cited to support the principles of judicial deference and justiciability. The British cited decision, *Chandler v DPP* [1964] AC 763, was originally linked with the prerogative, but this aspect was not noted.

[152] I Cram, 'Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases' 68 CLJ 118 (2009).

[153] The earliest, *Burmah Oil* (n 27) contains extensive analysis of foreign law, mainly from the US. Twenty of its 75 pages cite foreign law, ten of which are fully dedicated to analyses of

As a final test of the extent of reliance on foreign precedents this field, I consider the number of times key US and UK non-statutory powers decisions were cited in the examined systems without limiting the search to decisions directly concerned with non-statutory powers.[154] No Federal US court has ever cited any of the key decisions delivered in the other systems.[155] British courts cited *Dames & Moore* in one decision and *Hamdan* in five, but all references are part of the factual background and are not linked with the judicial reasoning over challenges to domestic government action.[156] *De Keyser* was cited six times by the Supreme Court of Israel, but only in the context of the law of confiscation.[157] The Israeli Supreme Court cited *GCHQ* in two decisions, and *Youngstown* in four; only one citation was used to support the court's ruling on the proper extent of non-statutory executive powers.[158]

It would seem, then, that in the constitutional systems analysed in this article, the design and evolution of the distinct solutions to this shared problem show virtually no evidence of overt transplantation. Whether these findings reflect a global pattern, which challenges the discourse of world constitutionalism at least in structural-institutional contexts, requires further comparative study.

C. Assessing Functional Convergence

How can convergence, arrived at in the virtual absence of cross-border transplantation be explained in this case, and beyond? 'Ancestor' systems may have created their respective solutions independently, but should the dearth of explicit evidence of external influence during their evolution stages be imputed to their 'ancestor' status? Why do Israeli courts, operating in a non-ancestor system, show a similar marginalization of foreign law in this context, contrary to their general tendency to extensively rely on foreign sources in other constitutional matters?

American precedents, but the focus is limited to one question: the right of property owners for compensation of property destroyed during war. The analysis contains no reference to questions of legitimacy or authorization. A similar pattern exists in *Bancoult 2* (n 5) (comparison of colonial and ex-colonial constitutions).

[154] For the US decisions see n 148; the UK decisions are *De Keyser* (n 40), *GCHQ* (n 44) and *Bancoult 2* (n 5).

[155] Westlaw search, 4 May 2014.

[156] *Dames and Moore* (n 83), cited in *Dallal v Bank Mellat* [1986] 1 QB 441 (application for recognition of foreign arbitral tribunal; US decision cited as the basis for the recognition of the agreement between Iran and the US). *Hamdan* was cited five times in cases involving applicants held by US authorities under their anti-terrorism law; none of the decisions cites *Hamdan* as support for the challenge of domestic action. Westlaw UK search, 4 May 2014.

[157] In comparison, the Israel Supreme Court has cited *Brown v Board of Education* and *Baker v Carr*, as support to decisions on non-discrimination and justiciability, 12 and 11 times, respectively. Nevo search, 4 May 2014.

[158] In *Kiryat Gat* (n 97) 844, *Youngstown* was briefly cited to support the court's adoption of the residuality rule. No British decision was cited in this context, and the textual support for this rule was more decisive.

The relative similarity of the contours of non-statutory executive powers in the three Western systems can be tentatively explained by their shared democratic ethos and the generally similar socio-economic climates. At the meta-level of the nature of these polities as democratic States, convergence can well be described as transplant-derived. The adherence to the rule of law, the primacy of individual liberty, and the establishment of some form of separation of powers have migrated from the ancestor democracies, England and the US, to Israel, among many nations. This shared, if vague, ethos has shaped public law in all democracies. Those countries also share, on a same general level, social and political realities that directly impact on the extent of executive powers. The separation of powers ideal infers subjection of the executive branch to statute, but the delineation of the powers of central government rests on an ingrained tension between the need to grant power to the government and the dangers of abuse of the granted power. Thus, strong forces supporting the enhancement of power, briefly addressed in Part II, compete with legality arguments, and have promoted the adoption, formal or de facto, of doctrines that uphold some of these powers, or at least doctrines of deference and non-intervention. Eventually, non-statutory powers are likely to be invoked in contexts that render them socially or politically expedient. But why is transnational transplantation missing in this institutional aspect of constitutional law?

Groppi and Pontoreau's distinction between overt reliance on foreign sources in human-rights and in institutional issues is an important starting point. The editors of this collection offer two explanations for the relative prevalence of foreign citation in human-rights contexts. First, similarities of constitutional bills of rights, which indicate transplantation at the design stage, enhance the tendency to consider foreign systems. This reason links with the second explanation, which I find stronger. The protection of human rights by law is essentially universal: Human rights treaties and other rules of international humanitarian law apply across borders as well as domestically.[159]

Yet Groppi and Ponthoreau do not explain the lower incidence of visible cross-border influence in institutional-structural elements. Some of the reasons for the emergence of this pattern may be gleaned from general arguments that resist convergence in constitutional law, succinctly framed, but not followed as a call for rejection of comparison, by Professor Saunders:

> Constitutional law … is deeply embedded in the politics of the polity; derives authority, theoretically and in some cases practically, from the support of the people; may be the product of a long and distinctive history; and may in this case

[159] Indeed, the transborder nature of human-rights law cannot be contested, and can promote transplantation for two contradicting reasons. In systems intent on protecting transnational human rights rules, reliance on foreign law signals the system's participation in the global order; in systems that are reticent to fully embrace these rules, but are obligated to do so under their international commitment, overt transplantation can constitute an internally-directed message that the adoption of these rules is entirely the result of foreign pressure.

> have developed organically over time as an integrated, interdependent constitutional system of which the legal system itself is part.[160]

This argument is strongest in the context of structural-institutional matters that pertain to the sovereignty of the nation, as in the case of executive powers. Courts deciding in such areas do not only settle disagreements that have reached the court; their output signals the unity of the State and its uniqueness as a separate and independent structural entity. I argue that the closer the issue set before constitution designers and courts to the core structural elements of the constitution, as in the issue studied in this article, the structure of executive power, the more likely the absence of development of domestic law by relying on other systems, unless strong external political pressure unsettles internal evolution. Development of this argument and assessment of its force in new democracies are relegated to further research.

VI. CONCLUSION

The exercise of unilateral, non-statutory executive powers in a democratic society directly challenges the basic democratic principles that justify exercise of force in the social and economic spheres. Two central values, representation and deliberation, are compromised. We may agree or disagree with the temporary denial of statutory rights of access and use oil-rich public lands due to the depletion of natural sources, with the suspension of claims of US nationals against Iran as part of an agreement to free the US hostages, with the subjection of government contractors to non-discrimination policies, or with the indefinite detention of suspected terrorists.[161] But, fundamentally, in these cases, the interests of individuals were affected without legislative authorization: in the first example, against its authorization, in the third, against the background of the inability to pass similar policies in Congress, and in all the above examples, due to the convenience of reliance on this nebulous source of power.

Despite the evident constitutional problem, this article shows that such powers have long pedigrees and are well-embedded in the constitutional practice of at least three Western democracies. The incompleteness of law, supplemented by the political expediency of reliance on non-statutory rules—especially when the executive is challenged by a relatively hostile legislature—virtually guarantees their use. Three different arrangements have contained such powers, using a variety of mechanisms, from pure history, as in the UK, through an explicit authorization in a constitution-type measure, as in Israel.

I have also shown that the systems share, to a degree, two central constraints, the first subjecting non-statutory powers to statute under a residuality rule, the

[160] C Saunders, 'Comparative Method and Constitutional Law' in Sung Nak-in (ed), *Constitutionalism and Constitutional Adjudication in Asia* (Seoul National University 2005) 575.

[161] Decided, respectively, in *Midwest Oil* (n 18), *Dames and Moore* (n 83), and cases cited at n 70, and *Hamdan* (n 62).

second constraining their exercise in human-rights contexts. Yet, in all these systems, these constraints have been judicially diluted, either actively, by creating doctrines that uphold some of these powers, or passively, by refusing to review the decision-making process.

The picture of functional convergence-in-action, drawn in Part V, presents an opportunity to reconsider visions of the global diffusion of constitutionalism. Most diffusion analyses in constitutional law are concerned with the adoption of human-rights protection through judicial review under a written constitution. Yet in the structural-institutional context analysed in this article, there is no direct evidence that this convergence is the result of conscious decisions to emulate or even reject foreign constructs. Further, little evidence of cross-country citations by courts concerned with the nature and extent of non-statutory powers was traced. The recently published comparison between the citation practices of 16 different systems, which finds less reliance on foreign law in institutional contexts, supports my findings.[162]

Since two of the three examined solutions were adopted by ancestor systems, one could argue that the lack of transnational influence may be indicative of the protean nature of such systems, not of a general global trend. For a well-rounded analysis of the global element in structural issues, further study of so-called secondary systems is required. For example, presidential systems influenced by the US may have adopted US-type non-statutory arrangements.

Whether global or simply typical to ancestor systems, the absence of transnational influence in the context studied in this article can be tentatively explained in several ways. First, transplantation of the negative variety, that is, rejection of foreign constructs, cannot be ruled out simply due to the absence of open evidence. Transplantation could have occurred covertly during the design process. The study of legislative history and other secondary sources is therefore required to fully assess the true influence of foreign sources.

Beyond this, the findings assert the distinction between human-rights and institutional-structural aspects of constitutional law. While the globalization of the protection of human rights cannot be disputed, international law is less concerned with institutional aspects, and for a reason. Structural constructs are often left to States, since they constitute key symbols of national identity and are influenced by domestic politics and climates. In this context, then, the arguments of the culturalist, divergence-focused camp may be correct. Internal politics, in addition to history and culture, may be influential to the development of certain fields, much more than internal and external pressures to go global. The evolution of non-statutory powers in the three studied systems supports this argument. Further study of this, and other institutional-structural fields such as federalism and parliamentary immunity, is required to fully assess its force.

[162] Groppi and Ponthoreau (n 136).