"Medieval institutions and god-like technology": rescuing the *Carltona* doctrine from uncertainty and irrelevance in the digital age

The American sociobiologist Edward O. Wilson has neatly summed up the problem facing lawyers in the digital age:

> "The real problem of humanity is the following: we have palaeolithic emotions; medieval institutions; and godlike technology."[1]

Our medieval institutions are of course regulated by public law, which is "as much concerned with the protection and validation of good administration as it is with controlling abuses of power."[2] The *Carltona* doctrine performs precisely this function. It provides that:

> "the functions which are given to ministers… [are] so multifarious that no Minister could ever personally attend to them… The duties imposed upon Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department. Public business could not be carried on if that were not the case."[3]

In this essay, I will argue that the *Carltona* doctrine, first articulated 77 years ago, is now dangerously uncertain and at risk of becoming irrelevant. Uncertain, because of the Supreme Court's reformulation of the doctrine in *R v Adams (Northern Ireland)*,[4] which

[1] Quoted in John Lanchester, 'Outsmarted by Our Smartphones' *The Sunday Times* (London, 27 September 2020) Magazine 11.
[2] Stephen Sedley, *Lions under the Throne: Essays on the History of English Public Law* (CUP 2015) 9.
[3] *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560 (CA) 563.

may end up inducing decision-making paralysis in some parts of the Civil Service. And at risk of irrelevance because, as governments seek to maximise the benefits of artificial intelligence for making effective decisions, the doctrine is incapable of managing the problems which will arise when decisions taken in the name of the Secretary of State are made by, or with the assistance of, algorithms rather than humans.

Background to the doctrine

There are several aspects of the *Carltona* doctrine as it stood prior to the decision in *Adams* which are relevant to what follows.

First, the doctrine does not involve Ministers delegating their powers: rather, officials act as the "*alter ego*"[5] of the Secretary of State (SoS) such that "a decision made on behalf of a Minister by one of his officials is constitutionally the decision of the Minister himself."[6] As such, the public law requirements on delegation of powers (including the requirement that "the [degree of supervisory] control preserved...must be close enough for the decision to be identifiable as that of the delegating authority"[7]) do not apply. The constitutionally responsible SoS acts through his official.

Second, prior to *Adams*, the courts recognised that, absent express statutory language to the contrary, the doctrine would generally apply:

[4] [2020] UKSC 19, [2020] 1 WLR 2077. Mr Adams successfully argued that the Interim Custody Order (ICO) under which he was interned in Northern Ireland in 1973 was unlawful because it was not signed personally by the Secretary of State.
[5] *Nelms v Roe* [1970] 1 WLR 4 (QB), 8 (Lord Parker CJ).
[6] *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2015] AC 384, [49] (Lord Reed SCJ).
[7] Catherine Donnelly and Ivan Hare (eds), *De Smith's Principles of Judicial Review* (2nd edn, Sweet & Maxwell 2020) para 5-155.

> "It is well recognised that when a statute places a duty on a Minister it may generally be exercised by a member of his department for whom he accepts responsibility: this is the *Carltona* principle. Parliament can of course limit the Minister's power to devolve or delegate the decision and require him to exercise it in person".[8]

There is clear evidence that this doctrine broadly reflects Parliamentary practice: Professor Richard Ekins and Sir Stephen Laws have identified a range of statutes where Parliament has specifically limited the class of persons who may act on the SoS's behalf, "confirm[ing] the default application of the principle."[9]

Third, even in cases where the exercise of Ministers' powers had a serious impact on those affected, such as decisions to wind up a company[10] or to issue notices of deportation,[11] the courts generally held that the seriousness of the subject matter was not determinative of whether a decision could be devolved to officials. As the Court of Appeal put it in *R v Skinner,* although a "vitally important matter might well have occupied the Minister's personal attention... there is in principle no obligation upon the Minister to give it his personal attention."[12]

Against this background, the Court of Appeal in Northern Ireland set out a more open-ended approach to the doctrine in *McCafferty's Application.*[13] Taking as his starting point the principle that "it is to be implied that the intention of Parliament is to

[8] *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254, 303 (Lord Griffiths).
[9] Richard Ekins and Stephen Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange 2020) 41.
[10] *Re Golden Chemical Products Ltd* [1976] Ch 300.
[11] *Oladehinde* (n 8).
[12] *R v Skinner* [1968] 2 QB 700 (CA), 709 (Widgery LJ).
[13] *Re an application for writ of habeas corpus by Terence McCafferty* [2009] NICA 59.

permit the *Carltona* principle to apply", Coughlin LJ set out a number of "implied factors to be considered" when deciding whether or not the doctrine applied in a particular case.[14] As we shall see, this "open-ended" approach was adopted wholesale in *Adams*, giving rise to some acute practical problems.

1) The trouble with *Adams*

In *Adams*, Lord Kerr held that, despite Parliament's willingness to displace the *Carltona* doctrine with express statutory language on occasion, "that does not amount... to the creation of a presumption in law that the principle must be taken to apply unless it has been removed by express statutory language."[15] He disposed with the case on the basis that Parliament clearly intended that Interim Custody Orders of the kind used to intern Mr Adams could only be approved personally by the SoS,[16] and that this would not have involved imposing an impossible burden upon him.[17] However, Lord Kerr then went on to set out (*obiter*) his "provisional view" on the application of the doctrine more generally, calling for

> "an open-ended examination of the factors identified by Coghlin LJ in *McCafferty*, namely, the framework of the legislation, the language of pertinent provisions in the legislation and the 'importance of the subject matter', in other words, the gravity of the consequences flowing from the exercise of the power, rather than the application of a presumption."[18]

[14] *McCafferty* (n 13), [17] (Coughlin LJ).
[15] *Adams* (n 4), [25] (Lord Kerr).
[16] *Adams* (n 4), [37] (Lord Kerr).
[17] *Adams* (n 4), [39] (Lord Kerr).

Whilst his Lordship characterised the process as "a matter of textual analysis", this three-fold test actually includes a crucially important policy consideration: are the consequences of the decision so serious that, absent express words or necessary implication to the contrary, the decision should only be taken personally by the SoS? In the absence of any indication in either the legislative framework or the language of the statute that Parliament intended to require a decision to be taken personally by the SoS, the application of the *Carltona* doctrine may still be displaced if, in the court's view, the consequences arising from the decision are of sufficient gravity. This presents two serious problems for officials, who will doubtless be keen to ensure that their decisions cannot be overturned on judicial review on the basis that they unlawfully exceeded the limits of *Carltona* devolution.

First, how will officials identify the issues which are sufficiently serious that a decision will need to be taken personally by the SoS? Cases decided prior to *Adams* have generally applied Lord Kerr's textual analysis, but not his "seriousness" test. For example, it has been previously been held that a SoS should have taken a decision personally when deciding to intern a suspect in wartime,[19] but not when deciding the tariff period for life prisoners.[20] If decisions on similar facts were challenged today, would the "seriousness" test affect the result? The answer might be that decisions involving the right to liberty ought always to be taken personally by the SoS.[21] But what of tasks such as the certification of a breathalyser (held in *Skinner* to engage *Carltona*

[18] *Adams* (n 4), [26] (Lord Kerr).
[19] *Liversidge v Anderson* [1942] AC 206 (HL).
[20] *R v Secretary of State for the Home Department ex p Doody* [1993] QB 157 (CA), affd [1994] 1 AC 531.
[21] Neil Parpworth, 'Deprivation of Liberty and the Carltona Principle: *R v Adams* [2020] UKSC 19' (2020) J Crim L (forthcoming) <https://doi.org/10.1177/0022018320946886> accessed 27 September 2020.

and not require a personal decision) which, if incorrectly calibrated, might result in a wrongful conviction and imprisonment for up to six months[22] (or set a drunken motorist loose on the roads)? And what of other categories of decision which have a serious impact on the person affected, such as reviewing the decision to cancel a British citizen's passport on the grounds of national security,[23] or issuing 'notices of letting to a disqualified person' which result in a tenant being evicted from their home?[24] Absent an obvious devolution to officials in the relevant statute, must the SoS now consider all of these issues personally unless, per Lord Kerr, this would impose an impossible burden upon him?[25] Brightman J's concern in *Re Golden Chemical Products Ltd* that officials might be left grappling with an "impossibly vague" policy test, "groping in a perpetual twilight, except at the extremes of midnight and midday",[26] has become a reality.

Second, all of this legal uncertainty may generate decision-making inertia. David Lock QC has suggested that there will be "a great deal of head-scratching within Whitehall and some nervousness as to whether existing and well established practices are likely to be exposed if subject to judicial review challenge."[27] Lord Kerr's three-fold test is all very well when applied in the cold light of judicial review, but it is of no assistance to an official faced with an urgent, high-risk decision: are they empowered to act on behalf of their Minister, or not? The consequence of this will be decisions "drifting" upwards for the SoS to take personally, out of an abundance of caution. This

[22] Road Traffic Act 1988, s 5(1), Road Traffic Offenders Act 1988 sch 2.
[23] *R (MR) v Secretary of State for the Home Department* [2017] EWHC 469 (Admin), [2017] ACD 58.
[24] *R (Goloshvili) v Secretary of State for the Home Department* [2019] EWHC 614 (Admin), [2019] HLR 37.
[25] *Adams* (n 4), [39] (Lord Kerr).
[26] *Golden Chemicals* (n 10), 310 (Brightman J).
[27] David Lock, 'The Gerry Adams Judgment: Has the Supreme Court Rewritten the Carltona Doctrine with Significant Potential Implications for Ministers?' (*Landmark Chambers*, 13 May 2020) <https://www.landmarkchambers.co.uk/the-gerry-adams-judgment-has-the-supreme-court-rewritten-the-carltona-doctrine-with-significant-potential-implications-for-ministers> accessed 27 September 2020.

risks paralysing effective administration and doing injustice to those affected because of the associated delays. We should have some sympathy for Ekins' and Laws' conclusion that *Adams* has "cast doubt on this fundamental building block for the operation of the machinery of government."[28]

2) *Carltona* in the age of artificial intelligence

This summer, the "mutant algorithm" which unfairly downgraded the exam grades of thousands of students was headline news.[29] It is one of a growing number of examples[30] of government using artificial intelligence (AI) to facilitate, or perhaps in the future even to replace, human decision-making. A recent government-commissioned study on the use of AI across several sectors noted a "lack of clarity in how regulation applied to the use of data in particular circumstances, and a lack of transparency about how data was actually being used."[31] In a future where government departments rely on AI to exercise Ministerial powers, can *Carltona* regulate decisions made by machines?

The biggest difficulty in applying *Carltona* to AI is found in *Oladehinde*, a challenge to a deportation decision taken by immigration officials on behalf of the Home Secretary.[32] Whilst devolution of Ministerial decisions is a "practical necessity in the administration of government," Lord Griffiths held that those decisions "must be taken

[28] Ekins and Laws (n 9), 36.
[29] Heather Stewart, 'Boris Johnson Blames "Mutant Algorithm" for Exams Fiasco', *The Guardian* (London, 26 August 2020) <https://www.theguardian.com/politics/2020/aug/26/boris-johnson-blames-mutant-algorithm-for-exams-fiasco> accessed 27 September 2020.
[30] Government Digital Service and Office for Artificial Intelligence, *A Guide to Using Artificial Intelligence in the Public Sector* (18 October 2019) <https://www.gov.uk/government/collections/a-guide-to-using-artificial-intelligence-in-the-public-sector> accessed 27 September 2020.
[31] Centre for Data Ethics and Innovation, *CDEI AI Barometer* (23 June 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/894170/CDEI_AI_Barometer.pdf> accessed 27 September 2020.
[32] *Oladehinde* (n 8).

by a person of suitable seniority in the Home Office for whom the Home Secretary accepts responsibility".[33] The same principle has since been held to apply to the devolution of power by chiefs of police, who are statutory office holders.[34] Lord Donaldson of Lymington MR went further, contemplating the possibility that a decision taken by officials could be challenged on the ground that "the decision to devolve authority was *Wednesbury* unreasonable with, if appropriate, a submission that it involved a contravention of the rules of natural justice or of fairness."[35]

We ought, therefore, to draw out the following principles from *Oladehinde*. Officials may act as the *alter ego* of the SoS (or statutory office holder). The SoS must consciously devolve his authority, considering whether he can reasonably and rationally accept responsibility for the decision taken by the devolvee. And the power as exercised by the devolvee must not be contrary to natural justice. This presents acute problems if the Minister devolves some or all of the decision-making discretion to a machine, rather than to his officials.

A recent report from the Centre for Data Ethics and Innovation has highlighted several problems with automated decision making which are relevant in the present context. Examining the use of AI across several sectors, the authors concluded that the risk of bias leading to discrimination was "high" or "medium" across the board, as was the lack of explainability and transparency surrounding decisions derived from the use of AI.[36] As such, devolving decision making powers to machines immediately runs up

[33] *Oladehinde* (n 8), 300 (Lord Griffiths).
[34] *DPP v Haw* [2007] EWHC 1931 (Admin), [2008] 1 WLR 379; *R (on the application of Hamill) v Chelmsford Magistrates' Court* [2014] EWHC 2799 (Admin), [2015] 1 WLR 1798.
[35] *Oladehinde* (n 8),282 (Lord Donaldson of Lymington MR).
[36] CDEI (n 31).

against three fundamental public law principles: rationality, the need to give reasons, and the duty to avoid bias.

Basic deployments of AI involve a human-designed set of criteria which an algorithm uses to make decisions. Whilst it is usually possible to provide a rational explanation for these decisions, they involve a high risk of what is known as "algorithmic bias", in which an algorithm replicates and amplifies the biases of its creators.[37] For example, a predictive algorithm used in recruitment which is 90% accurate might be "100% accurate for a majority population who make up 90% of applicants but wholly inaccurate for minority groups who make up the other 10%."[38] There is a clear risk of bias and public law unfairness.

Advanced AI frequently involves "deep learning": feeding data through massive neural networks such that the machine gradually "learns" to identify patterns. Its potential applications include police facial recognition systems,[39] or software designed to analyse natural language to detect benefit fraudsters.[40] The opacity of this "learning" process generates a "black box effect":[41] the means by which a machine arrived at a decision are largely unknowable to an outside observer, and it is therefore impossible to articulate a rational basis for the decision arrived at. It may be difficult to avoid decisions made by AI falling into the category of irrational, unlawful decisions which appear to

[37] Ifeoma Ajunwa, 'The Paradox of Automation as Anti-Bias Intervention' (2016) 41 Cardozo L Rev 1671.
[38] Information Commissioner's Office, 'Big Data, Artificial Intelligence, Machine Learning and Data Protection' (4 September 2017) <https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf> accessed 27 September 2020.
[39] *R (Bridges) v Chief Constable of South Wales* [2020] EWCA Civ 1058.
[40] 'DWP to increase role of AI' (*UK Authority,* 18 June 2020), <https://www.ukauthority.com/articles/dwp-to-increase-role-of-ai/> accessed 27 September 2020.
[41] Roger Levy, 'The Black Box Problem' (2019) 5 RUSI J 82.

have been made in an arbitrary fashion, akin to "spinning a coin or consulting an astrologer."[42]

As the use of AI in the public sector develops, systems will need to be designed to ensure humans remain ultimately accountable for the decision-making process, but as yet it remains unclear how this could be achieved.[43] In the meantime, it is doubtful whether a Minister could devolve decision-making power to a machine without falling foul of the principles in *Oladehinde*, unless he had satisfied himself that AI was making decisions on his behalf in a manner which was rationally explicable and demonstrably fair and unbiased.

3) A statutory solution

How, then, should legislators respond to the legal uncertainty generated by *Adams* and exacerbated by the growing use of AI? The solution is not, as Ekins and Laws have suggested, to close the stable door after the horse has bolted by retrospectively rendering all internment orders issued in Northern Ireland lawful.[44] This would directly contravene the principled position emerging from *Adams* that decisions engaging fundamental rights "should be subject to enhanced scrutiny and care, and given the most careful consideration possible by those ultimately responsible to Parliament for them."[45] It would also fail to address the wider practical consequences of

[42] *R v Deputy Industrial Injuries Commissioner ex p Moore* [1965] 1 QB 456 (CA), 488 (Diplock LJ).
[43] Alexander Babuta, Marion Oswald and Ardi Janjeva, *Artificial Intelligence and UK National Security: Policy Considerations* (RUSI, 2020) <https://rusi.org/sites/default/files/ai_national_security_final_web_version.pdf> accessed 27 September 2020.
[44] Ekins and Laws (n 9).
[45] Blinne Ní Ghrálaigh, 'Case Comment: *R v Adams (Northern Ireland)* [2020] UKSC 19' (*UKSC Blog,* 18 August 2020), <http://ukscblog.com/case-comment-r-v-adams-northern-ireland-2020-uksc-19> accessed 27 September 2020.

the judgment set out above. Instead, broader legislation is required to regulate and control the devolution of Ministerial power in a way which provides legal certainty to decision makers and is capable of dealing with the rise of AI.

The starting point for the new legislation would be to adopt, UK-wide, the statutory provision for the *Carltona* doctrine which already exists in Wales, that "without prejudice to any rule of law with respect to the carrying out of functions by members of the civil service of the State under authority", Ministers may "authorise" civil servants "to carry out any function on their behalf".[46] However, this provision should be subject to two conditions.

The first condition should enact Lord Kerr's suggestion that the seriousness of the subject matter is an important factor in determining whether the SoS is required to take a decision personally. Setting out to define, in the abstract, what constitutes a "sufficiently serious" matter would not be straightforward. Parliament would want to have the benefit of expert advice, perhaps through the Joint Committee on Human Rights, to establish a set of criteria which might go into the statute. A sensible starting point would be to distinguish between those decisions which ought only to be taken by Ministers of the Crown, accountable to directly Parliament (including junior ministers), such as those in *R (Doody) v Home Secretary* involving long-term deprivation of liberty;[47] and those which might be taken by departmental officials (accountable to Parliament through their Ministers and their Permanent Under-Secretary). In all cases, the SoS would be required to consider the consequences for individuals who may be affected by his

[46] Government in Wales Act 2006 s 52(9). The Explanatory Notes make clear that, under this provision, the powers of Welsh Ministers "may, in the absence of any express statutory prohibition, be exercised in their name and under their authority by officials."
[47] *Doody* (n 20) (CA), 196 (Staughton LJ).

decision before coming to a view as to the appropriate level of devolution (if any).[48] The immediate practical benefit of this would be that, for an anxious official unsure of whether he is empowered to act in respect of a particular class of decisions, he may submit to the SoS for a decision under a clear statutory framework, rather than attempting to second-guess what the courts might conclude in an *ex post facto* judicial review.

The second condition in the new statutory scheme should prohibit the exercise of the functions of the SoS by means of automated decision making or AI without the most careful scrutiny. Again, Parliament would need to take expert advice given the technical complexities of the subject. The fundamental legislative decision would be: should the devolution of a decision to machines be regulated only if the machine makes the decision alone, with no meaningful human input? Or should "machine-assisted" decision making, where the final decision is made by an official on the basis of guidance provided by AI, also be covered?

However Parliament might choose to frame this second condition, the statutory requirement ought to be that a SoS may only permit one of his functions to be exercised by means of AI if he is satisfied that the AI to be used meets a set of basic criteria. The government has already produced a "data ethics framework" which could form the basis of the matters the SoS could be required to take into account:

[48] There is scope for quite granular differentiation here. If the SoS determined one of his functions ought only be exercised by a Minister of the Crown, he could decide to devolve it to a Minister of State in his department, but not to the more junior Ministers of the Crown (Parliamentary Under-Secretaries of State and Parliamentary Secretaries). The SoS could also specify the seniority (grade) of any officials empowered to act on his behalf in respect of the matter in question.

1) Transparency: “your actions, processes and data [should be] open to inspection by publishing information about the project in a complete, open, understandable, easily-accessible, and free format”;
2) Accountability: “the public or its representatives [should be] able to exercise effective oversight and control over the decisions and actions taken by the government and its officials”;
3) Fairness: “the project and its outcomes [should] respect the dignity of individuals [and be] just, nondiscriminatory, and consistent with the public interest, including human rights and democratic values”.[49]

Civil society projects, such as the *Toronto Declaration*’s articles on on the use of AI by governments,[50] would provide some further helpful principles which could be applied when considering the human rights impact of deploying AI in the public sector and refining this second condition on the devolution of power.

In conclusion, if the *Carltona* doctrine is to be rescued from the dual perils of uncertainty and increasing irrelevance, Parliament should act to ensure the devolution of Ministerial power - one of the foundational aspects of good administration - remains fit for purpose in the digital age.

[49] Government Digital Service, *Data Ethics Framework* (2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917805/Data_Ethics_Framework.pdf> accessed 27 September 2020.
[50] Amnesty International and Access Now, *The Toronto Declaration* (2018) <https://www.torontodeclaration.org> accessed 27 September 2020.

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