A tangled constitutional web: The black-spider memos and the British constitution's relational architecture

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Few cases qualify for constitutional-blockbuster status. *Evans*, however, is one of them.[1] At its heart lie questions about a network of constitutional relationships between the 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. It is the range and depth of those questions, together with the disparate answers given to them by a divided seven-Justice Supreme Court, that justifies characterising *Evans* as one of the landmark public-law cases of the early 21st century.

The facts are eye-catching to say the least.[2] For several decades, it has been the practice of Prince Charles to send letters to Government Ministers sharing his views on matters of public policy. The attempts of journalist Rob Evans to leverage the Freedom of Information Act 2000 (FoIA) in order to secure the release of these 'black-spider memos' — so called because of Charles's handwriting style and preferred ink colour[3] — triggered a decade-long legal saga that culminated in the judgment of the Supreme Court in *Evans*. After the relevant Departments declined — citing public-interest grounds — to release the memos, Evans complained to the Information Commissioner, who upheld the Departments' decisions. However, in a subsequent, path-breaking judgment, the Commissioner's decisions were overturned on appeal by the Upper Tribunal. Following detailed consideration of constitutional conventions pertaining to the role of the heir to the throne,[4] the Tribunal held that the public interest in revealing the nature and extent (if any) of Charles's influence on Government outweighed any public interest that might be served by facilitating Charles's lobbying of Ministers behind a veil of secrecy.[5]

That was not, however, the end of the matter, since the Government then resorted to its executive-override power under section 53 of the FoIA. By issuing a certificate asserting 'reasonable grounds' for the opinion that non-disclosure would not be unlawful, the Government sought to nullify the Upper Tribunal's order that the letters be disclosed. In advancing such 'reasonable grounds', the Attorney-General contended that disclosure might undermine Charles's perceived political neutrality

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[1] *R (Evans) v Attorney-General* [2015] UKSC 21, [2015] 2 WLR 813.

[2] This article is concerned with only the domestic-law point that fell for determination in *Evans*. It does not address a separate ground, concerning EU law, on which the Attorney-General (unsuccessfully) appealed to the Supreme Court.

[3] Although it turns out that the letters that were the subject of the freedom-of-information requests were in fact typewritten.

[4] This aspect of the *Evans* saga is itself highly constitutionally significant. For discussion, see Philip Murray, 'The Prince and the Paper: Disclosing Prince Charles's Advocacy Correspondence' [2013] CLJ 1.

[5] [2012] UKUT 313 (AAC).

and thereby undermine public confidence in his capacity to serve as king. (It worth pausing to note that that claim looks — at best — overblown now that the letters have seen the light of day.)[6] The Attorney-General went on to argue that engaging in this form of advocacy formed an aspect of Charles's preparation for kingship such that the letters fell within the scope of the so-called education convention. Thereafter, the Government's use of the veto was itself challenged by way of judicial review — unsuccessfully in the Administrative Court,[7] but successfully in the Court of Appeal[8] and in the Supreme Court.[9] It is the judgment of the latter Court that forms the focus of this article.

Relational constitutional principles

The question with which *Evans* is centrally concerned is the extent to which it is legally and constitutionally legitimate for *a court exercising powers of judicial review* to strike down a *Government Minister's* decision made under powers granted by *Parliament* in order to overturn an *independent judicial tribunal's* judgment. The case thus features four institutional actors drawn from across the three branches of government. And while *Evans* is ostensibly about the extent of the relevant actors' respective powers, it is more fundamentally about the meaning and interaction of the three fundamental principles — the rule of law, the sovereignty of Parliament and the separation of powers — that shape both the constitutional authority of those institutions and the relationships that exist between them.

Inevitably, such questions do not admit of straightforward answers: they form sites of controversy, how they fall to be approached being coloured heavily by the underlying constitutional perspective that one adopts. Parliamentary sovereignty, for instance, would appear to preclude judicial evisceration of administrative authority — including even a discretionary power to override a judicial decision — conferred via primary legislation. But it does not necessarily follow that the sovereignty of Parliament requires a reviewing court to conceive of such discretion in uncontrolled or generous terms: the extent of legislatively confided executive power is a product not merely of the statutory text, but of the way in which other constitutional principles operate upon it and influence its construction. For example, the rule of law jealously guards the judicial role as arbiter of legal disputes and therefore inevitably views with suspicion the notion of executive override of judicial authority. Yet the rule of law arguably also views with suspicion judicial intransigence in the face of clear legal provisions enshrined in an Act of Parliament. It is simplistic, therefore, to suppose that the rule of law speaks only with one voice when confronted with a statutory provision facilitating ministerial override of a judicial tribunal. A similar point can be made in respect of the separation of powers. That doctrine naturally places in doubt the legitimacy of what might be characterised as an administrative incursion into judicial territory through the exercise of an executive-override power. But if that power has been conferred in the first place by legislation enacted by Parliament, the separation of powers may be understood to require a degree of respect for Parliament's legislative

[6] Prince Charles's letters to Government Ministers, together with Ministers' responses, are available at https://www.gov.uk/government/collections/prince-of-wales-correspondence-with-government-departments.

[7] [2013] EWHC 1960 (Admin), [2013] 3 WLR 1631.

[8] [2014] EWCA Civ 254, [2014] QB 855.

[9] [2015] UKSC 21, [2015] 2 WLR 813.

entitlement to allocate authority that arises pursuant to one of its statutory schemes, and a commensurate degree of respect for executive judgements rendered under such schemes.

Each of the constitutional principles in play in *Evans* is thus multifaceted and complex. At least to some extent, the meaning and content that we assign to one of those principles is necessarily a function of the meaning and content that we ascribe to one or both of the other principles. It is, for instance, problematic to suggest that parliamentary sovereignty requires this or that meaning to be assigned to a given legislative provision: the assignment of meaning can only be the product of an interpretive process, which will itself be informed by (among other things) other relevant constitutional principles. In this sense, the basic architecture of the constitution consists of a series of relational principles. They make subtle, overlapping, sometimes-contradictory, sometimes-complementary claims. None of them stands for a simple proposition, and the degree of complexity that they exhibit when viewed in isolation is multiplied when they are — as they must be — conceived of in relational terms. For this reason, a large part of the complexity of constitutional adjudication in cases such as *Evans* derives from the need to determine not simply what these fundamental principles mean, but how they interact with, qualify and inform prevailing conceptions of one another. Unsurprisingly, there is considerable scope for differences of view in relation to such matters, as *Evans* amply attests. Those differences are manifested not only by the very different positions adopted by the majority and minority judges, but by highly significant differences of emphasis *within* the majority. The remainder of this article is structured by reference to the distinction between the two majority judgments (given respectively by Lord Neuberger, with whom Lords Kerr and Reed agreed, and Lord Mance, with whom Lady Hale agreed). However, account will also be taken of taken of the positions adopted by the dissentients, Lords Hughes and Wilson, not least because their disagreement *with* Lords Neuberger and Mance is, to an extent, simply an exaggerated version of the disagreement that exists *between* Lords Neuberger and Mance.

A bottom-up, administrative-law approach

The two majority judgments are distinguished by the legal lenses through which they approach the issues. Lord Neuberger's approach (of which more later) relies heavily upon the capacity of other *constitutional-law* principles to operate radically upon the interpretive process, thereby shaving the hard edges off the notion of parliamentary sovereignty. Lord Mance, in contrast, whilst alive to the rule-of-law and separation-of-powers issues at stake, seeks to refract them more subtly, through an *administrative-law* lens.

In approaching the central question — whether the Attorney-General had established that there were 'reasonable grounds' for non-disclosure— Lord Mance therefore paid particular attention to the standard of review that should apply when assessing the adequacy of the proffered grounds. It might be thought obvious that that standard should be reasonableness, both because it represents the default setting in administrative law, and because the reference to 'reasonable' grounds in the statute appears to imply that judicial scrutiny should be confined to an inquiry as to reasonableness. However, neither of these considerations need be — or, for Lord Mance, was — determinative. As to the first point, the default status of *Wednesbury* review[10] is increasingly questionable.[11] As to the

[10] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[11] For instance, the Supreme Court indicated in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 that a proportionality standard may be appropriate and available beyond the traditional provinces of EU law and Convention and common-law rights cases. Indeed, the

second matter, it does not follow that the word 'reasonable' in the legislation necessarily licences the Attorney-General to invoke the override power provided only that to do so is not *Wednesbury* unreasonable. The meaning of the term 'reasonable grounds' necessarily depends on a process of statutory construction to which relevant constitutional principles are pertinent. What passes muster as reasonable grounds for (say) declining to grant a licence and for overriding a judicial decision are two very different kettles of fish, and no constitutional heterodoxy is involved in suggesting that the latter form of executive action warrants closer scrutiny. The catholic notion of reasonableness that is yielded by this analysis has its roots in the anxious-scrutiny model embraced by the courts in human-rights cases prior to the enactment of the Human Rights Act 1998.[12]

It was against this background that Lord Mance considered the meaning of the term 'reasonable grounds', and so the operative standard of review. Endorsing (at least implicitly) certain aspects of Lord Neuberger's view, Lord Mance said that there is an incongruity — which is 'if anything more marked in the case of a court of record like the Upper Tribunal' — entailed by 'a minister or officer of the executive, however distinguished, overriding a judicial decision'.[13] Such incongruity arises, as noted above, because of the *prima facie* tension between executive override of judicial decisions and key aspects of the rule-of-law and separation-of-powers principles. This led Lord Mance to the conclusion that the reasonable-grounds criterion in the statute was more demanding that the standard public-law requirement of *Wednesbury* reasonableness. The statute, he said, erected 'a higher hurdle than mere rationality'.[14] In this way, Lord Mance permitted the fundamental constitutional principles with which the statutory scheme, at least taken at face value, lacked full congruity to shape the construction of that scheme, thus facilitating the adoption of a more exacting conception of reasonableness.

Although Lord Mance's bottom line was that something more than conventional rationality is required, further nuance was added to his analysis by the distinction he drew between executive override on the basis of disagreement with the Tribunal concerning (a) findings of fact or law and (b) the ascription of weight to and the subsequent weighing of competing public interests. As to the former, he concluded that the executive would be capable of establishing reasonable grounds only by supplying 'the clearest possible justification' — a hurdle he considered to be so high as potentially to remove any practical difference between his preferred approach and Lord Neuberger's ostensibly more drastic reading of the statute.[15] As to the latter, however, Lord Mance considered that the weighing of competing interests was 'contemplated' by the Act and would pass muster on the reasonable-grounds test if 'properly explained' and accompanied by 'solid reasons'.[16]

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courts have already departed from conventional *Wednesbury* review in cases concerning executive override of institutionally expert *non-judicial* decision-makers: see, e.g., *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.

[12] E.g. *R v Ministry of Defence, ex parte Smith* [1996] QB 517. See further Sir John Laws, '*Wednesbury*' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord* (Clarendon Press 1998).

[13] [2015] UKSC 21, [2015] 2 WLR 813, [123] (Lord Mance).

[14] [2015] UKSC 21, [2015] 2 WLR 813, [128].

[15] [2015] UKSC 21, [2015] 2 WLR 813, [130].

[16] [2015] UKSC 21, [2015] 2 WLR 813, [130].

This distinction reflects particular understandings of the respective roles of the judiciary and the executive under the separation of powers, reserving greater latitude to the executive in relation to matters of public policy upon which it may claim special authority. In this way, Lord Mance's approach tracks considerations that underpin the doctrine of curial deference that shapes substantive judicial review, albeit that such considerations play out in *Evans* in an usually complex setting that involves both the relative competences of the reviewing court and the executive defendant, and the relative competences of the defendant and the judicial tribunal which made the decision which is the subject-matter of the relevant disagreement. For instance, Lord Mance's view that deference should not be exhibited in relation to disagreements concerning fact or law springs not primarily from *the reviewing court's* superior expertise or constitutional position, but from its regard for the *Upper Tribunal* as an expert, independent judicial body whose views on such matters ought to be secured against ready administrative interference. Indeed, when Lord Mance went on — having concluded that the disagreement between the Attorney-General and the Upper Tribunal did not concern the weighing of public interests — to apply the clearest-possible-justification test, it proved to be exceptionally demanding. Even though the Attorney-General supplied substantial reasons for his decision, Lord Mance judged them insufficient because they failed to disclose adequate engagement with, or 'give any real answer to', the 'closely reasoned analysis' of the Upper Tribunal.[17] Lord Mance's approach thus set the bar very high indeed, enabling the court to treat as inadequate reasons for the exercise of the override power that — although arguably *reasonable*, in the sense of being substantial and not obviously illogical — were not considered to be sufficiently *convincing*.

The primary point of contention as between Lord Mance and the dissentients was an issue of characterization, the dissentients concluding that the disagreement between the Attorney-General and the Upper Tribunal concerned not matters of fact or law but the weighing of public interests. However, the difference between Lord Mance and the dissentients arguably goes deeper than this. Lord Mance agreed with Lord Wilson that the weighing of public interests is a function which the legislation contemplates will be performed by the Government. As such, Lord Mance accepted that a Ministerial decision about the weighing of such interests would be lawful if 'properly explained' by reference to 'solid reasons'.[18] However, the extent to which Lords Mance and Wilson are really in agreement on this point is questionable. A requirement to supply reasons that are 'solid' implies a qualitative assessment of them that transcends standard rationality review which, at least in its orthodox manifestation, is concerned only with the detection of decisions that are so unreasonable as to defy logic or basic tenets of morality.[19] Certainly, Lord Neuberger took Lord Mance's approach to scrutiny, even in relation to the weighing of public interests, to be a robust one, saying that it would 'normally be very hard for [the executive] to justify differing from a tribunal decision on the balancing exercise on Lord Mance's analysis'.[20] In contrast, Lord Wilson said that the question for the court was simply 'whether the grounds which formed [the Attorney-General's] opinion were reasonable',[21] while Lord Hughes merely said that the Attorney-General was required to act

[17] [2015] UKSC 21, [2015] 2 WLR 813, [142].

[18] [2015] UKSC 21, [2015] 2 WLR 813, [130] (Lord Mance).

[19] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock).

[20] [2015] UKSC 21, [2015] 2 WLR 813, [93].

[21] [2015] UKSC 21, [2015] 2 WLR 813, [180].

rationally.[22] For the dissentients, then, an unvarnished test of *Wednesbury* reasonableness — rather than a more demanding requirement such as one involving 'anxious scrutiny'[23] or 'cogent reasons'[24] — applied, thereby making the override power, at least when exercised on the basis of a disagreement as to the weighing of public interests, a generous one.

What accounts for the different positions occupied by Lord Mance and by the dissentients? Why do they appear to disagree about the meaning of the statutory term 'reasonable grounds' and (as a result) the standard of judicial scrutiny that should apply when determining the adequacy of the proffered grounds? Scope for disagreement arises because, self-evidently, these questions are not decisively answered by the text of the statute. Rather, the wording of the text allows the Justices to project onto the statute their own visions concerning the extent to which (a) the legislature should be taken to have authorized executive override of a judicial body; (b) the executive should be free to determine for itself when it is reasonable to exercise the override power; and (c) a reviewing court should exercise vigilance when examining the reasons offered as justification for the exercise of the power.

In approaching these issues, the dissentients chose to examine the statutory text largely in isolation from other constitutional principles that might have informed the statute's interpretation and the conception of the judicial role under it. Lord Wilson's judgment, for instance, includes an account of the legislative history of what became the FoIA, leading him to the view that the override power 'is a central feature of the Act'.[25] Meanwhile, Lord Hughes took the issue before the court to be 'a matter of the plain words of the statute';[26] and while he acknowledged that the rule of law 'is of the first importance', he emphasized that an 'integral part' of that principle is that 'courts give effect to Parliamentary intention'.[27] On this analysis, there was no warrant for rendering the reasonable-grounds test more demanding than it appeared at face value.

In contrast, Lord Mance's approach to the statute and to the reviewing court's role under it was informed to a greater extent by rule-of-law and separation-of-powers concerns that arguably warrant particular vigilance in relation to executive action that stands in opposition to the judgment of an independent judicial tribunal. His departure, even in weighing-of-public-interests cases, from a bare rationality standard acknowledges the constitutional dubiousness of the override power, more-intensive review of its exercise connoting not that the reviewing court enjoys particular legitimacy (relative to the executive) in respect of the weighing task, but that the decision of the Upper Tribunal to which the weighing exercise was originally assigned itself warrants a degree of respect by virtue of constitutional principles that demand executive compliance with judgments of independent judicial bodies. On this approach, reasonable grounds for administrative override of such judgments form a necessarily slim category.

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[22] [2015] UKSC 21, [2015] 2 WLR 813, [160].

[23] E.g. *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

[24] E.g. *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] QB 114.

[25] [2015] UKSC 21, [2015] 2 WLR 813, [170].

[26] [2015] UKSC 21, [2015] 2 WLR 813, [155].

[27] [2015] UKSC 21, [2015] 2 WLR 813, [154].

A top-down, constitutional-law approach

The ultimate point of contestation between Lord Mance and the dissentients is thus the nature of the constitutional environment that the FoIA inhabits, and, in particular, the extent to which that environment is sufficiently normatively rich to justify departure from the view — which itself rests on (different) normative considerations — that courts should only give effect to the 'plain words' of legislation. Precisely the same point of contestation explains the disagreement between Lord Neuberger on the one hand and Lords Mance, Hughes and Wilson on the other. This disagreement, however, plays out on a much broader constitutional canvas, being concerned not with the appropriate depth of judicial scrutiny (which is itself, admittedly, an ultimately constitutional question) but with the deployment of normative principles so as to interpretively neutralise unconstitutional executive authority. To put the matter in blunter terms, whereas Lord Mance utilised administrative-law instruments in order to narrow the override power, Lord Neuberger used constitutional-law tools to eviscerate it. This distinction reflects the differing extents to which Lords Neuberger and Mance were prepared to permit fundamental constitutional principles to operate upon the interpretive process. While, as we have seen, Lord Mance was not unsympathetic to the normative claims made by the separation-of-powers and rule-of-law principles, he opted to invest them with purchase by means of modulating the operative standard of review. The statutory text exerted a significant pull, but one that was interpretively tempered by the application of competing constitutional principles that pointed away from a plain-words construction. (For the dissentients, of course, the statute exerted a stronger pull still, Lord Wilson treating parliamentary sovereignty as a focal constitutional principle that is 'emblematic of our democracy'.[28])

For Lord Neuberger, in contrast, the pull of the statutory text (and hence, it can be inferred, of the principle of parliamentary sovereignty that favours judicial fidelity to such texts) was weaker, the force exerted by the separation of powers and the rule of law being correspondingly stronger — an approach that can be attributed to Lord Neuberger's defensible perception that a broad executive-override power would represent not merely a marginal skirmish with, but a full-frontal assault upon, those constitutional principles. Lord Neuberger therefore placed the constitutional objectionability, as he saw it, of an executive-override power front and centre. A power enabling the executive to override a judicial decision with which it disagreed would, he said, be 'unique in the laws of the United Kingdom' and would 'cut across two constitutional principles which are also fundamental components of the rule of law'[29] — namely, that judicial decisions 'cannot be ignored by anyone', 'least of all … the executive', and that executive action, 'subject to jealously guarded statutory exceptions', must be subject to judicial scrutiny.[30] Lord Neuberger's view was that broad override powers would 'flout … the first principle' and 'stand … the second principle on its head'.[31]

These considerations led Lord Neuberger to perform upon the Act what can only be described — not necessarily pejoratively — as radical interpretive surgery pursuant to the principle of legality. In applying that principle, he invoked a series of cases including *Pierson*,[32] *Jackson*[33] and *AXA*,[34]

[28] [2015] UKSC 21, [2015] 2 WLR 813, [168].

[29] [2015] UKSC 21, [2015] 2 WLR 813, [51].

[30] [2015] UKSC 21, [2015] 2 WLR 813, [52].

[31] [2015] UKSC 21, [2015] 2 WLR 813, [52].

[32] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539.

concluding that s 53 of the FoIA would be capable of having the 'remarkable effect' urged by the Attorney-General only if the text provided for such an effect in terms that were 'crystal clear'.[35] It followed that the legislation did not permit a member of the executive to override an Upper Tribunal decision whenever he or she took 'a different view'.[36] However, Lord Neuberger went much further than merely ruling out the assignment to the executive of *carte blanche* override powers. Rather than holding that s 53, properly construed, did not permit override whenever the executive disagreed with the Tribunal, he concluded that the power could be exercised only in two highly limited and unlikely sets of circumstances — namely, in the event of 'a material change of circumstances since the tribunal decision' or if 'the decision of the tribunal was demonstrably flawed in fact or in law'.[37] This led Lord Neuberger to conclude that it is 'not reasonable' for the Attorney-General to invoke s 53 'simply because, on the same facts *and admittedly reasonably*, he takes a different view from that adopted by a court of record after a full public oral hearing'.[38] To the extent that the obvious 'paradox', as Lord Wilson put it,[39] raised by Lord Neuberger's position is capable of resolution, such resolution turns upon a construction of s 53 that holds it will never be reasonable to exercise the veto outwith the two exceptional circumstances. In other words, an Attorney-General's opinion based upon otherwise-reasonable grounds will not satisfy the legislation because, as construed by Lord Neuberger, the existence of one of the exceptional circumstances is a precondition for the existence of reasonable grounds *in the statutory sense*.

Neither Lord Mance nor the dissentients were prepared to subscribe to this construction of s 53. Lord Mance considered that s 53 'must have been intended by Parliament to have, and can and should be read as having, a wider potential effect' than that which Lord Neuberger's interpretation afforded it.[40] Lord Hughes went further: Parliament had 'plainly shown' its intention,[41] and Lord Neuberger's construction was 'simply too highly strained':[42] it rendered 'vestigial' the 'generally expressed power' conferred by s 53.[43] Meanwhile, Lord Wilson's critique was nothing short of trenchant: the Court of Appeal,[44] whose view concerning the need for exceptional circumstances Lord Neuberger shared, 'did not … interpret' s 53 — it 're-wrote' it.[45] Indeed, Lord Wilson went so far as to say that the exceptional circumstances required by Lord Neuberger for the triggering of s 53

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[33] *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262.

[34] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.

[35] [2015] UKSC 21, [2015] 2 WLR 813, [58]

[36] [2015] UKSC 21, [2015] 2 WLR 813, [59].

[37] [2015] UKSC 21, [2015] 2 WLR 813, [71].

[38] [2015] UKSC 21, [2015] 2 WLR 813, [88] (emphasis added).

[39] [2015] UKSC 21, [2015] 2 WLR 813, [169].

[40] [2015] UKSC 21, [2015] 2 WLR 813, [124].

[41] [2015] UKSC 21, [2015] 2 WLR 813, [154].

[42] [2015] UKSC 21, [2015] 2 WLR 813, [155].

[43] [2015] UKSC 21, [2015] 2 WLR 813, [156].

[44] [2014] EWCA Civ 254, [2014] QB 855.

[45] [2015] UKSC 21, [2015] 2 WLR 813, [168].

were so 'far-fetched' as to mean that 'for all practical purposes' it would 'almost never' be possible for the power to be used so as to override a tribunal ruling.[46]

Lord Wilson has a point. The impact upon s 53 of Lord Neuberger's interpretation is drastic. Indeed, it is comparable to the radical implications that the House of Lords' judgment in *Anisminic* had for the ouster provision contained in s 4(4) of the Foreign Compensation Act 1950.[47] This indicates that, for Lord Neuberger, the pull of constitutional principles favouring judicial independence and the inviolability of judicial decisions is very strong indeed. To some extent, this can be regarded as evidence of the tension that exists in this context *between* those principles and (depending upon the uses to which it is put) parliamentary sovereignty. However, the matter is not as straightforward as that, for it also reveals that Lord Neuberger's understanding of those other principles itself differs from the understandings of Lords Mance, Hughes and Wilson. For instance, the four judgments reflect a spectrum of judicial opinion concerning the separation of powers and, in particular, about the relative weight to be ascribed to those aspects of the principle that respectively favour (a) judicial deference (by a reviewing court) to executive decision-making and (b) executive respect for and compliance with the decisions of independent judicial bodies.. For Lord Mance, the latter consideration impacted upon the former, judicial scrutiny of the quality of the executive's decision being heightened by the fact that, in the first place, that decision chafed against that aspect of the separation of powers which favours the inviolability of judicial decisions. In contrast, for Lord Neuberger, any question of judicial deference to executive decision-making under s 53 was foreclosed by means of the priority accorded to the inviolability consideration, the scope of the power being construed in such narrow terms as to reduce the range of circumstances in which the power could be exercised (and the executive's judgment in relation to its exercise given any degree of weight at all) almost to vanishing point. In this way, Lords Mance and Neuberger assigned different weights to distinct aspects of the separation of powers.

That said, their approaches are also distinguished by the extent to which they were prepared to permit that principle, along with the rule of law, to shape the interpretation of the statute. Lord Neuberger's construction is undeniably strangulated, the interpretations of the other Justices being obviously far less strained. Does this mean that Lord Neuberger's construction is wrong, or that it denies parliamentary sovereignty? Viewed in one way, the notion of parliamentary sovereignty is a binary one: either Parliament is sovereign, because it is competent to enact any legislation it wishes, or it is not; and, if it is sovereign, courts have no choice but to enforce its enactments regardless of their content. That obligation lies at the heart of the notion of parliamentary sovereignty, any qualification of the obligation being an apparent repudiation of the sovereignty principle itself. However, the significance of the obligation can meaningfully be understood only in the light of its content. And whatever the content of the obligation might be, it self-evidently does not connote a duty invariably to give effect to nothing other than the literal meaning of the words used by

[46] [2015] UKSC 21, [2015] 2 WLR 813, [177].

[47] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Although *Anisminic* is sometimes presented as an example of judicial disobedience to statute, not least because it is perceived to have rendered the preclusive clause nugatory, it did not in fact — at the time *Anisminic* was decided — have such an effect since it preserved the capacity of the ouster clause to preclude judicial intervention in respect of non-jurisdictional errors on the face of the record. It is arguable that Lord Neuberger's construction of s 53 of the FoIA rendered it at least as, and perhaps more, 'vestigial' than did the Appellate Committee's interpretation of the ouster in *Anisminic*.

Parliament. The judicial obligation to enforce legislation implies a judicial power to interpret it, including in the light of relevant constitutional principles.

This is not, however, to suggest that the principle of parliamentary sovereignty is an infinitely elastic one, such that no amount of judicial violence to statutory provisions would imply any breach of the judicial obligation implicit in the principle. Unless the obligation to enforce legislation is to be emptied of any meaningful content, a point must come at which the statutory text is so clear as to preclude a given 'interpretation', even if competing constructions would accommodate rule-of-law or separation-of-powers considerations less fully. The obligation, after all, is to interpret the statutory provision, not to treat it as an essentially blank canvas on which to project constitutional values that operate so radically upon the provision as to overwhelm it. Viewed in this way, it is difficult to avoid the conclusion that Lord Neuberger's treatment of s 53 of the FoIA at least closely approached, and may have crossed, the fine line that distinguishes bold statutory construction from judicial intransigence in the face of a constitutionally offensive statutory provision.

On the face of it, the crossing of that Rubicon (if indeed it was crossed) is itself constitutionally offensive to the principle of parliamentary sovereignty, since it implies a failure to discharge the obligation to enforce legislation that is its very essence. Yet such judicial interventions may take on a different complexion if viewed in wider perspective. A decision like *Evans* is not necessarily the end of the road as far as the bigger legal picture is concerned. It would, after all, be possible for Parliament to respond by amending s 53 in order to render the override power exercisable in circumstances broader than those contemplated by Lord Neuberger.[48] Any such revised provision would itself, of course, be subject to judicial interpretation, but, inevitably, the more clearly expressed a successor provision, the more resistant it would be to interpretive reshaping. The approach to statutory construction disclosed by Lord Neuberger's judgment in *Evans* can thus be regarded as part of an iterative process: a constitutional dance in which the courts either pull Parliament back from a perceived constitutional brink by interpretively neutralising the relevant provision, or force Parliament to confront the political cost of retaliation by requiring the use of yet-starker terms if the court's construction is to be successfully displaced through legislative amendment.[49] Viewed thus, Lord Neuberger's treatment of s 53 may fairly be characterised as a soft form of judicial strike-down: an interpretation whose boldness casts doubt upon the appropriateness of so characterising it, but one that is legislatively reversible through the use of yet-clearer language.

Such judicial activism does not sit comfortably with the notion of parliamentary sovereignty, but it does not follow that the two are wholly irreconcilable. Indeed, such a judicial approach might be considered the ultimate illustration of the relational nature of the three fundamental principles that form the bedrock of the UK's constitutional order, the ascription of preponderant weight to rule-of-law or separation-of-powers considerations in a particular case being rescued from constitutional heterodoxy by an underlying commitment to parliamentary sovereignty which concedes the

[48] Indeed, it is reported at the time of writing that the Government is contemplating legislation that would do precisely this. See, e.g., 'PM to seek cross-party consensus for veto on publication of documents' (*The Guardian* website, 13 May 2015, http://gu.com/p/48pc3/stw).

[49] Lord Phillips has indicated that, *in extremis*, he considers this sort of judicial treatment of legislation to be justifiable: Political and Constitutional Reform Committee, *Constitutional Role of the Judiciary if there were a Written Constitution* (HC 2013–14, 802) 16–17.

possibility of legislative override. In this way, each of the fundamental principles is invested with a finite degree of elasticity, the capacity of the rule of law and the separation of powers to qualify the courts' commitment to the enforcement of legislation being itself qualified by the longstop possibility of Parliament's standing upon its sovereign right to have the last (or at least a further) word. The untidiness of the constitutional order implied by this analysis may be inherently unappealing. But such untidiness is inevitable in a system in which the rule of law, the separation of powers and the sovereignty of Parliament each rightly assert their fundamentality, but in which (for the time being, at least) ultimate priority is conceded to the latter