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# Unpacking Separation of Powers: Judicial Independence, Sovereignty and Conceptual Flexibility in the United Kingdom Constitution

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Separation of powers and constitutional thought – and indeed practice – enjoy an uneasy relationship in the United Kingdom, with evidence of the apparent centrality of the doctrine to the constitution<sup>1</sup> as commonly found as evidence of its irrelevance.<sup>2</sup> The contested nature of the doctrine is attributable to a number of factors: the physical “fusion” of the elected branches of government,<sup>3</sup> the absence of a documentary constitution prescribing the organs of government and their functions,<sup>4</sup> the lack of a clear tradition of legal control on government<sup>5</sup> and differing visions of the aims and purpose of separation of powers itself.<sup>6</sup> Yet accounts of the United Kingdom constitution have rarely been able to completely omit analysis of the

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<sup>1</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) 8; E. Barendt, “The Separation of Powers and Constitutional Government” [1995] PL 599.

<sup>2</sup> S.A. De Smith, “The Separation of Powers in New Dress” (1966) 12 *McGill Law Journal* 491; G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), ch.5; O. Hood Phillips, “A Constitutional Myth: Separation of Powers” (1977) 93 L.Q.R. 11.

<sup>3</sup> W. Bagehot, *The English Constitution* (Oxford: Oxford University Press, 2001) (Oxford World’s Classics), p.11.

<sup>4</sup> S.A. de Smith, “Separation of Powers in New Dress” (1966) 12 *McGill Law Journal* 491, 491.

<sup>5</sup> M. Loughlin, “Wither the Constitution?”, in C. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000), p.425.

<sup>6</sup> G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), ch.5.

doctrine.<sup>7</sup> This is partially for the reason that notions of mixed government and/or the balanced constitution – ideas which *have* proved influential in constitutional discourse – can be seen to serve the same aims as separation of powers through less visible divisions between institutions and governmental functions.<sup>8</sup>

Despite uncertainty over the influence of separation of powers in the United Kingdom, ideas associated with the doctrine have recently enjoyed something of a renaissance.<sup>9</sup> Separation of powers has (re)surfaced as an instrument of constitutional argumentation providing a facilitating framework for constitutional debate and is increasingly invoked in support of decision-making in the politico-legislative arena.<sup>10</sup> The structural changes engineered by the Constitutional Reform Act 2005 in particular have contributed to a more tangible separation of powers within which the judicial branch has emerged as both stronger<sup>11</sup> and institutionally independent of its elected counterparts.<sup>12</sup>

Specifically, it has been suggested that “the courts have begun to talk of the separation of powers in more juridical terms.”<sup>13</sup> While assertions of a rudimentary separation of functions between the core institutions of government may well have been occasional features of twentieth century judicial decisions,<sup>14</sup> assertions of the *fundamentality* of

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<sup>7</sup> Even S.A. De Smith did not reject the influence of the doctrine outright, and was forced to concede that “a brief survey of the doctrine brings out more clearly some features of the British system of government” (S.A. De Smith, *Constitutional and Administrative Law* (3<sup>rd</sup> ed) (Harmondsworth: Penguin, 1977), p.36).

<sup>8</sup> R. Masterman and J.E.K. Murkens, “Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court” [2013] P.L. 800, 800-802.

<sup>9</sup> For instance: V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), ch.11; R. Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: Cambridge University Press, 2011).

<sup>10</sup> See generally: J. Simson Caird, R. Hazell and D. Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution* (London: Constitution Unit, 2014), pp.13-16.

<sup>11</sup> R. Hazell, “The Continuing Dynamism of Constitutional Reform” (2007) 60(1) *Parliamentary Affairs* 3, 17.

<sup>12</sup> R. Masterman and J.E.K. Murkens, “Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court” [2013] P.L. 800, 804-806.

<sup>13</sup> A. Tomkins, “The Rule of Law in Blair’s Britain” (2007) 26 *University of Queensland Law Journal* 255, 260-261. See also: J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007), pp.90-92.

<sup>14</sup> See: *Duport Steel v Sirs* [1980] 1 W.L.R. 142, 157; *M v Home Office* [1994] 1 A.C. 377, 395.

separation of powers have become more commonplace in recent times.<sup>15</sup> Separation of powers is not only revealing itself as an influential factor in macro-level constitutional renovation but is also argued to show increasing signs of enforceability in the micro-level processes of litigation.

Recognising this “rehabilitation” of separation of powers into United Kingdom constitutional discourse,<sup>16</sup> this piece seeks to unpick the extent to which the doctrine operates as a normative influence on *judicial* decision-making. We seek to examine whether the increased prominence of separation of powers discourse also reveals a convergence around the normative influence, or influences, of an increasingly judicialised doctrine. Our argument is that beneath the veneer of uncertainty and imprecision can be found four co-existing (and non-mutually exclusive) understandings of separation of powers, with each broadly reflective of a judicial philosophy of accountability and of a particular understanding of the judicial function within the constitution. The paper proceeds by assessing the constitutional dynamics of the separation of powers, presenting a version of separation of powers that evidences a shift away from the doctrine’s traditional, and relatively static, institutional stipulations, without losing sight of the imperative that governmental powers are divided amongst institutions. We then turn to the core of our argument, detailing the manifestation of the four variants of separation of powers in judicial discourse and examining the relative constitutional position of judicial power evident in each model. Our analysis identifies the following core variations of separation of powers evident in judicial reasoning: (i) a hierarchical, or sovereignty-endorsing, variant; (ii) a weakly normative variant; (iii) a strongly normative variant; and (iv) a vision of separation of powers as a constitutional fundamental. The final part of the paper situates separation of powers within the broader constitutional order, explaining the internal coherence and context-sensitivity of the outlined variants. The paper is decidedly juristic in outlook, both in its attempts to unpick the legalisation of separation of powers and in acknowledging that a degree of enforceability is central to the elevation of separation of powers from a merely explanatory to a normative device.

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<sup>15</sup> For instance: *R. (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 A.C. 837, 882 and 899; *DPP of Jamaica v Mollison* [2003] UKPC 6; [2003] 2 A.C. 411, [13].

<sup>16</sup> K. Malleon, “The Rehabilitation of Separation of Powers in the United Kingdom” in L.E. de Groot van Leeuwen and W. Rombouts (eds), *Separation of Powers in Theory and Practice* (Nijmegen: Wolf Legal Publishers, 2010).

## **From a Rigid to a Flexible Model of Separation of Powers**

A tendency to ascribe fixed meaning to the institutional requirements of separation of powers has obscured the various ways in which the doctrine has found purchase in the development of the United Kingdom constitution. A perceived absence of clarity has similarly seen the doctrine criticised for its inability to accurately reflect or prescribe constitutional practice.<sup>17</sup> Our argument treats this mutability as a basis from which to examine how various understandings of the doctrine operate and influence constitutional understanding, rather than as a reason to reject separation of powers as constitutionally irrelevant. Though recent constitutional developments have contributed to the sense that separation of powers has greater purchase within the United Kingdom constitution than hitherto, the precise extent to which the doctrine exerts *normative* influence remains a point of uncertainty. Primarily, this can be attributed to two factors: (i) the traditional absence of appropriate constitutional divisions of power between the institutions of government and (ii) a tendency towards understanding separation of powers – in spite of its alleged doctrinal imprecision – as prescriptive of a relatively inflexible institutional template.<sup>18</sup>

As to the first of these, the “fusion” of the executive and legislative branches remains indicative of the subsidiary nature of separation of powers concerns within the Westminster model. It follows that the concerns of a tripartite separation of powers did not significantly impact upon the establishment of core institutional relationships within the constitution.<sup>19</sup> Additional inter-institutional connections have prompted the dismissal of separation of powers as constitutionally redundant; the pre-2005 incarnation of the office of Lord Chancellor, described by Hartley and Griffith as “the living refutation of the doctrine of separation of powers in England”,<sup>20</sup> provides the paradigmatic example.

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<sup>17</sup> J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007), pp.83-86.

<sup>18</sup> See also: A. Tomkins, “Of Constitutional Spectres” [1999] P.L. 525, 532. Cf. N. Bamforth, “Separation of Powers and Comparative Analysis” in K.S. Ziegler, D. Baranger and A.W. Bradley, *Constitutionalism and the Role of Parliaments* (Oxford: Hart Publishing, 2007), pp.177-179.

<sup>19</sup> A. Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), pp.35-39.

<sup>20</sup> T.C. Hartley and J.A.G. Griffith, *Government and Law* (2<sup>nd</sup> ed) (London: Weidenfeld and Nicolson, 1981), p.179.

Secondly, much of traditional English constitutional theory held that the division of power required by separation of powers was at odds with the unfettered legislative power of Parliament.<sup>21</sup> Separation of powers, it has been argued, requires that no single branch of government wield disproportionate constitutional influence *and* that the institutions of government exercise a degree of coercive influence over each other.<sup>22</sup> This leaves little space for separation of powers to co-exist with the core doctrine of parliamentary sovereignty which has traditionally determined that constitutional authority be organised hierarchically and allows little scope for the constitutional restraint of legislative authority.

It is clear however that separation of powers has been employed – by the elected branches *and* by the courts – as both an objective of, and justification for, recent constitutional decisions. As such, neither the constitutional heritage of non-compliant structural arrangements nor the conceptual immobility of the sovereignty doctrine can provide a compelling and complete rejection of the place of separation of powers in contemporary constitutional discourse. Case law further challenges this conceptual rigidity, revealing a concept that is operative in judicial reasoning as a descriptive, rhetorical and normative device. Conceiving of separation of powers as less of an inflexible prescription, and more as an overarching principle of constitutional conduct<sup>23</sup> or fluid encapsulation of constitutional dynamics,<sup>24</sup> allows us to interpret variance from its institutional “template” sympathetically, permitting greater precision in calculating its influence in constitutional practice. By contrast with Marshall, who argues that the malleability of separation of powers results in uncertainty and normative weakness,<sup>25</sup> we argue that flexibility is central to the place of separation of powers in the United Kingdom’s constitution and has allowed the doctrine to retain credence in the face of obstacles to its straightforward application.

### **Deploying Separation of Powers in Judicial Reasoning**

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<sup>21</sup> J. Baker, “The unwritten constitution of the United Kingdom” [2013] E.C.L.J. 4, 10-19; C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), pp.22-26.

<sup>22</sup> E. Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), p.14-17.

<sup>23</sup> J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007), ch.4.

<sup>24</sup> M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001), p.225-229.

<sup>25</sup> G. Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971), ch.5.

References to separation of powers concerns in judicial reasoning can tentatively be observed to reveal a series of approaches to the doctrine, each of which seeks the reconciliation of separation of powers with established features of a constitution which continues to be shaped (to a greater or lesser degree) by parliamentary sovereignty. Our argument outlines four judicial understandings of the doctrine that range from a hierarchical version carrying few independent normative implications (serving as little more than a ratification of parliamentary sovereignty), to the conceptualisation of the doctrine as a freestanding and fundamental principle of the constitutional structure. Resting between these variants are medial approaches that acknowledge the influence of separation of powers as distinct from parliamentary sovereignty, and recognise certain judicial powers as reserved to the courts. The weakly normative version carves out a conceptual space for an autonomous judicial role and is advanced by the articulation of specific, independently-held, judicial functions under the strongly normative approach.

*A hierarchical, or sovereignty-endorsing, separation of powers*

Separation of powers and parliamentary sovereignty are often portrayed as incompatible. There can be no effective division of powers, it is argued, when one institution of government lays claim to unlimited legal authority and its enactments – by mere virtue of that authority – are deemed to be constitutional.<sup>26</sup> Yet parliamentary sovereignty does give rise to a separation of powers, if not one of legally co-equal branches. Acceptance that separation of powers might assume multiple forms facilitates an allocation of functions to branches of the state without necessarily assuming or demanding an equal distribution of power.

It is commonplace that judicial reference to separation of powers acknowledges the existence of three branches of government and an apportionment of functions between them: “Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law.”<sup>27</sup> Hence legislative, executive and adjudicative functions are acknowledged to attach to three core branches of government. This minimalist version of separation of powers is a consequence of the legally superior position of the legislature and therefore “implicit in a constitution on the Westminster model.”<sup>28</sup> Perhaps the most well-known invocation of

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<sup>26</sup> E. Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), p.17.

<sup>27</sup> *M v Home Office* [1994] 1 A.C. 377, 395.

<sup>28</sup> *Hinds v The Queen* [1977] A.C. 195, 225.

separation of powers in this particular guise can be found in the House of Lords decision in *Duport Steel v Sirs*:<sup>29</sup>

... it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them.<sup>30</sup>

It would be incorrect to dismiss this approach as merely descriptive of constitutional practice,<sup>31</sup> for the reason that behind this nominal allocation of powers can be found the underpinning *normative* influence of parliamentary supremacy.<sup>32</sup> In *Duport* – cautioning against what he saw to be the overly activist interpretative approach of the Court of Appeal – Lord Diplock outlined the consequences of Parliament’s legally superior status:

... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it ... under our constitution it is Parliament’s opinion ... that is paramount.<sup>33</sup>

The normative influence of the sovereignty doctrine can therefore be clearly seen to influence the constitutional division of powers. This separation is entirely consistent with the legally and constitutionally inferior, or subservient, role historically assumed by the courts, a role which can be understood as the necessary consequence of Parliament’s legal sovereignty.<sup>34</sup> Parliamentary supremacy may not be necessarily inconsistent with, or destructive of, separation of powers. Rather, it can be understood as generating a particular, hierarchical,

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<sup>29</sup> *Duport Steel v Sirs* [1980] 1 W.L.R. 142.

<sup>30</sup> *Ibid.*, 157.

<sup>31</sup> For the suggestion that separation of powers in the British context can *only* be regarded as descriptive see: A. Tomkins, *Public Law* (Oxford: Oxford University Press, 2003), p.38.

<sup>32</sup> Indeed, Tomkins has elsewhere contended that parliamentary sovereignty, rather than separation of powers, is the precise focus of Lord Diplock’s remarks in *Duport Steel* (A. Tomkins, “Of Constitutional Spectres” [1999] P.L. 525, 531).

<sup>33</sup> *Duport Steel v Sirs* [1980] 1 W.L.R. 142, 157.

<sup>34</sup> See: R. Masterman and J. Murkens, “Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court” [2013] P.L. 800, 802-804.

variant of the doctrine in which the legislature – though susceptible to the vital checks and balances of the *political* process<sup>35</sup> – is regarded as being *legally* superior.

The assumptions that flow from the recognition of the legislature as constitutionally superior to courts and executive can be seen to condition the courts' interpretative role, and the regulation of power allocated to the executive. As *Duport* demonstrates, literal – or plain meaning – approaches to statutory construction are driven by the supremacy of the legislature and manifested in the courts' attempts to give faithful effect to Parliament's legislative intent. The roles of legislator and interpreter are acknowledged (indeed required) in this separation of powers, but the supremacy of the former – and the resulting judicial reverence for statutory language<sup>36</sup> – determines (and limits) the approach to be taken by the interpreter. The formalist school of legislative interpretation, prominent in judicial attitudes and method for much of the twentieth century,<sup>37</sup> is an emanation of this variation of separation of powers.

The preservation of the determinative legislative authority of Parliament remains influential,<sup>38</sup> even in the face of reform that considerably repositions the respective powers of the three branches vis-à-vis each other.<sup>39</sup> The architects of the Human Rights Act 1998 were thus keen to emphasise the Act's maintenance of this “traditional understanding of the separation of powers.”<sup>40</sup> In giving effect to the courts' obligations under the Act this hierarchical understanding of separation of powers is able to condition the extent to which the courts' interpretative powers – under s.3(1) – might be utilised legitimately.<sup>41</sup> Lord Millett, dissenting, in *Ghaidan v Godin-Mendoza* noted that the “quasi-legislative” approach taken by

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<sup>35</sup> See: *R. v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 A.C. 513, 544-546; *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583, [248]-[255].

<sup>36</sup> G. Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971), p.74.

<sup>37</sup> R. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (London: Weidenfeld and Nicolson, 1979), chs.10 and 11; J. Steyn, “Does legal formalism hold sway in England?” (1996) 49 *Current Legal Problems* 43.

<sup>38</sup> *R. (Jackson) v Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262, [9] (Lord Bingham); *R. (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] A.C. 1787, [168] (Lord Wilson).

<sup>39</sup> K.D. Ewing, “The Human Rights Act and Parliamentary Democracy” (1999) 62 *M.L.R.* 79, 79.

<sup>40</sup> HL Debs, vol. 582, col. 1228 (3 November 1997) (Lord Irvine of Lairg Q.C.). See also: HC Debs, vol. 306, col. 772 (16 February 1998).

<sup>41</sup> *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557.

the majority to the use of s.3(1)<sup>42</sup> – which permitted the reinterpretation of provisions of the Rent Act 1977 to achieve compliance with the requirements of Articles 8 and 12 of the Convention – may have been “appropriate where the constitution ... is the supreme law” but “is not appropriate in the United Kingdom, which has no written constitution and where the prevailing constitutional doctrine is based on the supremacy of Parliament.”<sup>43</sup> Millett’s view acknowledges a division of power between courts and legislature under which the judicial role is constrained by that which the constitution envisages should be undertaken by the legislature. It additionally highlights that the normative content of this particular division of governmental powers – the role of pseudo-independent interpreter – is contingent on the sovereignty doctrine, rather than an autonomous function of the courts.

Consistently with formalist approaches to statutory construction, the hierarchical approach to separation of powers does not completely eschew legal checks on government, instead attempting to explain them by reference to the legal supremacy of Parliament. Hence, conceptualisation of the court’s supervisory role in judicial review cases by reference to the *ultra vires* rule provides a representation of this hierarchical – sovereignty-endorsing – approach to separation of powers; the *ultra vires* theory “grounds judicial review firmly in the sovereignty of Parliament.”<sup>44</sup> Under the *ultra vires* model, the courts’ powers of review exist in order to police the legality of statutory delegations of power to government and owe their authority to the inferred intention of Parliament that those powers be exercised in accordance with law.<sup>45</sup> While it is clear that this understanding of separation of powers has informed self-perceptions of the judicial role, the absence of a normative bite *independent* of the implications of parliamentary sovereignty precludes its full reconciliation with the aspiration of the doctrine to limit power through its division. Moreover, the hierarchical variant fails to provide a platform for creative (law-making) judicial functions and cannot fully account for judicial scrutiny of non-statutory governmental powers. The constitutional value of this variant is therefore undermined by its ability to offer only a partial account of the judicial role within the constitution.

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<sup>42</sup> An approach evident elsewhere in s.3(1) jurisprudence: *R. v A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 A.C. 269.

<sup>43</sup> *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557, 585.

<sup>44</sup> J. Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] P.L. 671, 673.

<sup>45</sup> *Boddington v British Transport Police* [1999] 2 A.C. 143, 164 (Lord Browne-Wilkinson).

*The weakly normative variant*

Those accounts of separation of powers that demarcate autonomous judicial functions begin to provide a more holistic appreciation of the judicial role. By contrast with the hierarchical account of separation of powers, the weakly normative variant provides a positive endorsement of an independent judiciary rather than a negative suggestion that judicial functions are largely derivative of a higher constitutional authority. At a general level, the weakly normative variant of separation of powers:

... requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts.<sup>46</sup>

As Stanley Burnton J suggests, the division and exercise of constitutional power by the judiciary should be understood as being conceptually autonomous of powers exercised by the other branches of state. Understood in this way, this conception of separation of powers becomes more than simple camouflage for the supremacy of the legislature, and envisages a parallel space in which the court's *independent* judgment and authority carry weight. More specifically, whereas the hierarchical understanding of separation of powers focuses on the *source* of judicial power, weakly normative readings of separation of powers invite reflection on its *extent*. Though still acknowledging the ultimate primacy of the legislature, weakly normative readings of separation of powers recognise an autonomous judicial function that exists in the absence of any explicit or implicit conferral of power by way of legislative direction. This understanding acknowledges that:

Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others ... The

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<sup>46</sup> *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin); [2010] Q.B. 98, [46] (Stanley Burnton J). See also: *Ahmed v HM Treasury* [2010] UKSC 5; [2010] 2 A.C. 534, [85] (Lord Phillips).

principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle.<sup>47</sup>

The weakly normative variant can then be conceptually distinguished from (and seen as a *necessary* development of) the hierarchical approach, for the reason that it recognises the constitutional value of an autonomous judicial function that is independent of legislative, or assumed legislative, intent. It is within this understanding of separation of powers that the limited law-making powers of the courts<sup>48</sup> and ability of the common law to legitimise judicial review – and recognise that non-statutory governmental powers may be susceptible to judicial scrutiny – most clearly reside. The common law theory of judicial review supports a system of judicial checks and balances that is not derivative of parliamentary authority.<sup>49</sup> This variant is implicit in those specific cases where the courts have asserted a power to review exercises of non-statutory governmental powers,<sup>50</sup> and in encapsulations of judicial review as – in the words of Baroness Hale in *Cart* – “an artefact of the common law whose object is to maintain the rule of law – that is to ensure that ... decisions are taken in accordance with the law.”<sup>51</sup> Baroness Hale implicitly recognises the supremacy of the legislature, but explicitly conceives of judicial review as an autonomous creation of the common law.<sup>52</sup> The normative component of this variant of separation of powers therefore extends beyond policing that statutory delegations of power are exercised consistently with the intentions of the legislature and begins to underpin the courts’ independent role in upholding the rule of law.

That the common law has come to recognise the existence of “constitutional or fundamental”<sup>53</sup> rights – freedoms which do not owe their existence to legislation, yet may exert influence over its interpretation – provides a further illustration of the normative

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<sup>47</sup> *R. (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 A.C. 185, [76].

<sup>48</sup> Lord Reid, “The Judge as Lawmaker” (1972) 12 *Jnl Soc Public Teachers of Law* 22; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557, [30]-[36].

<sup>49</sup> D. Oliver, “Is the ultra vires rule the basis of judicial review?” [1987] P.L. 543.

<sup>50</sup> For instance: *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374; *R. v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] Q.B. 815.

<sup>51</sup> *R. (on the application of Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 A.C. 663, [37].

<sup>52</sup> See also: P. Craig, *Administrative Law* (6<sup>th</sup> ed) (London: Sweet & Maxwell, 2008), p.17.

<sup>53</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151, [62].

influence of the common law over statute.<sup>54</sup> In *Witham* Laws LJ famously found that constitutional rights at common law “can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits” such limitation.<sup>55</sup> By virtue of this approach to statutory construction – subsequently endorsed, and developed, at the highest judicial levels<sup>56</sup> – interference with rights existent at common law is permitted, but only in so far as authorised by specific statutory direction. A linguistically surmountable check is therefore placed upon the ability of the legislature to interfere with those constitutional rights recognised by the common law. Weakly normative readings of separation of powers acknowledge, rather than assume, the constitutional superiority of the legislature, recognising that the “considered opinion of the legislature”<sup>57</sup> does – and *should* as a result of its democratic underpinnings – carry normative weight.

Though supportive of independently imposed checks and balances structures, in practice, weakly normative readings of separation of powers may also be characterised by occasionally deferential tendencies towards the legislature.<sup>58</sup> While a hierarchical interpretation of separation of powers approaches the authority of primary legislation as an immovable object, the weakly normative approach sees deference to legislative authority as a matter of judgment rather than of routine. Lord Hoffmann’s rhetorically powerful speech in the *ProLife Alliance* case provides an example. In criticising the *language* of deference – noting the “overtones of servility, or perhaps gracious concession” that the term implied – Hoffmann rejected the notion that judicial authority should be regarded as being necessarily constitutionally secondary to the legislative power of Parliament. However, the decision of the House of Lords was almost certainly deferential towards the primary decision-maker as a matter of fact.<sup>59</sup> A comparable tendency is visible in Lord Hoffmann’s famous speech in *Simms*.<sup>60</sup> There Hoffmann hails the ability of the principle of legality to see courts enforcing powers of review (“principles of constitutionality”) not dissimilar to those exercised by

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<sup>54</sup> See also: *R. v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198.

<sup>55</sup> *R. v Lord Chancellor, ex parte Witham* [1998] Q.B. 575, 586.

<sup>56</sup> *R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3.

<sup>57</sup> *Wilson v First County Trust (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816, [112].

<sup>58</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374; *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 A.C. 453.

<sup>59</sup> *R. (on the application of ProLife Alliance) v British Broadcasting Corporation* [2004] 1 A.C. 185, [75].

<sup>60</sup> *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115.

explicitly constitutional courts, while simultaneously conceding (where legislative purpose is clear) Parliament's ability to legislate absent legal constraints.<sup>61</sup>

### *The strongly normative variant*

Strongly normative approaches to separation of powers have seen judges utilise the doctrine as being either substantially determinative of an adjudicative dispute, or as strongly supportive of the idea of specific (exclusive) judicial functions. Thus, this variant differs from the weakly normative approach by identifying judicial functions and showing willingness to enforce their reservation to the judicial branch. The division of tasks envisaged by this variant echoes the reflexive allocation of governmental functions discussed above – “[i]nterpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament”<sup>62</sup> – but further envisages the articulation of exclusive, independent functions for the court.

The sentencing context is one in which “the courts have begun to talk of the separation of powers in more juridical terms.”<sup>63</sup> The judgment of Lord Steyn in *Venables* – expressing the House of Lords’ decision that when fixing a tariff for life sentence prisoners, the Secretary of State performs a role analogous to that of a judge and is consequently barred from taking account of public protests<sup>64</sup> – can be seen to embrace the strongly normative approach. Evinced an embrace of *exclusive* judicial functions, Lord Steyn noted that “[i]n fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function.”<sup>65</sup>

Following implementation of the Human Rights Act, further development of the strongly normative perspective was revealed in *Anderson*, with the House of Lords holding that the Home Secretary’s power to set tariffs for prisoners convicted of murder could not

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<sup>61</sup> Ibid., 131: “Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. [...] The constraints upon ... Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost.”

<sup>62</sup> *In Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 A.C. 291, [39].

<sup>63</sup> A. Tomkins, “The Rule of Law in Blair’s Britain” (2007) 26 *University of Queensland Law Journal* 255, 260-261.

<sup>64</sup> *R. v Secretary of State for the Home Department, ex parte Venables* [1998] A.C. 407, 528.

<sup>65</sup> Ibid., 526.

persist in light of the Article 6(1) ECHR requirement that tariffs be fixed by the judicial branch.<sup>66</sup> Lord Steyn observed that “Article 6(1) requires effective separation of powers between the courts and the executive, and further requires that what can in shorthand be called judicial functions may *only* be exercised by the courts.”<sup>67</sup> Consequently, Steyn spoke to “the evolution and strengthening of the principle of separation of powers between the executive and judiciary which underlies Article 6(1)” and the influence of this invigorated separation of powers on the development of Article 6 decisions relating to the sentencing exercise.<sup>68</sup> The influence of the ECHR in this approach is undoubtable, and Lord Steyn’s comments portray a level of permeability in the doctrine, which allows it to absorb elements of the Convention. Accordingly, while to some eyes the court’s judgment may read as a legalistic application of the Convention, there is more to it; the approach also reflects a strongly normative separation of powers protective of an independent area of responsibility for the courts.<sup>69</sup>

This strongly normative approach can be supported in four ways. First, by textual arguments, using enforceable norms that display separation of powers characteristics such as Article 6(1); second, by institutional arguments, which can take the form of articulating a function seen to be inherent in the nature of the judicial role on the basis of the rule of law or judicial independence; third, by reference to the allocation of certain functions to judicial bodies on the basis of the decision-making attributes of judicial processes or finally, the approach may be supported by invoking the constitutional responsibility of courts. The textual explanation emerges in the application of Article 6(1) as a requirement that sentencing rest within the exclusive domain of the courts. This was the support proffered for the strong normative stance that was adopted in *Anderson*. Beyond textual explanations, the exclusivity of certain functions can be justified by reference to the institutional virtues of the court and the procedural virtues of the curial process. Such was Laws LJ’s explanation of the interpretive function in *Cart v Upper Tribunal*:

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<sup>66</sup> Ibid, [40].

<sup>67</sup> *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, [40] (Lord Steyn) (emphasis added).

<sup>68</sup> Ibid, [40]-[41].

<sup>69</sup> See also: *R. (Girling) v Parole Board* [2006] EWCA Civ 1779; [2007] Q.B. 783, [7]-[9], [19]-[20].

The interpreter's role cannot be fulfilled by the legislature or executive: for in that case they or either of them would be judge in their own cause, with the ills of arbitrary government which that would entail. Nor, generally, can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the text's application, and authoritative – accepted as the last word, subject only to any appeal. Only a court can fulfil that role.<sup>70</sup>

Based on Laws' analysis, the virtues of the court as interpreter rest in the personal impartiality of the judge, the institutional independence of the judiciary, and the legal authority of court decisions.

There is perhaps an instinctive constitutional appeal to ground the strongly normative approach in the inherent functions of the judiciary as, historically, one can point to functions that appear to be central to the judicial role. However, this form of support is self-limiting, relying on the elusive standard of "inherence". As it is notoriously difficult to universally define the nature of judicial, executive, and legislative power, there are few tasks that could be said to be *inherent* in the function of any one branch.<sup>71</sup> The "institutional virtues" approach, on the other hand, invites reflection on the process of judicial decision-making and a determination of functions that are suited to that form of decision-making. This view has the merit of drilling down to an underlying concern of the separation of powers, which is to allocate power to organs of government with regard to how that power will be exercised.<sup>72</sup> This approach therefore enables extension or limitation of strong normative use of the separation of powers in response to reasoned assessment of the suitability of the allocation of a particular decision or issue to an organ of the state.<sup>73</sup>

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<sup>70</sup> *R. (Cart) v Upper Tribunal* [2009] EWHC 3052; [2010] 2 W.L.R. 1012, [37].

<sup>71</sup> I. Jennings, *The Law and the Constitution* (London: University of London Press, 1959), p.294.

<sup>72</sup> See a discussion of similar approaches to the separation of powers and the due process principle in F. Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court" (2004) 32 *Federal Law Review* 205.

<sup>73</sup> A variant on the strongly normative reading of separation of powers envisages that other branches of government might also be the "exclusive" holder of particular functions (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153, [50]-[54]).

An alternative framing of the specific functions of the courts and the relationship between the judiciary and Parliament rests on an understanding of the “constitutional responsibility” of courts.<sup>74</sup> The idea of constitutional responsibility is animated where there are issues touching upon individual rights, and requires courts to play a strong scrutinising and regulatory role, even in policy areas apparently clearly demarcated as being for the elected branches of government. Lord Hope has pointed to a constitutional responsibility of the courts where there exists the potential for discrimination in the distribution of public goods:

Cases about discrimination in an area of social policy ... will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests.<sup>75</sup>

This view of the constitutional role of the court reveals parallels between the strongly normative variant of the separation of powers and some strains of common law constitutionalism; recognition of exclusive functions for courts on the one hand and legislators on the other, in the strongly normative conception, mirrors a moderate articulation of common law constitutionalism as a model whereby the judiciary and Parliament each has its own constitutional sphere of operation. As T.R.S. Allan has argued, “only a strict division between legislator, executive government, and independent judiciary, marking the boundaries of separate jurisdictions, can preserve a sphere of individual autonomy in the face of state power.”<sup>76</sup> In this sense, common law constitutionalism views the judiciary and Parliament as dominant within their own respective spheres,<sup>77</sup> and remains adamant that under current

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<sup>74</sup> *Re P (adoption: unmarried couple)* [2008] UKHL 38; [2009] 1 A.C. 173; *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] A.C. 657, [111].

<sup>75</sup> *Re P (adoption: unmarried couple)* [2008] UKHL 38; [2009] 1 A.C. 173, [48].

<sup>76</sup> T.R.S. Allan, *The Sovereignty of Law: Freedom: Constitution and Common Law* (Oxford: Oxford University Press, 2013), p.3.

<sup>77</sup> For an attempt to begin to define how these spheres interact in practice see: C.J.S. Knight, “Bi-polar Sovereignty Restated” (2009) 68 C.L.J. 361.

constitutional doctrine, Parliament has “the last clear and unequivocal word”<sup>78</sup> insofar as primary legislation affirms “fundamental ideals of democracy and legality.”<sup>79</sup> It is largely this view of the functions of, and relationship between, the institutions that is reflected in the strongly normative approach.

Despite the above instances of strong normative application of the separation of powers, this approach to the doctrine is not commonly seen; the potent assertion in *Anderson* of the separation of judicial and executive powers required by Article 6(1) ECHR remains its high-water mark. Attempts to broaden the relevance and centrality of the separation of powers to the interpretation and enforcement of Article 6 have been less successful in subsequent cases. This is evidenced in *Kehoe*, in which Ward LJ was a lone voice maintaining that the correct approach for deciding whether a bar to access to the court violates Article 6(1) was to determine if the exclusion was one that contravened the separation of powers. While Ward LJ sought to emphasise the doctrine in resolving the dispute, the remaining Court of Appeal judges (and Law Lords) assessed the issue not as one that turned on consistency with the separation of powers, but rather on the existence of a civil right which an individual is prevented from claiming in courts due to a procedural bar erected by the statute.<sup>80</sup>

Further reticence toward the strongly normative stance is revealed in the courts’ post-*Anderson* preference for the practical requirements of Article 6 over reliance on the separation of powers as a determinative doctrine in fair trial cases. This realignment has eroded the doctrinal assistance supplied by Article 6 to effectuate a strong normative application of separation of powers. As a result, in *Davidson v Scottish Ministers* – concerning the consistency of simultaneously held judicial and executive roles with Article 6 – Lord Hope was explicit that the decision be grounded in the practical requirements of the Convention and not on the “theory of the separation of powers alone”.<sup>81</sup> The resettling of the application of Article 6 in a way that de-emphasises autonomous separation of powers

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<sup>78</sup> P. Craig, “Constitutional Foundations, the Rule of Law and Supremacy” [2003] P.L. 92, 109; P. Craig, *Administrative Law* (7th edn, London: Sweet & Maxwell, 2012), pp.27-28.

<sup>79</sup> T.R.S. Allan, *The Sovereignty of Law: Freedom: Constitution and Common Law* (Oxford: Oxford University Press, 2013), p.9.

<sup>80</sup> *R. (Kehoe) v Secretary of State for Work and Pensions* [2004] EWCA Civ 225; [2004] Q.B. 1378 (CA) and [2005] UKHL 48; [2006] 1 A.C. 42 (HL), [40] (Lord Hope).

<sup>81</sup> *Davidson v Scottish Ministers (No 2)* [2004] UKHL 34; 2005 1 S.C. 7, [53].

doctrine can be viewed as a reassertion of what has been referred to as “the English constitution’s long tradition of institutional pragmatism”, whereby the focus is on practical solutions to problems, rather than fealty to constitutional ideology.<sup>82</sup>

The infrequency with which the strongly normative approach is employed is also perhaps indicative that the context of conviction and sentencing is exceptional, being one of few areas in United Kingdom constitutional law that has, over time, come to lend itself to claims of exclusivity on the part of the judiciary.<sup>83</sup> Indeed, the limited reach of the strongly normative approach is an offshoot of the fact that “in classical English constitutional law, the idea of separated powers protects the independence of the courts from the executive”<sup>84</sup> and thus, the independence of the judiciary is the most broadly and traditionally accepted aspect of the separation of powers.<sup>85</sup> The independence of the judiciary occupies such a central and exalted place in the United Kingdom’s separation of powers that one judge has remarked that the separation of powers “in our Constitution is *restricted to the judicial function of government*.”<sup>86</sup> From this perspective, it is difficult to envision further expansion of the strongly normative variant of the separation of powers.

#### *Separation of powers as a constitutional fundamental*

The fourth approach to separation of powers views the doctrine as a “fundamental” constitutional principle<sup>87</sup> and “a constitutive element of democratic government”.<sup>88</sup> The

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<sup>82</sup> C.J.S. Knight, “Bi-polar Sovereignty Restated” (2009) 68 C.L.J. 361, 362.

<sup>83</sup> *R. v Secretary of State for the Home Department, ex parte Venables* [1998] A.C. 407, 526; *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] ULHL 46; [2003] 1 A.C. 837.

<sup>84</sup> C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), p.26.

<sup>85</sup> R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011), pp.26-30.

<sup>86</sup> *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin); [2010] Q.B. 98, [46] (Stanley Burton J) (emphasis added).

<sup>87</sup> See *R. v Secretary of State for the Home Department, ex parte Venables* [1998] A.C. 407, 526 (Lord Steyn); *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, [27] (Lord Steyn); Lord Hoffmann, “The COMBAR Lecture 2001: Separation of Powers” (2002) J.R. 137, 137; *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41; [2005] 2 A.C. 680, [31] (Lord Nicholls).

“fundamental” approach to the separation of powers has been cross-institutional, with references to the doctrine as a “core constitutional principle”<sup>89</sup> also appearing in parliamentary debates and Select Committee reports.<sup>90</sup> The language of fundamentality would seem – at first glance – to signal the triumph of a strong form common law constitutionalist framework in which the courts are able to wield constitutional principles against legislation (and in which the corpus of judge-made law is viewed as tantamount to a free-standing constitutional framework).<sup>91</sup> Yet, at the point at which separation of powers may be expected to have greatest normative value it can be seen to fall short. Thus, judicial attempts to enforce the separation of powers as a *fundamental* and free-standing constitutional principle have failed: “[a]rguments based on the theory of the separation of powers will not suffice.”<sup>92</sup> Against this backdrop, it is perhaps unsurprising that Lord Neuberger in *Evans v Attorney-General* – in seeking to demarcate *exclusive* judicial functions through an explicitly “constitutional”<sup>93</sup> approach to the Ministerial veto power in s.53 of the Freedom of Information Act 2000 – sought to ground his judgment in the more familiar constitutional terrain provided by the rule of law.<sup>94</sup> Indeed, unlike the strongly normative version, the fundamental variant of separation of powers does not give rise to strong normative *enforcement* of separation of powers. Whereas the strongly normative variant prioritises practicality and effective problem solving, the articulation of separation of powers as a fundamental offers broader rhetorical support for the constitutional role of the doctrine. Thus, while the fundamental variant of the separation of powers seems on the surface to project a vision of the constitution as higher-order law, the separation of powers doctrine is

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<sup>88</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, [113] (Lord Hope).

<sup>89</sup> House of Lords Select Committee on the Constitution, *Immigration Bill* (07 March 2014), [17].

<sup>90</sup> For instance: House of Lords Select Committee on the Constitution, *Police (Detention and Bail) Bill* (Sixteenth Report) (HL Paper 178), [7].

<sup>91</sup> J. Leslie, “Vindicating Common Law Constitutionalism” (2010) 30 L.S. 301, 308.

<sup>92</sup> *Davidson v Scottish Ministers (No.2)* [2004] UKHL 34, [53]. See also: *R. (Smith) v Secretary of State for the Home Department* [2004] EWCA Civ 99; [2004] Q.B. 1342.

<sup>93</sup> *R. (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] A.C. 1787, [51] (Lord Neuberger).

<sup>94</sup> *Ibid.*, [51]-[53].

not in practice so applied. The crux of this category then is that there is an apparent contradiction between rhetorical references to the doctrine and its practical application.

There are three possible ways of accounting for this contradiction of practical constitutional significance and rhetorical usage. The first is to view judicial assertion that the separation of powers is “fundamental” as a statement that the doctrine is foundational to the constitutional system. Here, “fundamental” is used to connote a foundation of the existing constitutional structure rather than a higher order (constitutional) law.<sup>95</sup> The Supreme Court has perhaps illuminated a path for incorporating the notion of fundamental principles into interpretive practice. Elucidation of the principle of legality in *AXA* indicates that the court will be slow to find that fundamental principles have been abrogated by legislation and will require that such a legislative intention be communicated through express words or necessary inference.<sup>96</sup> It was in this vein that Lords Neuberger and Mance stated in the *HS2* judgment “that there *may* be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.”<sup>97</sup>

A further mechanism that clarifies the judicial articulation of the separation of powers as fundamental is to draw another critical distinction – between the separation of powers as a doctrine and judicial power to enforce it. Thus, while the separation of powers may achieve recognition as a constitutional principle, this is separate from the question whether it may be enforced by judges and, if it is enforceable, whether it is opposable against the legislature as well as the executive. The distinction between the existence and recognition of a norm on the one hand, and enforceability on the other, is not new to the law and has been invoked in the field of socio-economic rights to distinguish between the existence of a justiciable right and the extent of the state’s duties to respect and promote rights.<sup>98</sup> The realm of constitutional law also reveals distinctions between recognition and enforcement in relation to judicial

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<sup>95</sup> M. Walters, “The Common Law Constitution in Canada: The Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 *U Toronto LJ* 91, 96.

<sup>96</sup> *AXA General Insurance, Petitioners* [2011] UKSC 46; [2012] 1 A.C. 868, [150]-[154].

<sup>97</sup> *R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324, [207] (emphasis added); P. Craig, “Constitutionalising Constitutional Law: *HS2*” [2014] P.L. 373.

<sup>98</sup> P. O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (London: Routledge, 2012), pp.78-85.

enforcement of conventions.<sup>99</sup> Thus, there is much precedent for making the distinction between recognising the separation of powers as a fundamental constitutional principle while failing to enforce it as a strong normative principle in the courts.

Finally, the distinction between fundamentality and institutional enforcement power can be partly explained by considering the methodological trajectory behind the “fundamental” statements in *Anderson*. Lord Steyn’s speech in *Anderson* cited Privy Council case-law from common law jurisdictions in which there is both a written constitution and jurisdiction to invalidate legislation on the ground of fundamental constitutional principles. The cases referred to in the House of Lords included judgments from Australia<sup>100</sup>, Ceylon<sup>101</sup> and Jamaica,<sup>102</sup> in which the separation of powers was characterised as a “fundamental principle” applicable to legislation in constitutional review. In those cases there was a confluence of fundamental constitutional character and institutional power, yet in *Anderson* the context was quite different, with neither the constitution nor Human Rights Act providing explicit support for a comparably robust assertion of constitutional principle. Accordingly, while in *Anderson* the separation of powers could be applied to practical effect through Article 6 of the Convention and section 4 of the Human Rights Act, in other cases the Act might not provide the vehicle through which the separation of powers can have such practical impact. Thus, the limited practical application of the conception of the separation of powers as a fundamental and/or constitutional principle serves to underscore Elliott’s observation that “because the British system is not ... a constitution of absolutes, the extent to which fundamental principles can be upheld by courts is necessarily a function of the legislative and institutional circumstances with which they are confronted.”<sup>103</sup>

### **Embracing the variable separation of powers**

The understandings of separation of powers outlined above confirm much of the malleability that a number of critics have used to damn the doctrine and to question its relevance to the

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<sup>99</sup> *Attorney-General v Jonathan Cape Ltd* [1976] Q.B. 752; *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583, [141]-[146].

<sup>100</sup> *Attorney General for Australia v The Queen* [1957] A.C. 288, 315.

<sup>101</sup> *Liyanage v The Queen* [1967] 1 A.C. 259, 291.

<sup>102</sup> *Hinds v The Queen* [1977] A.C. 195.

<sup>103</sup> M. Elliott, “The Immigration Rules, the Rule of Law and the Separation of Powers” (2012) 71 C.L.J. 468, 471-72.

United Kingdom constitution. However, given that relative fluidity is one of the constitution's enduring characteristics, rejection of separation of powers – based on the inherent flexibility of the doctrine alone – is difficult to support. It is at least arguable, for instance, that the rule of law can be seen to suffer from the same defect, and yet its place in the constitutional milieu is broadly undisputed.<sup>104</sup> Acceptance that “our constitution has never embraced a rigid separation of powers”<sup>105</sup> allows conceptualisation of separation of powers as a continuum (or an “ethos”<sup>106</sup>), rather than a single, rigid, template of institutional design or power allocation. Acknowledging that separation of powers admits of multiple variants, each enjoying related, but distinct, meanings, not only emphasises the relevance of the doctrine to our constitutional discourse but permits closer examination of its normative potential and reveals a deeper resonance with existing doctrine and practice than has often been accepted.

The core imperative of separation of powers is to act as “a safeguard against the concentration of power”.<sup>107</sup> It is this feature of the flexible model that ensures its internal coherence; despite persistent contestation of the central attributes of the separation of powers, its objectives and effects, its central objective is to distribute state power.<sup>108</sup> The proposed variable understanding requires divided power, but acknowledges and permits variations in the precise functional distribution achieved in order to afford contextual recognition to, and balance, co-existing constitutional imperatives (including parliamentary sovereignty, individual rights and considerations of relative institutional competence). The adaptability of the doctrine partially explains the continuing resonance of separation of powers, and reveals

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<sup>104</sup> P. Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] P.L. 467; J. Jowell, “The Rule of Law and Its Underlying Values” in J. Jowell and D. Oliver (eds), *The Changing Constitution* (7th edn) (Oxford: Oxford University Press, 2011).

<sup>105</sup> *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, [39]. See also: *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) B.C.L.R. 1253 (CC); 1996 (4) S.A. 744 (CC), [109].

<sup>106</sup> M. Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001), p.226.

<sup>107</sup> E. Barendt, “Separation of powers and Constitutional Government” [1995] P.L. 599, 601.

<sup>108</sup> J. Waldron, “Separation of Powers in Thought and Practice” (2014) 54 *Boston College Law Rev* 433, 433, 438.

far richer understandings of the concept than have traditionally been acknowledged in uncritical assertions of the United Kingdom's "partial" separation of powers.<sup>109</sup>

Each of the models advanced here is concerned with the allocation of power and with its regulation. But each differs in its emphasis and mode of operation; from the bare acknowledgement that the interpretive function is derivative of – but distinct from – legislative authority, to the increasingly potent suggestions that judicial power enjoys an autonomous normative status and that specific judicial functions should be reserved to the courts. Each model is also concerned with guaranteeing checks and balances; with the spectrum ranging from the legally minimalist and *ultra vires* approaches of the hierarchical variant to the suggestions of a free-standing and determinative doctrine of separated powers and a fully-fledged common law constitution. The further we move along the spectrum away from the hierarchical version, the greater the potential of an enforceable separation of powers to independently defend constitutional imperatives such as liberty and the rule of law. Paradoxically, in the United Kingdom constitutional order, a shift away from the hierarchical variant has the consequence that the doctrine becomes less judicially enforceable as its strength must be tempered by – and may come into conflict with – other constitutional doctrines, not least of which is parliamentary sovereignty.

While assertions of a strongly normative variant of separation of powers – or indeed claims as to its fundamentality – certainly enjoy greater rhetorical potency, they simultaneously lack practical force. The greater the normative claim made on behalf of separation of powers in the United Kingdom constitution, the weaker its legal (juridical) purchase becomes. The enforceability of a strongly normative separation of powers is therefore seemingly limited to those circumstances in which its requirements run concurrently with co-existing legal doctrine. This does not result in the complete diminution of the shaping influence of separation of powers; the doctrine may assume broader, prospective significance in constitutional framing and constitutional reform efforts. Rather, there is a point at which its utility as a tool of *judicial* reasoning becomes rhetorical and ceases to exert a meaningful conditioning influence on the outcome of the case at hand. Some judges may well regard separation of powers as a free-standing constitutional fundamental,

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<sup>109</sup> Though for a quite specific account see: E. Barendt, "Separation of Powers and Constitutional Government" [1995] P.L. 599.

but it is not so fundamental to the United Kingdom constitution that it will, in the abstract, determine the outcome of litigation.<sup>110</sup>

A fluid understanding of separation of powers is arguably consistent with the incremental development of, and institutional pragmatism inherent in, the constitution. Several commentators have argued that the Human Rights Act precipitated a step-change in the relationship between the United Kingdom constitution and separation of powers, evidencing a conceptual shift away from viewing separation of powers as a “political ideal” towards understanding it as a concept holding the capacity to be “judicially enforceable.”<sup>111</sup> There is, of course, a degree of truth to this suggestion; strongly normative assertions of separation of powers have been given succour by the jurisprudence on Article 6(1) ECHR, while assertions of the fundamentality of the doctrine have drawn heavily on the (related) jurisprudential rhetoric of the European Court of Human Rights.<sup>112</sup> But both the hierarchical and weakly normative understandings of the doctrine remain juridical tools with far deeper constitutional underpinnings. The hierarchical model explicitly takes its lead from the foundational doctrine of sovereignty, while the weakly normative variant clearly acknowledges the continuing influence of legislative supremacy. Even in his notable articulation of a stronger variant of the doctrine in *Anderson*, Lord Steyn was careful to identify the supremacy of Parliament as “the paramount principle of our constitution.”<sup>113</sup> So to suggest that the Human Rights Act marked an unprecedented departure from past practice would be to overstate what should actually be recognised as a further incremental development of longstanding principles.

A more accurate assessment of the doctrine’s development and its place in the United Kingdom constitution is that as there has been a shift in institutional relationships, the separation of powers has evolved in tandem with those changes. This shift has seen the court

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<sup>110</sup> *Davidson v Scottish Ministers (No 2)* [2004] UKHL 34; 2005 1 S.C. 7, [53].

<sup>111</sup> A. Tomkins, “The Rule of Law in Blair’s Britain” (2007) 26 *University of Queensland Law Journal* 255, 260-261.

<sup>112</sup> Including *Benjamin and Wilson v United Kingdom* (2002) 36 E.H.R.R. 1; *Stafford v United Kingdom* (2002) 35 E.H.R.R. 1121.

<sup>113</sup> *R. (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 A.C. 837, [39]. See also: *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583, [43].

exercise powers of “quasi-constitutional review”<sup>114</sup> in relation to legislation impacting upon human rights standards, the competences of devolved institutions of government, and the interplay between national and supra-national legal norms.<sup>115</sup> The notion of separation of powers serves as a guide to the boundaries of the powers and responsibilities of the courts vis-à-vis Parliament, providing an analytical framework as well as a reminder that while institutional boundaries continue to shift, the core duty of the courts in relation to legislation (including under the Human Rights Act) remains interpretive.<sup>116</sup> Drawing this connection reveals the continuum that exists between pre- and post-Human Rights Act cases and the subtlety of the doctrine’s evolution in the Human Rights Act era. More radical assertions of judicial power may be visible, but they remain largely exceptional.<sup>117</sup> Acknowledging the modesty of this conceptual shift – given the infrequency with which separation of powers is articulated in its strongly normative form – demonstrates that while the prevailing judicial vision of separation of powers may evidence a movement towards (weak) normativity it has not seen the courts lose sight of more longstanding constitutional assumptions.

## Conclusion

The spectrum of separation of powers sketched here provides both a lens through which the judicial role can be understood and explained and a litmus test of the doctrine’s enforceability. Separation of powers is neither a constitutional irrelevance, nor a free-standing and judicially-enforceable constitutional doctrine, yet it remains an important tool in the explanation and assessment of constitutional power in the United Kingdom. Occupying a constitutional space that permits its co-existence (and allows for overlap) with parliamentary sovereignty and the rule of law, it conditions judicial self-perception, seeks to explain the bases of judicial power and places limitations on the exercise of those powers.

Our analysis has demonstrated that, at the general level, separation of powers is a fluid, but commonly-used, feature of judicial decision-making. But it is wrong to dismiss the doctrine as lacking normative bite. Though the hierarchical variant owes its rudimentary

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<sup>114</sup> R. Masterman and J.E.K. Murkens, “Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court” [2013] P.L. 800, 809-811.

<sup>115</sup> Most recently: *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583.

<sup>116</sup> *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 A.C. 467, [37]-[38].

<sup>117</sup> For instance: *R. (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] A.C. 1787.

separation of functions to the sovereignty doctrine – and remains influential upon formalistic approaches to legislative interpretation<sup>118</sup> and potentially inhibiting of judicial oversight of politicised questions<sup>119</sup> – it also offers an incomplete account of actual judicial role and function. More realistically, the weakly and strongly normative understandings of the doctrine require judicial independence and provide conceptual backing to the articulation of explicitly judicial functions. The former recognises judicial autonomy and underpins the constitutional practice of judicial review; the latter begins to carve out a space for the articulation of explicitly judicial functions, but is deployed only insofar as those functions can be reinforced by doctrinal support for judicial independence. In consequence, a modest shift towards a juridical separation of powers may well have occurred, but the normativity of the doctrine remains uneven and contextual.

Even at the soft end of the functional spectrum where the doctrine lacks *judicial* enforceability, other constitutional actors nonetheless have recourse to separation of powers language to inform extra-judicial debate. Utilised to shape and contextualise constitutional developments, separation of powers performs a broader constitutional function by framing and informing political and legal debate. While the want of formal (judicial) enforceability undoubtedly weakens the claims of those who would see separation of powers conceptualised as a true constitutional fundamental, the political constitution is all too familiar with softer tools of constitutional regulation.<sup>120</sup> Seen in this light, separation of powers remains a vital tool of constitutional argumentation even when it does not operate as a positive, judicially-enforceable norm.

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<sup>118</sup> *R. (on the application of Evans) v Attorney-General* [2015] UKSC 21; [2015] A.C. 1787, [152]-[167].

<sup>119</sup> *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583, [248]-[255].

<sup>120</sup> See: A. McHarg, “Reforming the United Kingdom Constitution: Law, Convention, Soft Law” (2008) 71 M.L.R. 835.