What is the core of the separation of powers?*

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A. Introduction: is there a unity to the separation of powers principle?

In considering the unity of public law, a case might be made for the principle of the separation of powers as evidence of a cross-border commonality of concepts – or, alternatively, as a cautionary warning against easy assumptions of comparative equivalence. Few principles of public law have been adopted and applied across such a wide range of different jurisdictions. Yet, few have also given rise to such disagreement about what the principle involves or implies.

This follows in part from an unfortunate divergence between popular conceptions of the separation of powers and the practical realities involved in establishing and operating a system based on institutional separation. It is well known that, contrary to the absolutist ideas of a tripartite "pure doctrine"[1] associated with Montesquieu[2], "in democratic systems of government in which checks and balances [exist] … there is no separation that is absolute'.[3] Yet, "this caricature of the separation of powers has become part of conventional wisdom despite the fact that it has never been advocated in these terms by any serious theorist, nor is it workable in practice".[4]

The weaknesses of conventional wisdom are, however, compounded by the indeterminacy of the separation of powers principle itself. If separation of power scholars are united on the practical impossibility (and likely undesirability) of a pure tripartite theory, there is a striking lack of consensus on what (if any) institutional

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[1] MJC Vile,*Constitutionalism and the Separation of Powers* (Clarendon, 1967), 14.

[2] It has been suggested on several occasions that this attribution is incorrect as a matter of legal history, or at least more complicated than conventional wisdom (or a reading of the Federalist Papers) might allow. For an early example of this, see Max Radin, The doctrine of the separation of powers in 17th century controversies (1938) 86 University of Pennsylvania Law Review 842.

[3] *Re Certification of the Constitution of South Africa* (the First Certification case) 1996 (4) SA 744, at para.s 106-8.

[4] Cameron Maxwell, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers* (Oxford University Press, 2013), 9.

principle ought to operate in its stead. There is no agreement on the aims or objectives of the theory,[5] or on the number or identity[6] of powers which it ought to regulate. Even the implications of the principle's proclaimed commitment to 'separation' is open to question: is the theory one that is predisposed towards institutional separation or checking? The "embarrassing secret" that "both commitments at the center of separation of powers doctrine are misconceived"[7] has fostered uncertainty over what the model ought to entail, as well as over the extent to which a given system (especially one based on a Westminster model of cabinet government) can be said to adhere to separation of powers principles. The consequence for British public law has been an historical disagreement over whether the idea of a separation of powers was a foundational element of the British constitutional order[8] or a "tiresome … and irrelevant"[9] "constitutional myth"[10]?

Accepting that the idea is a "many headed hydra"[11], Roger Masterman's location of the doctrine's "continuing relevance … in the aspirations that lie behind [it] as a constitutional and/or political theory rather than a template of institutional design"[12] has some practical promise. Yet his immediate concession that "here, too, no uniform conception of the aims of the doctrine – or doctrines – can be found" points to the challenges for even a pragmatically 'flexible' approach to the principle. As Masterman suggests, it seems plausible to treat the persistence of separation of powers thinking as evidence that a strategy of separating institutional power resonates (to some degree at least) with basic intuitions about constitutional government. The risk, however, is that unity or coherence in separation of powers theory is found at a level of abstraction that renders it practically meaningless. If the

[5] See, for example, Gwynn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* (Tullane Studies, 1965); Brown, Accountability, Liberty and the Constitution (1998) 98 Colum. L. Rev. 531; Allan, *Constitutional Justice, 31-59* ; N Barber, Prelude to the Separation of Powers (2001) 60 CLJ 59; Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State (2003) 78 N.Y.U.L. Rev. 461.

[6] Frank Vibert, *The Rise of the Unelected* (Cambridge University Press, 2007); Eoin Carolan, *The New Separation of Powers* (Oxford University Press, 2009).

[7] Elizabeth Magill, Beyond powers and branches in separation of powers law (2001) 150 University of Pennsylvania Law Review 603, 604.

[8] *Duport Steel v Sirs* [1980] 1 WLR 142.

[9] De Smith, The separation of powers in new dress (1966) 12 McGill Law Journal 491, 491.

[10] O Hood Philips, A constitutional myth: separation of powers (1977) 93 LQR 11.

[11] Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press, 2011), 16

[12] Masterman, 13

principle is to provide practical guidance on real-world constitutional questions, the making of contestable choices about its aims, objectives or institutional details seems unavoidable.

It is important therefore to be clear about the aims and limits of this paper. In particular, it should be emphasised at the outset that the paper does not advance a universal theory of the separation of powers. That is not to deny that – on the premise of the arguments made here – certain specific models of institutional separation may be normatively or constitutionally more attractive than others. The focus here, however, is a more limited one of interrogating further the suggested intuitions about institutional separation as a constitutional technique.

Part B considers the case for the separation of powers as contributing to a positive account of constitutionalism. The aim of this section is to identify what (if at all) are the minimum requirements of a constitutional separation of powers. If it is the case that institutional separation makes a positive contribution to constitutional government, is this applicable to any system of separated powers? Or does this contribution depend on the presence of certain characteristics? If – as the paper argues – it is the latter, this suggests that there may, after all, be some unity of principle amongst the separation of powers' diversity of forms. Parts C and D considers the minimum principles proposed in Part B in light of two recent decisions of the United Kingdom courts: *R (Cart) v Upper Tribunal* and *Evans v Attorney General*. Part E offers some brief conclusions.

B. Constitutionalism and the separation of powers

The case for a positive constitutionalist approach to institutional separation

Although the aim of this exercise is to isolate the minimum characteristics of separation of powers systems generally, it would be misleading to present it as a value-neutral analysis. Any assessment of the minimum requirements for an effective separation of powers system necessarily presupposes an understanding of

what constitutes effectiveness in the constitutional context.[13] It may be useful, therefore, to make explicit some of the assumptions that underlie the analysis that follows. The first, and likely least controversial, is that a pure system of institutional separation is impossible and undesirable.[14] The second is that the creation of a constitutional system serves more than the merely negative objective of checking government power.

The latter may be more contentious, both as a matter of general constitutional theory and, given the prominence in most accounts of the separation of powers of its value as a safeguard against state tyranny,[15] in the specific context of this piece. The argument here follows McIlwain,[16] Barber,[17] Maxwell[18] and others in contending that constitutionalism generally, and the separation of powers specifically, has value not simply as a means of limiting government action but also as making a positive contribution to effective government. Constitutionalism, from this perspective, is as much about the co-ordination of collective action in normatively or socially positive ways as it is about protecting individuals from the abuse of these collective powers. Co-ordination by constitutional mechanisms facilitates the practical functioning of an organised political community; indeed, Maxwell argues persuasively that it is the inevitable solution to the speech act problems created by the shift to literacy as the primary method of organising collective action. The challenge for any system regulated by written text is to ensure that instructions will be correctly undertaken in the absence of their author. Constitutionalism performs this function by co-ordinating an agreed approach to orders-as-written-communications.

If it is assumed, therefore, that co-ordination is a legitimate objective of a constitutional order, what are the implications for the efficacy of the separation of

[13] NW Barber, Prelude to the separation of powers (2001) 60 Cambridge Law Journal 59, 66.
[14] This point has been made repeatedly elsewhere: It is naïve … to think of separation of powers rules as capable of creating sealed chambers, each of which must contain all there is of the executive, legislative and judicial powers. Overlap is inevitable P Bator, Constitution as Architecture: Legislative and Administrative Courts under Article III (1990) 65 Ind. LJ 233, 265.
[15] Nedham, *A True State of the Case of the Commonwealth* (1654); The Federalist Papers (1787).
[16] Charles McIllwain, Constitutionalism: Ancient and Modern (Cornell University Press, 1940).
[17] The Constitutional State (Oxford University Press, 2010) ; Constitutionalism: Negative and Positive (2015) 38 (2) DULJ 249.
[18] Cameron Maxwell, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers* (Oxford University Press, 2013).

powers? Perhaps most importantly, linking the separation of powers with a positive account of constitutionalism suggests that institutional separation is, of itself, insufficient. After all, if the purpose was simply to prevent tyranny by making government action more difficult, there would be no reason to limit inter-institutional checks to three institutions – or, indeed, to any finite number of checks. Positive constitutionalism, however, requires more than separation for separation's sake. Rather, it assumes that institutions should be separated *and co-ordinated* in ways that are capable of making a positive contribution to collective action.

The recurring efforts[19] to portray the European Union in separation of powers terms provide anecdotal evidence of the negative separation problem. The EU meets the basic negative requirement of establishing separate institutions. The difficulty, however, is that the number of institutions and complexity of inter-institutional arrangements makes a more positive constitutional analysis problematic. While the system provides a safeguard against unchecked power, it is not clear what, if any, principle regulates inter-institutional relationships. This leaves the EU's structures to be governed by an ambiguous notion of institutional balance: "a device which enables the Community to move forward in an incremental manner, without ever really resolving the issues of democracy and legitimacy which lie at the heart of the debate about its future".[20] In the long run, however, that ambiguity complicates efforts to make a positive case for the EU as a legitimate governing authority. Addressing that legitimacy problem seems to be the inspiration for efforts to provide a more positive constitutional analysis of the EU's structures: a recognition of the need to move beyond a system that simply separates to one that consciously and conspicuously provides for positive forms of institutional co-ordination.

The positive benefits of institutional separation

What then are the positive dimensions to a system of institutional separation within a constitutional structure? It is instructive here to think about the processes involved in

[19] Koen Lenaerts, Some Reflections on the Separation of Powers in the European Community (1991) 28 CML Rev 11; Gerard Conway, Recovering a Separation of Powers in the European Union (2011) 17 ELJ 304.
[20] See Paul Craig, Democracy and Rulemaking within the EC: An Empirical and Normative Assessment, Jean Monnet Working Papers No. 2/97 <http://econpapers.repec.org/paper/erpjeanmo/p0291.htm> (last visited July 27th, 2016).).

exercising power within a system of separate institutions. A constitutional system comprising separate institutions means that institutional co-ordination is typically difficult to avoid. In seeking to pursue a particular objective, an institution is likely to require some assistance from another agency or agencies, whether by way of positive support or forbearance from interference. This compels the lead institutional actor to engage in a process of communication with the other branches or agencies of government. In a constitutional system based on the use of laws, this requires a degree of co-ordination by written communications which depend for their efficacy on a system of agreed and/or predictable interpretive techniques. The pursuit by one institution of a policy end within a system of separated powers will therefore usually require that institution, regardless of its place in the formal hierarchies of government, to publicly explain and defend its position to others.

The consequence of institutional separation is therefore the creation of dialogic inter-institutional processes. This practical obligation to engage may, in turn, foster certain positive constitutional attributes. Separation incentivises inter-branch communication, which – in a system based on the rule of law – provides a degree of *transparency* and *publicity*.[21] The *independence* of the branches increases the informational (and thus political) costs of pursuing policy objectives, which tends to encourage *generality* and discourage attainder. If an institution wishes to target a particular group but is dependent on the assistance of other institutions to achieve this, it can only be certain of success if it makes its intentions clear. Separation does not absolutely preclude abusive outcomes, but it does limit the potential for surreptitious tyrannies. The burden of persuasion identified above also means that an institution may, in practice, be required to explain its favoured course of action. The provision of this type of institutional *justification*, in turn, means that the actions of that institution are more *susceptible to challenge and/or review* by other agencies of government. This also has the potential to enhance the degree of *expertise* in government by allowing other agencies with particular experience or specialisations to identify and correct errors in the reasoning provided. Taken together, these process values promote institutional *accountability*, which in turn fosters the

[21] Whether within government, or to the public at large.

substantive principle of *non-arbitrariness* which is at the core of legitimate governance.[22]

What do these benefits depend on?

It seems clear, therefore, that institutional separation is capable of making a positive contribution to constitutional government. However, as has already been argued, the fact that institutions may be formally separate is not enough to fulfil this function. The example of the US Foreign Intelligence Surveillance Court illustrates this point. An institution which is ostensibly independent, it operates almost entirely in secret and in the period between 2001 and 2012 denied 10 of the 20,909 applications for surveillance and property search warrants made to it. This has led to a common perception that the court operates as a rubber stamp for executive action: formally separate but practically ineffective. This highlights two related points for advocates of a separation of powers system. First of all, if a model of separated powers is to be practically effective, it must provide for more than *de jure* separation. Regard must also be had to the *de facto* dynamics of particular inter-institutional relationships. Secondly, the procedures by which inter-institutional engagement occurs are also constitutionally significant. The rule of law is, in part, about ensuring that co-ordination of collective action takes place in a public and transparent manner. Secret inter-institutional agreements may be consistent with a system of separated bodies but they are liable to undermine associated constitutional values. This again makes the point that something more than separation is required.

If separation itself is insufficient, the question then arises as to what might be the core additional elements of an effective model of institutional separation? From the abstract (and somewhat idealised) description of inter-branch engagement outlined above, it seems to be a prerequisite for the majority of the process values identified that the institutions involved are autonomous as a matter of fact and of law. The proposition that the interactions between separated institutions supports values such as transparency, publicity, generality and justification depends upon the assumption that these are arms-length transactions between autonomous institutions. In particular, the presence of genuine accountability – an entitlement and willingness to

[22] For this argument in more detail, see Carolan, at 82-105.

call another institution to explain and/or justify its position – seems logically prior to the achievement of these other process values. This suggests that there may be two essential components of an effective system of checks and balances: that the institutions involved are independent; and that they are able to hold each other to account. These conditions seem necessary for the establishment of the sort of contestatory inter-institutional engagement from which the other process values may flow.

Separation of powers scholarship has long acknowledged the centrality to the theory of institutional independence. This is well illustrated by the way in which the theory can sometimes be elided with the related (but logically distinct) principle of judicial independence. Less commonly discussed, perhaps, has been the second consideration identified above: that the system consists of independent institutions that provide an accountability check. It might be suggested that this is ether unnecessary or to some degree implicit in the notion of independent institutions sharing power; that the practical realities of power and self-interest mean that institutions will inevitably hold each other to account. Madison, for example, famously regarded self-interest as the animating impulse of an effective separation of powers system. In his view:

> the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.[23]

A key argument of this paper is that this is not sufficient for a constitutional system based on the rule of law. A system based on ad hoc forms of strategic or self-interested engagement does not provide genuine accountability (and therefore support the other positive constitutional values derived from it) because it subordinates its designated separation of powers to institutional pragmatism. A

[23] Book 51, *The Federalist Papers*.

system that trusts to ambition alone risks making accountability contingent on unpredictable factors like institutional reputations or self-image. This could, for example, encourage a wilful or populist institution to unilaterally determine the extent and manner of its engagement with other institutions. Ambition may be an effective means of generating institutional rivalries but it does not, of itself, signify much about how those rivalries ought to play out in practice. The difficulty with this is that it risks falling short of the kind of formal accountability that, it has been argued here, is a necessary part of an effective constitutional system based on the rule of law. For example, it is conceivable that situations will arise where institutions that are rivals nonetheless have a common interest in having their conflicts mediated behind closed doors, far away from formal or public scrutiny. This underlines the point that the accountability that is critical to effective constitutionalism requires the presence of a certain type of relationship in which separated institutions are entitled *as of right* to make certain demands of each other *through formal rule-based procedures*. Constitutionalism requires rules not realpolitik; and those rules require authoritative backing.

This calls attention to the importance of institutional authority within a constitutional system of separated powers. It is authority that underwrites the entitlement to hold another institution to account that is critical to rule of law-based constitutionalism. Authority generates and sustains a formal power relationship in which one institution holds authority and another is subject to it. This means that institutions act within and are subject to reciprocal power structures. Crucially, the engagement that occurs within such structures is one which denies the subject institution the possibility of unilateral or unfettered power. Rather, it is answerable for its position to an external actor. This is both formal symbol and practical safeguard of the rule of law. Separation may encourage the kind of institutional dynamics that make rivalry more likely but it is the presence of formal authority structures that transforms competition into constitutional checking. These formal relationships are, to paraphrase Madison's terminology, the "necessary constitutional means" through which "personal motives" must operate.

Conclusion: two minimum requirements?

This suggests that there are two core requirements for an effective system of institutional separation: namely that it provides for inter-institutional checks that are both independent and authoritative. While the identity and nature of the institutions separated might differ from system to system (or theorist to theorist), independence and authority seem to be the minimum characteristics for the separation of powers to make an effective contribution to rule-of-law based constitutionalism.

A focus on independence alone does little to address specific constitutional questions because it is capable of supporting either the separation or checking of the institutions at issue. More importantly perhaps, the principle is primarily a passive one that focuses on defending institutional prerogatives. Provided that certain boundaries are observed, it offers limited guidance on the more positive constitutional challenge of shaping how institutional interaction should occur.

Similarly, an approach which concentrated on ensuring formal authority structures would be of little benefit if the institutions participating in these structures were not independent in thought and deed. While these formal safeguards may foster some of the process values described above (such as publicity), it is questionable whether a system in which a body is capable of exerting dominion over the agency charged with its checking could be said to provide an effective separation of powers. Independence – both in law and in fact – is necessary to ensure formal inter-institutional safeguards do not prove illusory in practice. There is no magic in a model of institutional government which focus its attention on things that are not real. Institutional theories must be grounded in the descriptively present and the normatively possible.

By contrast, an approach that takes account of both independence and authority may better capture how intuitions about institutional separation can and should apply so as to promote the constitutional values that have been associated with the separation of powers. This two-pronged approach seems to embody the minimum structural elements of an effective separation of powers strategy. Independence is the institutional quality that makes separation possible; authority provides a system of social rules and relationships through which the separation can be made effective.

If this is correct, it holds out the possibility of greater clarity on how separation of powers concerns shape public law reasoning. In fact – as the next section suggests - this two-pronged approach to the separation of powers may provide some insight into the English courts' engagement with fundamental constitutional principles in recent cases. Most notably, it will be argued that the decision in *Evans* might be most plausibly explained as based on a concern for the authority dimension of the separation of powers that is present but not expressly articulated in the majority's reasoning.

C. Identifying and explaining these dual requirements: the decision in *Cart v Upper Tribunal*

The dual significance of independence and authority to an effective separation of powers system was usefully highlighted by Laws LJ in the Divisional Court's decision in *R (Cart) v Upper Tribunal*.[24] There the Court was faced with an argument that the Upper Tribunal and Special Immigration Appeals Commission could not be subject to judicial review by reason of their statutory designation as superior courts of record. This is a classic example of a formalistic separation of powers analysis in which the question of how a power is classified takes precedence over any examination of the substance of the institutional activities at issue[25]. Laws LJ rejected the suggestion that the mere designation of an institution as judicial could exempt it from judicial review. This, in effect, acknowledged the limitations of an approach to institutional separation that focuses on form alone. The Court instead opted for the kind of mixed practical-conceptual analysis advocated here by considering how the real-world operations of the arrangements at issue might conform to substantive constitutional principles.

From the point of view of substantive principles, Laws LJ's judgment focused in particular on how the susceptibility of these bodies to judicial review was connected to broader notions of the rule of law. While he conceded that the rule of law is "a Protean conception" with an "elusive and multiple nature",[26] he nonetheless set out a

[24] [2009] EWHC 3052 (Admin).
[25] See, for example, *Doody v Secretary of State for the Home Department* [1994] 1 AC 531.
[26] Paragraph 35.

relatively precise account of how the principle would be offended by the argument proposed.

> If judicial review were so excluded, SIAC and UT - and any other body which might be immunised against judicial review by a like formula - would (in matters not subject to statutory appeal) be the last judges of the law they have to apply. They would not be required to respect any other interpretation but their own. The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered.[27]

While the argument in question was not revived on appeal, it was notable that Lady Hale drew attention to it in her own Supreme Court judgment, observing that it had been "comprehensively demolished" by Laws LJ.'s analysis that, as she saw it, "[t]he rule of law requires that statute law be interpreted by an authoritative and independent judicial source".[28]

The analysis in *Cart* is significant for the way in which the rule of law problem is both articulated and addressed by Laws LJ. His identification of the problem corresponds to separation of powers intuitions about the risks of unchecked or unsupervised powers. The consequence of a categorical exemption of these bodies from judicial review is that they would be vested with unilateral power, "not be[ing] required to respect any other interpretation but their own". For Laws LJ, the rule of law would be threatened if an institution was permitted to act in so unaccountable a manner. The rule of law required, therefore, that the institution is made formally answerable to the courts. As both Laws LJ's decision, and Lady Hale's summary of it, make clear, however, both candidate requirements feature prominently in his reasoning. This highlights the fact that the authoritative character of the courts is a necessary and essential part of this rule of law response. Independence makes the scrutiny impartial; authority makes it effective.

[27] Paragraph 36.
[28] [2011] UKSC 28 at paragraph 30.

The decisions in *Cart* were, as a matter of fact and of reasoning, concerned with the authority of the judiciary in the exercise of its judicial review jurisdiction. As such, Laws LJ's analysis might, on one view, be construed as applying only to encroachments upon the judicial power. This would mean that it is less about the relationship between institutional separation and the rule of law and more about the specific constitutional position of the judiciary.

There are, however, a number of aspects of Laws LJ's ruling which suggest that he was concerned with more than defending judicial prerogatives. First of all, the reasoning is – as noted – explicitly couched in rule of law terms.

Secondly, while the decision ultimately distinguished between the SIAC and Upper Tribunal on the somewhat formalistic basis that the latter was an alter ego of the High Court, the fact that the Court had regard to pragmatic considerations like the appointment procedures for each body suggests that the conclusion was influenced to some degree by an assessment of whether it was actually capable of contributing to the system's rule of law checks. This echoed Laws LJ.'s endorsement of the approach adopted in *R. v Cripps, ex parte Muldoon*[29] which he regarded as one which "examine[d] all the characteristics of the court in question in order, not to dignify it with a name or status, but to ascertain whether in substance it should be subject to the judicial review jurisdiction of the High Court"[30].

Thirdly, and perhaps most importantly, Laws LJ expressed the view that the determining factor in those difficult cases that may arise on the margins of the judiciary's authority should be the implications for the rule of law. For him:

> The nature of the judicial review jurisdiction owned by the High Court has an elusive quality, because its limits are (generally) set by itself. In consequence, the distinction between a legal place where the jurisdiction cannot go, and a legal place where as a matter of discretion the High Court will not send it, is

[29] [1984] 1 QB 68.
[30] Paragraph 70.

> permeable: even unprincipled. Ultimately the court is simply concerned to give the jurisdiction the reach, or edge, which the rule of law requires.[31]

This is quite different from an analysis based on formal separation of powers classifications, or even the principle of judicial independence. The decision is certainly, to some degree, about protecting the value of the courts' judicial review jurisdiction. The importance of the jurisdiction is, however, located by the Court in the contribution that it makes to the efficacy of the constitutional system as a whole. This is not (merely) a negative defence of the boundaries of the judicial power. It is an instrumentalist justification of why the rule of law requires that provision is made for the kind of inter-institutional supervision that the judicial review jurisdiction offers: namely an independent and authoritative check on what might otherwise be a unilateral exercise of power. To read the decision in solely negative institutional terms would ignore Laws LJ's more fluid understanding of the basis and boundaries of the courts' competences.

This is relevant to the argument being made here because the more instrumentalist aspects of Laws LJ's reasoning are also those that bring out more clearly the contribution that *authoritative* institutional scrutiny makes to the rule of law. It was instructive in this regard that, while a number of reasons were advanced to explain the prior jurisprudence on the susceptibility of a 'superior court of record' to judicial review, Laws LJ regarded the decisive factor as being the delimited character of the competence at issue. In other words, it was the fact that the body was subject to legal rules that required and justified its oversight by an impartial and independence body. It is to ensure that these rules are adhered to that judicial review exists.[32] It was, in the Court's view, the necessity for enforcement of the rules laid down by law rather than the inherent status of the court that explained the approach adopted in the previous caselaw. This reflected the constitutional principle that, once there are rules that impose institutional limits, "[t]here has to be an impartial authoritative

[31] Paragraph 98.

[32] See the explanation of the superior courts' jurisdiction to review inferior courts at paragraph 65 on the basis that "there are bounds which by law th[e inferior courts] must not transgress. That is the edge kept sharp by the prerogative writs".

judicial source of statutory interpretation, independent both of the legislature and of the persons affected by the application in practice of the relevant texts"[33].

The view that rules must be accompanied by some provision for authoritative oversight is a corollary of the core rule of law precept that all are, in principle, subject to law. This follows from the structural dimensions to the concept of authority. Authority, in this context, should not be confused with authorisation. It is not about the existence or identification of an institutional power to act. On the contrary, it is about ensuring that such powers are exercised within the confines of the structural relationships which the rule of law inevitably creates. The presence of an *authoritative* accountability check makes clear that while the institution in question is entitled to exercise public power over others, it fundamentally remains a subject.

Authority is in this way central to the concept of political community. The idea of an organised community requires a system with the capacity to allow the creation and enforcement of mutual obligations. This necessarily presumes and requires the presence of power hierarchies in which there are authorities capable of creation and/or enforcement and actors that are subject to that authority. The presence of both authority and subject is a prerequisite for co-ordination.

Furthermore, authority fulfils a specific co-ordinating role in a constitutional system based on the rule of law. This follows from the fact that law (and by extension legal authority) operates in a pre-emptive manner: that is, that the fact that something becomes law thereby provides a pre-emptive reason for action. A person may disagree with a proposal and have good reasons for that disagreement; but if that proposal becomes law, the person is thereby obliged to comply regardless of his or her reasoned objection.

Authority functions in a similarly pre-emptive and content-independent manner. Where a body has authority, it is entitled to issue directions to those subject to its authority which they are obliged to accept because of the pre-existing power structures. It is the fact that the direction comes from the authority that requires the

[33] Paragraph 77.

subject to comply. Depending on the extent of the authority, the subject's scope for independent action is limited, or potentially ousted entirely. The question of whether and how the subject should act is no longer a matter of unilateral evaluation. It becomes instead a factual assessment of what the authority has directed. The subject cannot just disagree with the direction: it is pre-bound to accept it in the terms issued. The subject has an obligation to comply, or to answer for that non-compliance. The reciprocal character of this relationship is essential. Authority is not just about the issuing or projection of power; it also assumes and is dependent upon the presence of subjects who recognise and acknowledge their position as such.

On this concept of authority, Laws LJ's unease that the Upper Tribunal or SIAC would "not be required to respect any other interpretation but their own" goes beyond a concern to preserve the court's judicial review jurisdiction. It is connected with a deeper rule-of-law-related apprehension about the status of these bodies *as subjects*. A freedom to unilaterally interpret, evaluate and act on the limits imposed by rules would be inconsistent with the authority-subject structures which the rule of law requires. What the Court in *Cart* seemed to appreciate is that the overriding rule of law issue before it was not whether an exclusion of judicial review would detract from or otherwise impinge upon the authority of the court. The more pressing concern was to avoid a position in which a public body would be free to form their own view on an issue which is subject to legal regulation. Having authoritative oversight is a reminder that the body exercises power within a defined power structure in which it is, at all times, a subject. This reiterates the constitutionalist requirement that all are subjects before the law.

D. Independence, authority and the rule of law: R (Evans) v AG

The ambiguous constitutional implications of Evans

The Supreme Court's decision in *R (Evans) v Attorney General*[34] has already been acclaimed as "one of the landmark public law cases of the early 21st century", addressing "questions about a network of constitutional relationships between the

[34] [2015] UKSC 21.

monarchy and the executive, constitutional convention and constitutional law, the executive and the courts, regular courts and tribunals and, ultimately, between several fundamental constitutional principles": [35] namely "the rule of law, the sovereignty of Parliament and the separation of powers".[36]

The proceedings examined the scope of a power conferred on the Attorney General[37] by section 53 (2) of the Freedom of Information Act 2000 to certify, following the making of an enforcement order against a government department or public authority for failure to comply with the Act with the relevant provisions of the Act, that he had "on reasonable grounds" formed the view that there had been no failure to comply. The consequence of certification was that the enforcement notice ceased to have effect. In short, section 53 permitted a member of the executive to veto an enforcement order. The question at issue in *Evans* was on what grounds, if at all, the decision of the Attorney General could be reviewed by the courts. Like *Cart* therefore, the decision raised issues concerning the boundaries of judicial oversight. Like *Cart*, the Court was faced with the argument that a decision maker was exempt from judicial review. And like *Cart*, in rejecting that argument, the decision again emphasised the importance of independent oversight for a system of separated institutions under the rule of law.

However, the issues in *Evans* arguably raised more complex constitutional questions than those before the High Court in *Cart*. This followed from the fact that, whereas the argument in *Cart* that judicial review had been ousted rested on the relatively slender ground of a general description of the decision-maker, the asserted immunity in *Evans* had a specific statutory basis. As Lord Hughes put the point with brevity and clarity in his judgment (dissenting in part):

> I agree that Parliament will not be taken to have empowered a member of the executive to override a decision of a court unless it has made such an intention explicit. I agree that the courts are entitled to act on the basis that

[35] Mark Elliott, A tangled constitutional web: the black spider memos and the British constitutions relational architecture (2015) Public Law 539, 541

[36] Mark Elliott, A tangled constitutional web: the black spider memos and the British constitutions relational architecture (2015) Public Law 539, 539-540.

[37] The Attorney General was the relevant accountable person for the purpose of this case.

> only the clearest language will do this. In my view, however, Parliament has plainly shown such an intention in the present instance.
>
> In the end this issue does not admit of much elaboration; it seems to me to be a matter of the plain words of the statute.[38]

As a question of statutory construction, there was some force to this analysis. The approach applied by Lord Neuberger, for example, has been portrayed (with varying critical connotations) as "highly strained"[39] or as based on "what can only be described – not necessarily perjoratively – as radical interpretive surgery"[40]. What this suggests, at the very least, is that the position of the other members of the Court was influenced by factors other than the bare words of section 53 (2).

In fact, the other judgments delivered by both majority and minority contain quite different approaches to the issues before the Court. Lord Neuberger relied on high-level constitutional principles of the rule of law and separation of powers to justify a severely restricted reading of section 53 (2). Lord Wilson (dissenting) acknowledged the principle that the separation of powers may be relevant to exceptional cases of executive override but felt that Parliament had in this instance imposed sufficient safeguards in the design of section 53. Lord Mance, meanwhile, largely eschewed constitutional analysis in favour of an administrative law focus on the appropriate threshold of judicial review.

Within each judgment, there are striking – and arguably telling – examples of the type of reasoning that is so rooted in the particular facts of the proceedings that it casts doubt on the conceptual coherence of the analysis. At paragraph 69 of the decision, for example, Lord Neuberger explains why the accountable person's exercise of the section 53 (2) power can be reviewed in a passage which does little more than list the procedural characteristics of this case: that the decision of the Upper Tribunal was subject to appeal; that the decision-maker had relevant expertise; that there had been a hearing with witness and cross-examination; that

[38] Para.s 154-155.
[39] Lord Hughes, at para. 155.
[40] Elliott, at 546.

the decision was “closely reasoned”; that the Attorney consulted one side; that he received no fresh arguments or evidence, and so on. No guidance was given, for example, as to the relative weight or significance of these characteristics. Must they all be present for an executive override to be reviewable? Are some more constitutionally relevant than others? While this, of course, the kind of cautiously case-based common law analysis that resists grand academic theorising, reliance on a perfunctory catalogue of factual considerations does seem somewhat incongruous with the direct recourse made to broad constitutional principles elsewhere in the judgment.

The result is that *Evans* presents a somewhat patchy and uncertain account of how the relevant constitutional principles interact – save for the fact that they all appear, in some respects, to undergird the courts’ long-established antipathy to anything that resembles an ouster clause. In places, this lends a somewhat impressionistic appearance to the decision. There is a sense in some passages of an intuitive judicial discomfort with the notion of an executive veto; of a reluctance that has arguably been on display since *Anisminic*[41] to endorse the idea of a decision-maker operating outside judicial oversight. But as whole, the decisions of the majority do not really provide a pithy response to the rhetorical question posed by the High Court.

> The underlying submission on behalf of the claimant is, in effect, that the accountable person is not entitled simply to prefer his own view to that of the tribunal …. But I would ask in the present statutory context: why not?[42]

This question usefully seems to go to the nub of the Court’s constitutional concern. In this regard, it is notable that this is also the situation that is consistently identified across the decisions as constitutionally impermissible. The majority (and some of the minority) agree that it cannot be acceptable for the executive member to exercise a veto over an adjudicative decision “merely because a member of the executive … takes a different view”.[43] What appears more difficult is articulating why that is so,

[41] *Anisminic v Foreign Compensation Commission* [1969] 2 A.C. 147.
[42] [2014] 1 All ER 23, 55.
[43] Lord Neuberger, paragraph 59.

and identifying what should be done about it. Nonetheless, the fact that these different judgments agree on this as a point of unquestionable constitutional impermissibility suggests that there may be some underlying coherence to the judges' attitude to executive veto powers – and that such a unilateral exercise of power (even one expressly conferred by Parliament) is constitutionally transgressive in a way that is widely understood to raise fundamental rule of law or separation of powers concerns. This is significant because it suggests that this goes to the core of the Court's conception of the separation of powers; and because – as the remainder of this section argues – it reflects the two-pronged analysis of institutional separation advocated above.

Why is it impermissible for the Attorney to act "simply" on his own view?: the role of authority in Lord Neuberger's ruling

The relationship between section 53 and the rule of law is most explicitly addressed in Lord Neuberger's judgment. He identifies two rule-of-law related constitutional principles which would be threatened by a statutory power for the executive to unilaterally override a judicial determination. The first is the fact that a judicial decision is binding on the parties. The second more systemic reason is that executive conduct should – with "necessary well established" and "jealously scrutinised" exceptions – be subject to review by the courts "at the suit of an interested citizen"[44]. It would be contrary to the rule of law if a member of the executive could set aside a previous decision "merely because he does not agree with it"[45]. Significantly, Lord Neuberger then asserted in reliance on *M. v. Home Office*[46] and *Anisminic*[47] that the power to override a decision was objectionable in principle regardless of the merits or strength of the executive's position:

> [T]he fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point.[48]

[44] Para 52.
[45] Paragraph 51
[46] [1994] 1 AC 377.
[47] [1969] 2 AC 147.
[48] Paragraph 52.

This is not, therefore, a question of reasonableness review. The merits of the executive's reasoning (or, indeed, that of the decision-maker being overridden) are, as a matter of principle, irrelevant.

This is a clear if implicit acknowledgment of the importance of authority in a system based on the rule of law. It is the existence of an authority-subject relationship that means that the executive must act on the fact of the earlier decision rather than its own view of the reasons underlying it. This is, as detailed above, the whole point of authority: that it provides a pre-emptive and content-independent reason for a subject to comply with a direction. This again highlights how the principle of independence captures only part of an effective system of institutional separation. Lord Neuberger expressly accepts that the Attorney General, in exercising his clear statutory powers under section 53 (2), was acting as an office holder "deserving of the highest respect"[49] on the basis of his own independent view. For Lord Neuberger, however it is only where this independent judgment is exercised within the limits of established institutional relationships that the rule of law is respected. This is why the executive is not entitled to invoke section 53 "merely" or "simply" because it has a different view. Adherence to the pre-emptive character of the authority-subject relationship is necessary if a separation of institutions is to be constitutionally effective.

Tellingly, the remainder of Lord Neuberger's decision can also be explained as a defence of the authority-subject relationship. For example, he appears to regard the express statutory basis of this power as largely irrelevant,[50] rejecting the argument that this placed the Attorney in a stronger position than the decision-makers in *R. v Warwickshire County Council, ex parte Powergen plc*,[51] *R. v Secretary of State for the Home Department, ex parte Danaei*,[52] and *R (Bradley) v. Secretary of State for Work and Pensions*.[53] Nor does he place any emphasis on the fact that some of the

[49] Paragraph 69.
[50] Paragraph 64.
[51] (1997) 96 LGR 617.
[52] [1998] INLR 124.
[53] [2009] QB 114.

decision-makers in these cases were not judicial entities[54] or, conversely, on the fact that the Upper Tribunal is a court of record[55]. These are the kind of considerations that would be expected to feature if the analysis was based on parliamentary supremacy, judicial independence or a formal separation of powers.

Instead, the focus of the reasoning is on assessing the substance of the institutional separation in a manner that emphasises independence and authority. This is evidenced by his consideration of the circumstances in which the accountable person is permitted to refuse to follow the earlier decision. Lord Neuberger endorses the Court of Appeal's view that this is permissible only in the limited circumstances that there has been "a material change of circumstances since the tribunal decision or that the decision of the tribunal was demonstrably flawed in law".[56] It is possible that this narrow and restrictive reading of section 53 (2) might simply reflect a judicial antipathy to executive overrides. Arguably, however, the specific nature of these circumstances is significant. In both of the permissible circumstances, something has occurred that invalidates the authority of the original decision. A material change of circumstances means that the issue is different to that originally decided. A demonstrable flaw means that the original decision was wrong. From the point of view of the institutional relationship, however, the critical point is the decision loses its authoritative status – so that the persons to whom it was directed are no longer subject to it. This is an approach which seems animated by a concern not with the merits of the decision or the decision-makers but with the conditions within which an authority-subject relationship exists. Where that relationship exists, the subject must respect the authority's position by accepting its decision as pre-emptive. It is only once the subject is released from that relationship that it becomes entitled to reason and act on the basis of its own view.

Lord Neuberger's discussion of the relationship between the section 53 override power and the section 57 appeal process seemed to reflect the same concern to ensure the presence within the system of a legally authoritative check. It was argued on behalf of the Attorney that the constitutional considerations which Lord Neuberger

[54] Paragraph 65.
[55] Paragraph 85.
[56] Paragraph 71

had identified would not apply to a first-instance decision of the Information Commissioner because of the fact that the Commissioner is a member of the executive rather than a judicial body. Lord Neuberger accepted that this was the case. He was, however, reluctant to endorse the accompanying proposition that the executive therefore enjoyed greater freedom to make use of section 53 in respect of a Commissioner's decision. While it was not necessary to resolve the issue, he felt that "[t]here must … be a powerful case for saying that it would at least often be a misuse of the section 53 power to issue a certificate on certain grounds when it would be possible to appeal to the tribunal under section 57 on the same grounds".[57]

The suggestion that there could be an implied requirement to make use of the appeal mechanism even though that was neither set out in the statute or required by the rule of law considerations identified at paragraph 52 tends to confirm that there is a deeper constitutional principle at work here: one that seems, again, to be best explained as a concern to ensure independent and authoritative oversight of the exercise of legal powers. Once again, Lord Neuberger seems unwilling to rest his analysis on formal designations of institutions or of the powers being exercised. It is not, in the end, decisive whether a decision-maker is classified as executive or judicial, or that a decision is characterised as a finding of fact, an opinion on the merits or a balancing exercise.[58] The overarching concern is instead to ensure that the "accountable person" is answerable to *someone* in the exercise of their powers; that is, that they remain a subject to the law.

Is an assessment of the Attorney's reasons inconsistent with the concept of authority?

While Lord Mance's judgment avoided direct recourse to constitutional principles, it is notable that his reasoning also seems to reflect a concern to ensure that the Attorney remained subject to authoritative oversight. At first glance, the fact that his decision was focused on an assessment of the reasons for the Attorney's exercise of the section 53 power might be thought inconsistent with the authority-oriented account of the rule of law outlined here. After all, if the point of authority is that it is

[57] Paragraph 80.
[58] Paragraph 67.

pre-emptive, the reasons for the Attorney's disagreement should be irrelevant. That seems to be Lord Neuberger's view. However, a closer analysis of the decision (and, indeed, that of Lord Wilson) confirms that it too is motivated by a concern to preserve the authority-subject relationship. Lord Mance's judgment focuses on the reasons required to justify the accountable person's rejection of the earlier decision. The critical point is that, like Lord Neuberger, this, in principle, denies the executive the entitlement to reason or act freely in the exercise of section 53 (2). It is not the exercise of section 53 but the rejection of the earlier decision which must be capable of being justified. The authoritative character of the earlier decision is accordingly preserved. The accountable person remains subject to it and is bound to accept it until such time as they can provide reasons that meet the (in Lord Mance's case) high threshold to justify a different outcome.

Thus – as confirmed by how Lord Mance applied these principles to the situation in *Evans* – the fact that an authoritative decision has been given substantially restricts the executive's freedom to act. The fact that the Attorney's view had a reasonable basis was not sufficient to allow him to act on it. To constitute reasonable grounds for the purposes of the Act, however, these reasons had to go beyond a justification of his position *per se*. They had to make it reasonable to exercise an override power. Thus, while the Attorney has a rational basis for his views, they could not be regarded as "reasonable grounds" for exercising section 53 (2) because they directly contradicted those of the Upper Tribunal "without any real or adequate explanation" of the contradiction or "any substantial or sustainable basis being given for the disagreement".[59] The problem here was that the Attorney did not act on foot of the "background and law established by the tribunal's determination" but undertook "his own redetermination of the relevant background circumstances".[60] In other words, the Attorney had acted as if he had a free hand in respect of a decision which had already been the subject of an authoritative determination. This failed to recognise or respect his position as subject to the authority of the Tribunal.

[59] Paragraph 145.
[60] Paragraph 131.

In defining reasonableness in a manner that takes account of the statutory context to section 53 (2), Lord Mance's approach echoed that of the Court of Appeal.[61] In rejecting the proposition that an accountable person is free to make use of section 53 (2) as long they have "sensible and rational reasons" for their view, Lord Dyson MR preferred a definition of reasonableness that reflected "the context and the circumstances" in which the decision is made. Notably, the context and circumstances that were relevant to reasonableness in section 53 (2) were those that reflected the "constitutional significance"[62] of its impact on inter-institutional powers: that is, the caution required in considering a potential override of an earlier decision that was both independent and authoritative.

> In each of [Powergen, Danaei and Bradley], there was a judicial review challenge to the reasonableness of the later decision. In my view, the cases provide a helpful analogy. In each of them, the context in which the reasonableness of Y's decision was to be judged was that it was contrary to the earlier decision of X, which was an independent and impartial body that had conducted a full examination of the very issues that Y later had to determine. In each case, the court emphasised as being of particular importance, the fact that the earlier decision had been made by an independent and impartial body after a thorough consideration of the issues. In these circumstances, the court held that there had to be something more than mere disagreement on the same material for it to be reasonable for Y to disagree with X.[63]

While reasonableness is a more flexible and less categorical threshold than that suggested by Lord Neuberger, it is instructive that both approaches produce practically similar limitations on the use of section 53 (2). Under either test, the obligation is to demonstrate, in effect, that there are reasons why the authoritative status of the earlier decision should no longer apply. The effect of either the categorical or reasonableness approach is that it is necessary for the accountable person to reason in a way which proceeds from an acknowledgment and acceptance

[61] [2014] EWCA Civ 254.
[62] Paragraph 39.
[63] Paragraph 37.

that the earlier decision has authority and that they are subject to it. Both are directed to preserving the authority-subject structure between independent decision-maker and addressee of the decision. Where they differ is in a definition of the circumstances within which the subject need no longer treat the decision as authoritative. It is clear, however, that the question of authority is a central consideration at each stage of the analysis.

Indeed, it is noteworthy that even Lord Mance's recognition of potentially wider grounds of override is likely, in practice, to preserve the principle that the executive is subject to independent oversight. The decision points out that the decision to exercise the section 53 (2) power must satisfy a number of procedural requirements which facilitate judicial review. The Attorney was obliged to give reasons for his opinion. Those reasons are, in turn, subject to judicial scrutiny. Further, in the exercise of judicial review, the court is entitled to impose "a higher hurdle than mere rationality"[64] so as to ensure that there is "the clearest possible justification" for disagreement with the earlier decision.[65] In effect, this substitutes one authority relationship for another. This reiterates the position of the executive as a subject rather than as an autonomous actor. Whether before the Commissioner, the Tribunal or the courts in a judicial review, its exercise of statutory powers – even an express power of override – remains at all times subject to independent authoritative oversight.

The significance of the majority's view of Bradley

That the majority's primary concern was to preserve the authority and substance of inter-institutional engagement is perhaps most clearly evident in the Court's treatment of the decision in *R (Bradley) v Secretary of State for Work and Pensions*.[66] On a traditional or 'pure' separation of powers analysis, it would have been open to the Court in *Evans* to base its conclusions on a characterisation of the decision being overridden as judicial. This would have allowed the decision to be presented as a relatively straightforward defence of judicial independence. This

[64] Paragraph 129.
[65] Paragraph 130.
[66] [2009] QB 114.

could have been either because the Upper Tribunal is classified as a judicial body, or because the decision in question could have been plausibly described as a legal one.

As already noted, Lords Neuberger and Mance (as well as the Court of Appeal) rejected the latter approach. Both expressed a broad view of the scope of the obligation to respect the original decision so that it encompassed not just findings of law but also the decision-maker's view of the facts and background circumstances.

In terms of the other possibility, both judges interpreted *Bradley* as confirming that the imposition and enforcement of constraints on executive freedom of action was not based – or not based solely – on a concern for judicial independence. This followed from the fact that *Bradley* was concerned with an attempt by a Minister to reject the findings of maladministration by the Ombudsman. The Ombudsman is not a judicial body and its findings are not legally enforceable. However, the Court of Appeal in *Bradley* held that, while the Minister was not legally bound by the findings, he also was not entitled to reject them "merely because he preferred another view which could not be characterised as irrational". This is the theme that recurs throughout Lord Neuberger's decision: that a body that is subject to a decision thereby loses the freedom to act differently "simply" or "merely" because it has a different view. That this is the case even where the decision is taken by a non-judicial body and is largely without legal effect suggests that the rule of law concerns that are at work here are not based on the position or prerogatives of the courts. The focus is not on the decision-maker but on the person that is subject to it – and on the obligations that that subject status implies. As Lord Mance summarised it:

> [T]he decision [in Bradley] indicates that there can be constraints on executive departure from the considered findings of even a non-judicial body established to investigate and make recommendations.[67]

This confirms that the issues raised in Evans were about more than ouster clauses or judicial independence. The judgment reflects a broader concern about the integrity

[67] Paragraph 126.

of the system's institutional structures and the contribution this makes to the rule of law. This is not limited to judicial bodies or judicial review. In fact, the endorsement of *Bradley* suggests that the concern of the courts in this area is less with the decision-maker than with the addressee of the decision. Despite their differing tests and thresholds, the majority judgments are all, at their heart, about denying the addressee the entitlement to disagree with an earlier decision *just because*. In answer the High Court's rhetorical "why not", Dyson MR's response seems to sum up the sense of the majority: "Something more is required".[68] That "something more" is the consequence of the authority-subject relationship. It is what follows from the specifically pre-emptive nature of authority. It is the difference between advice and an order; between counsel and command; and, ultimately, between the situation where the executive addressee is subject to legal authority and one which is "uncomfortably close to decision-making by executive or administrative diktat".[69]

E. Conclusion

For all its ambiguity, the idea of the separation of powers has generally been understood to at a minimum encompass the principle of judicial independence. From the point of view of English law, the two have often been broadly equated since "the domestication of Montesquieu's theory in Blackstone's emphasis on the centrality of judicial independence in his elaboration on separate powers in England".[70] Masterman's focus on judicial competence and independence in his analysis of the separation of powers is a contemporary example of this approach. In the search for a core minimum value of the separation of powers, therefore, the principle of judicial independence is an obvious starting point. What *Cart* and *Evans* suggest, however, is a judicial view that a system of separated institutions cannot be reduced to a focus on independence or on the powers and functions of the judiciary. Whereas previous decisions such as *Anisminic* were capable of being understood as a defence of the judicial function, *Cart* and *Evans* are less easy to explain under a negative separation of powers or judicial independence analysis. In both cases, the courts

[68] Paragraph 38.
[69] *R v Secretary of State for the Home Department ex parte Danaei* [1998] INLR 124, per Judge LJ.
[70] JW Allison, History to understand, and history to reform, English public law (2013) 72 (3) CLJ 526, 530

accepted the possibility of the courts intervening to defend the position of a non-judicial body against a potential override. This is significant because it cuts across various aspects of (at least some concepts of) the separation of powers: the formal conception of it as based on a classification of functions; the idea of it as a negative protection of institutional boundaries; the prominence of the judicial function as the subject-matter of the model. This was, however, arguably the natural implication of the way in which both courts connected the specific separation of powers issues before them with a broader constitutional principle of the rule of law. What this meant was that the separation of institutions – and, indeed, the vesting of a judicial review jurisdiction in the courts – were effectively treated as methods of promoting and protecting the rule of law rather than ends in themselves. While these principles may provide prudential guidance in most cases, the constitutional priority appears to be to secure the rule of law. This means that a court could, in borderline cases, adopt a fluid approach to the limits of its judicial review powers that is based, primarily, on a substantive assessment of the rule of law implications of the subject-matter before it. What *Cart* and *Evans* in particular illustrate is that a rule-of-law-oriented assessment should concentrate on the position of the subject institution rather than the court. A focus on independence alone may mislead in that it inclines to the impression that what is at stake is the protection or vindication of the reviewer. In fact, what is arguably more critical for the rule of law is that there is a reviewee who acknowledges that they are subject to review. *Cart* and *Evans* are reminders of the point made by Laws LJ in his extra-judicial explanation of *Anisminic*: that "[t]o oust the court's power of review is necessarily to put some party above the law, or, at least, to make it and not the court the judge of what the law is, which is the same thing"[71]. The rule of law requires more than independent oversight; it requires that that oversight occur within an authority-subject relationship that it is understood and operated as such by both parties. A minimally effective separation of powers, therefore, must also involve more than (judicial) independence. The system must make provision for institutions that are separate, that are independent, and that exercise and are subject to authority.

[71] Laws, Is the High Court the guardian of fundamental constitutional rights? [1993] PL 59, 78.