‘Judicial treatment of ouster clauses: time for a new approach?’

Frederick George William Green

Banner ID: 000745656

Primary Supervisor: Professor Aileen McHarg

Secondary Supervisor: Professor Roger Masterman

Wordcount (excluding table of contents and bibliography): 39,035 words

Wordcount (including table of contents and bibliography): 40,847 words

Table of Contents

Chapter 1: Introduction

This thesis criticises the current 'nullity' approach to ouster clauses in the United Kingdom and considers the potential for the development of a post-*Anisminic* judicial framework for interpreting ouster clauses. Such a framework should allow certain decisionmakers a more deferential standard of judicial review, whilst rationalising judicial refusal to enforce ouster clauses in a manner which affirms, rather than challenges, Parliamentary sovereignty.

Ouster clauses are legislative provisions that purport to restrict, or in some cases completely remove, the supervisory jurisdiction of courts. In principle, an effective ouster clause prevents courts from judicially reviewing the decisions of public bodies protected by the provision. There is a long history of courts approaching ouster clauses with 'deep suspicion',[1] a suspicion that can be best understood when considering the institutional role of the judiciary. Courts serve to uphold the rule of law and correct legal errors, ouster clauses have the potential to prevent courts from executing these core functions. Judicial approaches to ouster clauses have been far from uniform, particularly when other jurisdictions are considered. Furthermore, there is great diversity in the form ouster clauses take, often reflecting the desire of Parliamentary drafters to prevent the clauses being circumvented in court. Ouster clauses aim to restrict or outright bar the judicial review of certain decisions of officials,[2] tribunals[3] or courts.[4] In England and Wales, the main court in question is the High Court, in Scotland the court with supervisory jurisdiction is the Outer House of the Court of Session,[5] in Northern Ireland judicial review is undertaken by the High Court of Northern Ireland.[6]

The relationship between judicial review and ouster clauses is tied closely to how errors of law are categorised, in particular whether errors of law can be considered to fall within the jurisdiction of a body, or whether an error of law exceeds its jurisdiction. By leading to the convergence of the two categories of error of law, *Anisminic*[7] left ouster clauses with little practical effect, this 'landmark'[8] decision continues to define the approach taken to ouster clauses by the judiciary of the United Kingdom. This thesis refers to the effect of *Anisminic* as the 'nullity approach',

[1] P Scott 'Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal' (2017) P.L., Jul, 355.

[2] Dissolution and Calling of Parliament Act 2022 Section 3.

[3] Judicial Review and Courts Act 2022 Section 2.

[4] Housing Act 1974 Schedule 8, paragraph 2(2).

[5] For supervisory jurisdiction over criminal matters, the relevant court in Scotland is the High Court of Justiciary.

[6] It is worth noting that judicial review, or functions analogous to judicial review are also undertaken in the Upper Tribunal and by the Investigatory Powers Tribunal, amongst other bodies, as discussed in Chapter 5.

[7] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

[8] *O'Reilly and Others Appellants v Mackman and Others Respondents* [1983] 2 A.C. 237 (Lord Diplock).

wherein all errors of law are nullities (errors exceeding jurisdiction) and can thus be reviewed regardless of the existence of an ouster clause.

The thesis will begin by exploring the historical context pre-*Anisminic*, the decisions that helped set the stage for *Anisminic* itself, and the manner in which *Anisminic* has subsequently been interpreted. The thesis will then identify the problems with *Anisminic* and the nullity approach to ouster clauses that has developed in the decades following the decision: a lack of respect for the determinations of highly specialised and competent tribunals, and difficulties in reconciling the effect of *Anisminic* on Parliamentary sovereignty. The thesis will then introduce two approaches that have the potential to address the deficiencies of *Anisminic* and the nullity approach and better define the future relationship between courts in the United Kingdom and ouster clauses: the identification of a conceptual limit on Parliament fully ousting review, and context-based limitations on judicial review. Finally, this thesis will analyse comparable jurisdictions and their contrasting approaches to ouster provisions to highlight the inappropriateness of a formal doctrine of deference in the United Kingdom, the pitfalls to be avoided when departing from *Anisminic*, and the appropriate scope of review for jurisdictional error.

This thesis will ultimately conclude that the future approach to ouster clauses by the courts of the United Kingdom should be defined by three pillars: a return on a limited basis to distinct categories of errors of law, greater emphasis on variable intensity of judicial review, and a conceptual limit on Parliamentary sovereignty preventing judicial review being ousted for jurisdictional error.

Chapter 2: *Anisminic* and the development of the nullity approach

Introduction

Whilst *Anisminic* continues to play a pivotal role on the effect given to ouster clauses, as seen in the recent case of *Privacy* (2019),[1] the case is best understood in the context of the extensive historical jurisprudence that preceded it. In order to highlight the issues with *Anisminic* and the nullity approach, it is first necessary to analyse the development of the law prior to the decision, and the decision itself.

Anisminic's full significance does not lie in a narrow reading of its ratio, but rather in how the case would subsequently be interpreted and what the case decided by necessary implication, particularly regarding the merging of the previously distinct concepts of errors of law within jurisdiction and errors of law going to jurisdiction and how this would impact on the judicial treatment of ouster clauses. It will be demonstrated that there continues to be both judicial and academic disagreement over the scope of *Anisminic*, particularly regarding its application to the judicial review of inferior court decisions.

After first grounding *Anisminic* in its historical context, this chapter will then consider the modern application of the decision, although critique of the *Anisminic* approach to dealing with ouster clauses (the nullity approach) will be discussed in Chapter 3.

Anisminic in context

Anisminic builds upon two closely linked concepts that have a long history in the common law: (1) that the decision of an inferior court or tribunal that goes beyond its jurisdiction can be judicially reviewed notwithstanding the existence of an ouster clause; and (2) that statutory provisions purporting to limit or oust supervisory jurisdiction ought to be construed narrowly. Prior to *Anisminic*, an ouster clause that survived such a narrow reading would have had the effect of excluding review of errors on the face of the record; an historic exception to the rule that errors made within jurisdiction were unreviewable.

Review of error on the face of the record was not consistently enforced from the 17th to 20th centuries, but was effectively revived by Lord Denning in *Shaw*:

> 'The origin of this controlling power was the writ of certiorari, by which the King commanded the judges of any inferior Court of Record to certify the record of any matter in their court with all things touching the same, and to send it to the King's Court to be examined.'[2]

Given that errors made in excess of jurisdiction were consistently regarded as *not* being protected by ouster clauses, the efficacy of a pre-*Anisminic* ouster clause should be judged primarily on whether it was found to exclude the review of errors on the face of the record, thereby fully protecting the jurisdiction of the relevant inferior court or tribunal to make errors of law within jurisdiction.

---

[1] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219.

[2] *R v Northumberland Compensation Appeal Tribunal, Ex p Shaw* [1952] 1 KB 338.

There is a long line of authority supporting the notion that errors of law made in excess of jurisdiction are reviewable notwithstanding an ouster clause. In *Foster's Case* (1614), Sir Edward Coke stated that there were occasions where the King's Bench would not be bound by the words of an Act of Parliament that sought to restrict its proceedings.[3] It is worth noting that Sir Edward Coke's statement was not qualified in any way, and that this case preceded the development of Parliamentary sovereignty but is nevertheless widely cited in subsequent cases involving ouster clauses. Qualifying this authority, Kelynge CJ in *Commissioners of Sewers* (1669) held that Parliament could not 'oust the jurisdiction of this Court *without particular words*' (emphasis added),[4] establishing a clear presumption in favour of Parliament not ousting the supervisory jurisdiction of the King's Bench, which operated through writs of certiorari and declarations. *Commissioners of Sewers* concerned a very early example of a statutory tribunal, which as the case proves were from their inception subject to judicial review if they 'exceed[ed] their jurisdiction'.[5] By the middle of the 18th century it was, according to Lord Mansfield in *Moreley* (1760), 'a point settled' that certiorari would continue to be available unless prohibited 'expressly' by statute.[6] When the statutory provision in question in the case (the Convectile Act 1670) is considered, it is reasonable to conclude that it does not expressly prohibit certiorari, given that it does not refer to certiorari directly (an argument which made an earlier appearance in *R v Plowright* 1686),[7] but instead refers to 'appeal', an entirely distinct procedure:

> 'no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act: but they shall be finally determined in the Quarter-Sessions only.'[8]

However, as shall be seen in later chapters, the exact linguistic formula that would be necessary to successfully oust judicial review has become increasingly controversial and subject to considerable academic and judicial debate.

The proposition that an ouster clause would not prevent the review of decisions of both inferior courts and tribunals made outside of jurisdiction saw considerable development in the 19th century. The orthodox understanding of the distinction between errors of law within jurisdiction and those that exceeded jurisdiction can be found in *Bolton* (1841),[9] as expressed by Lord Denman:

> 'All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it.'[10]

---

[3] [1614] 11 Co Rep 56b.

[4] *Smith, Lluellyn v Comrs of Sewers* [1669] 1 Mod 44.

[5] Ibid Moreton J.

[6] *R v Moreley* [1760] 2 Burrow 1040 97 E.R. 696.

[7] *R v Plowright* [1686] 3 Mod Rep 94.

[8] An Act to prevent and suppresse Seditious Conventicles 1670 Section 6.

[9] *R v Bolton* [1841] 1 Q.B. 66.

[10] Ibid.

Under *Bolton*, so long as the decision of an inferior court or tribunal did not exceed its jurisdiction or include an error of law on the face of the record, it was not reviewable by the King's Bench. The test for excess of jurisdiction in *Bolton* was a question of timing, sometimes referred to as the commencement theory of jurisdictional error; with errors made once the inquiry had been properly commenced being within jurisdiction and thus unreviewable.[11] Developments in the concept of jurisdictional error did not prevent the Privy Council in *Colonial Bank* (1874) (a case from colonial Australia that came to be widely endorsed)[12] from holding that an ouster clause would not prevent the review of 'manifest defect of jurisdiction',[13] building on previously stated authorities. The exact scope of errors of law that could be considered jurisdictional has therefore been an important part of the law concerning ouster clauses; the more restricted jurisdictional error is the greater potential effect an ouster clause can have.

With error on the face of the record and jurisdictional error offering the only possibility of decisions of inferior courts and tribunals being reviewed, it is easy to understand why both concepts came under pressure to be expanded. Indeed, Wade goes as far as to say that error on the face of the record was historically subject to 'abuse' by the courts,[14] with judges stretching the meaning of the term in order to empower themselves to review the determination at hand. An important early example of an expansion of jurisdictional error can be seen in *Cheltenham* (1841), where it was found that the decision of an inferior court that had been 'improperly constituted'[15] was reviewable notwithstanding an ouster clause. Although it was acknowledged by the court that the clause in question did have the effect of removing certiorari, the presence of the ouster clause did not prevent the King's Bench from ensuring the proceedings of the Magistrates were done 'in pursuance of the statute',[16] in other words, within the jurisdiction assigned by Parliament. The statutory removal of certiorari merely meant that errors on the face of the record were unreviewable, and did not prevent the review of errors that exceeded jurisdiction.

A clear example of an error of law going to jurisdiction in the orthodox, pre-*Anisminic* sense can be found in *Bradlaugh* (1878).[17] In *Bradlaugh*, a pornography case, a Magistrate ordered the destruction of a publication he regarded as obscene; however, the empowering Act included the additional requirement that the Magistrate must be of the view that a misdemeanour had occurred. The decision of the Magistrate was thus quashed, as it omitted 'an essential element of jurisdiction'

---

[11] J Beatson 'The Scope of Judicial Review for Error of Law' (1984) 4 Oxford Journal of Legal Studies 22.

[12] *R v Nat Bell Liquors* [1922] 2 A.C. 128.

[13] *The Colonial Bank of Australasia and John Turner, the Official Agent of the Golden Gate Gold Mining Company, Registered v Robert Willan* (1873-74) L.R. 5 P.C. 417.

[14] H W R Wade, C F Forsyth *Administrative Law* (11th Ed Oxford University Press 2014) 611.

[15] *R v The Commissioners for Paving, Lighting, &c., the Town of Cheltenham, and for Regulating the Police thereof* [1841] 1 Queen's Bench Reports 467 113 E.R. 1211.

[16] Ibid.

[17] *Ex p Bradlaugh* (1878) 3 Q.B.D. 509.

(Cockburn CJ)[18] and because it was 'well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction' (Mellor J).[19] The judges in the case acknowledged that the provision in question did have the effect of removing certiorari, but that such provisions did not apply to 'decisions' made in excess of jurisdiction, which are not decisions at all. The ouster clause in question was in the following terms:

> 'And be it enacted, That no Information, Conviction, or other Proceeding before or by any of the said Magistrates shall be quashed or set aside, or adjudged void or insufficient, for Want of Form, or be removed by Certiorari into Her Majesty's Court of Queen's Bench.'[20]

It is highly significant that a provision that directly prohibits certiorari was found to not prevent review of errors going to jurisdiction. As seen, 'no certiorari' clauses were a form of ouster found explicit enough to exclude review of error of law on the face of the record pre-*Anisminic*,[21] and were common in 19th century statutes.

Moving into the 20th century, *Gilmore* (1957) affirmed both that ouster clauses ought to be construed narrowly (with the words 'final' and 'without appeal' not excluding certiorari), and that jurisdictional errors could be reviewed notwithstanding an ouster clause.[22] In principle, this was a position that was readily comprehensible, but the reality of defining which errors went to jurisdiction proved to be challenging. In *Baldwin* (1964),[23] the House of Lords found that a decision that did not respect natural justice was a decision made outside jurisdiction and was thus reviewable even though there was an ouster clause. As shall be seen, *Anisminic* itself was yet another decision to challenge the limits of which errors of law could be considered to go to jurisdiction, taking an 'expansive' view,[24] just as many preceding decisions had done.

There was also difficulty in terms of defining what constituted 'the record' for the purposes of judicial review. In *Nat Bell Liquors* (1922), Lord Sumner discussed the extensive judicial disagreement on the extent to which evidence could be considered part of the record in the judicial review of criminal convictions.[25] The position of errors on the face of the record being reviewable could also produce unsatisfactory and illogical results, as illustrated by Lord Denning in *Shaw* (1952):

> 'Following these cases, I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the

---

[18] Ibid.

[19] Ibid.

[20] Metropolitan Police Courts Act 1839 Section 39.

[21] Op. Cit. [n14] 611.

[22] *R v Medical Appeal Tribunal Ex p. Gilmore* [1957] 1 Q.B. 574.

[23] *Ridge v Baldwin* [1964] AC 40.

[24] J A G Griffith 'Judicial Review for Jurisdictional Error' (1979) 38 Cambridge Law Journal 11.

[25] Op. Cit. [n14].

> reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision'[26]

Lord Denning's opinion reveals the pre-*Anisminic* prospect of a tribunal making an error of law, but not including it in the record, rendering the decision unreviewable. This result is unsatisfactory, with the reviewability of a decision depending on what is included in the record of the decision as opposed to the nature of the error of law. This example well illustrates the artificiality and excessive technicality that played a major role in judicial review prior to *Anisminic*.

By the years immediately preceding *Anisminic*, it was clearly established that an ouster clause would not prevent the review of errors of law that went to jurisdiction, and that provisions which on an ordinary reading would be interpreted to prohibit review would often be found to not have this effect. The most effective form of ouster pre-*Anisminic* was the 'no certiorari' clause, which fully excluded the review of error on the face of the record, but not errors in excess of jurisdiction. The category of errors of inferior courts and tribunals that were subject to review had been expanded over time by generous interpretations of both the record and jurisdictional error. The exact extent of jurisdictional error and the record were contested, with Hare noting that the traditional conception of jurisdictional error was 'extremely difficult to apply in practice';[27] it was thus often a challenging and technical exercise to establish whether an error was potentially reviewable in the first place. It was against this background, alongside the long held judicial presumption against certiorari being ousted, that the conflicting High Court, Court of Appeal and House of Lords decisions in *Anisminic* were made.

<u>*Anisminic*: the ruling</u>

In *Anisminic*, Anisminic Ltd (a mining company operating in Sinai, Egypt) sought compensation from the Foreign Compensation Commission (FCC) as a result of its property being sequestered by the Egyptian government and subsequently sold to an Egyptian owned company, TEDO. The FCC is a statutory tribunal established by the Foreign Compensation Act 1950 (FCA). The FCC made the preliminary determination that Anisminic Ltd had failed to establish a claim under the Order in Council[28] created under the FCA to govern the proceedings of the FCC. The FCC's determination would on the face of it seem final and not subject to judicial review given Section 4(4) of the Foreign Compensation Act 1950:

> 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.'

The FCC's justification was that the successor in title to the property Anisminic Ltd sought to be compensated for (TEDO) was not a British national. This determination was based on the FCC's

---

[26] Op. Cit. [n2].

[27] I Hare 'The separation of powers and judicial review for error of law' 113-140 in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998).

[28] Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962, SI 1962/2187.

construction of the Order in Council that regulated its proceedings, in particular article 4 (1) in Part III:

> 'The commission shall treat a claim under this Part of the Order as established if the applicant satisfies them of the following matters: - (a) that his application relates to property in Egypt which is referred to in Annex E; (b) if the property is referred to in paragraph (1) (a) or paragraph (2) of Annex E – (i) that the applicant is the person referred to in paragraph (1) (a) or in paragraph (2), as the case may be, as the owner of the property or is the successor in title of such person; and (ii) that the person referred to as aforesaid and any person who became successor in title of such person on or before February 28, 1959, were British nationals on October 31, 1956, and February 28, 1959; (c) if the property is referred to in paragraph (1) (b) of Annex E – (i) that the applicant was the owner on October 31, 1956, or, at the option of the applicant, on the date of the sale of the property at any time before February 28, 1959, by the Government of the United Arab Republic under the provisions of Egyptian Proclamation No. 5 of November 1, 1956, or is the successor in title of such owner; and (ii) that the owner on October 31, 1956, or on the date of such sale as the case may be, and any person who became successor in title of such owner on or before February 28, 1959, were British nationals on October 31, 1956 and February 28, 1959.'

The case rested on the following questions: (1) did the ouster clause prevent the High Court from deciding whether the preliminary determination of the FCC was a nullity (a decision made outside jurisdiction); (2) did the FCC misconstrue the order in Council in relation to the term 'successor in title'; and if so (3) did the FCC's misconstruction of the Order in Council amount to it exceeding its jurisdiction, rendering its determination a nullity.

Holding that the ouster clause did not prevent the review of jurisdictional errors, Browne J in the High Court ruled in favour of Anisminic Ltd.[29] Browne J ruled that the FCC had misconstrued Article 4(1) by determining that Anisminic Ltd did not make a valid claim on the basis that the successor in title was not a British national, and in so doing had entered a line of inquiry it had not been entitled to, which in the view of Browne J amounted to the FCC exceeding its jurisdiction.

The Court of Appeal, however, unanimously reversed the High Court's decision.[30] The Court of Appeal accepted that s4(4) FCA would not protect a determination that went beyond the jurisdiction of the FCC from being reviewed, but held that the FCC had made an interpretation of the Order in Council that was within its jurisdiction. It was, after all, settled law that ouster clauses did not protect decisions that exceeded jurisdiction, leaving the core issue of the case as whether embarking on an additional line of inquiry not specified in the empowering legislation amounted to exceeding jurisdiction, or whether in fact there was a misconstruction at all.

On appeal to the House of Lords, it was found unanimously that the ouster clause did not prevent the court from questioning whether the determination of the Commission was outside jurisdiction and a nullity; this built on the long line of authorities explored in the previous section and was not a breakthrough in the law. The majority held that the FCC's determination was outside its jurisdiction, and that therefore the determination of the FCC was in fact not a determination at

---

[29] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 223.

[30] *Anisminic Ltd v Foreign Compensation Commission* [1967] 2 All E.R. 986.

all, leaving it susceptible to judicial review. The majority of the House agreed (Lords Morris and Pearson dissenting) with Brown J's first instance decision that when a decisionmaker entered an inquiry on which it had no authority to do so, the resulting determination would be in excess of jurisdiction and was thus reviewable regardless of an ouster clause.

The FCC's determination that the successor in title must be a British national amounted to an additional 'condition' required to be granted compensation that was not found in the empowering Order in Council.[31] Whether or not the use of the additional condition amounted to the tribunal exceeding its jurisdiction was thus a key question to be answered, as Lord Reid put it:

> 'The question I have to consider is not whether they made a wrong decision but whether they inquired into and decided a matter which they had no right to consider.'[32]

Lords Wilberforce, Pearce and Reid in the majority held that the FCC had misconstrued the Order in Council, and that this error of law amounted to a jurisdictional error. Lord Pearson agreed with the majority that if a tribunal misconstrued its statutory framework and as a result made an inquiry into a matter it was not empowered to do so, the tribunal would be acting in excess of jurisdiction; however, his Lordship was not of the view that the FCC had misconstrued the Order in Council in the first place. Lord Morris agreed with the other Law Lords that the ouster clause in question did not prevent the review of jurisdictional errors, but believed the FCC had not exceeded its jurisdiction; his Lordship adhered to a more traditional understanding of jurisdictional error, wherein jurisdiction is exceeded if a body does not correctly commence an inquiry or is improperly constituted.

Anisminic did not expressly abolish the distinction between errors of law within jurisdiction and errors of law in excess of jurisdiction. Whether this was a necessary implication of the decision will be discussed in the next section. However, even a narrow reading of *Anisminic* leads to the conclusion that the decision expanded the category of errors that were considered to be jurisdictional, thus increasing the convergence between the two categories of error of law and reducing the scope of protection from judicial review offered by an ouster clause. By finding that asking the wrong questions could constitute a jurisdictional error, the House of Lords had brought about a major expansion of jurisdictional error.

Anisminic: contested scope

The ratio decidendi in *Anisminic* was 'relatively narrow',[33] but the mainstream judicial interpretation of the decision has led to sweeping changes in the law, starting with *Pearlman* (1978), the first major judicial treatment of *Anisminic*. It is only with reference to how *Anisminic* was later construed that its full constitutional impact, including the decision's impact on ouster clauses, can be understood. This section will outline how *Anisminic* was interpreted in the succeeding decades, with particular emphasis on the contested scope of the effect of the decision.

---

[31] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147.

[32] Ibid.

[33] D Feldman 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective.' in S Juss, M Sunkin (Eds) *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017).

Citing the fact that, in his view, the distinction had been 'eroded', Lord Denning argued in *Pearlman* that it was time to abandon the distinction between errors of law within jurisdiction and errors going to jurisdiction.[34] Lord Denning did not claim that *Anisminic* itself had abolished the distinction, but rather that *Anisminic* had contributed to the process of the two categories becoming indistinguishable. As discussed above, it is safe to conclude that *Anisminic* resulted in a greater convergence of the two categories of error of law. Lord Denning justified abandoning the distinction on the grounds that the High Court should be able to correct errors made by inferior courts and tribunals, and to ensure that the law was applied consistently. In *Racal (*1980), Lord Diplock endorsed the notion that the distinction between errors of law and errors of jurisdiction had broken down, though notably Lord Diplock expressly stated that this was only true in the case of administrative tribunals and not for inferior courts. The overturning of *Pearlman* (which had concerned an inferior court) by *Racal* is, as shall be discussed below, the subject of considerable controversy. Lord Diplock justified abandoning the distinction with reference to *Anisminic*:

> 'The break-through made by *Anisminic* [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished.'[35]

Lord Diplock's 'for practical purposes' qualification is significant. As previously stated, *Anisminic* did not expressly abolish the historic distinction between errors of law that went to jurisdiction and those that did not. Lord Diplock would go on to repeat this view in *O'Reilly* (1983).[36] Lord Diplock's interpretation of *Anisminic* has been subject to academic criticism, given that *Anisminic* did not expressly abolish the distinction.[37] However, a strong case can be made that by further converging errors of law within jurisdiction and errors of law that went to jurisdiction, *Anisminic* abolished the distinction by necessary implication; *Anisminic* may have demonstrated the futility of attempting to maintain two distinct categories of error of law, and the inherent collapsibility of the two concepts.

The breach of jurisdiction in *Anisminic* stemmed from a misconstruction, which led to the FCC making an inquiry which it had no authority to do. The FCC in *Anisminic* was correctly composed, there was no argument that the inquiry had been improperly commenced, or that there had been bad faith or a breach of natural justice; there had been no breach or abuse of jurisdiction in the traditional understanding of the term. The expansion of jurisdictional error by the majority in *Anisminic* left little scope for an error of law to be within jurisdiction. By finding that the FCC did not have the jurisdiction to misconstrue the Order in Council in the manner it did, the majority in the House of Lords further eroded the scope for a body to make an error of law within its jurisdiction, and expanded the circumstances in which a court could substitute its own interpretation of the law over that of the original decisionmaker, therein undermining the very notion that the decisionmaker had a 'jurisdiction' in any meaningful sense. A similar view is well stated by Lord Sumner in *Nat Bell Liquors*:

---

[34] *Pearlman v Keepers and Governors of Harrow School* [1978] 3 W.L.R. 736.

[35] *Re Racal Communications Ltd* [1981] A.C. 374; [1980] 3 W.L.R. 181.

[36] *O'Reilly and Others Appellants v Mackman and Others Respondents* [1983] 2 A.C. 237.

[37] T Endicott *Administrative Law* (5th Ed Oxford University Press 2021) 334.

> 'To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was any jurisdiction at all.'[38]

A potential rebuttal to the necessary implication argument can be found in Australian and Scots law. Australia has retained the distinction between errors of law within jurisdiction and errors of law going to jurisdiction,[39] even though the category of errors that can be considered to be jurisdictional is expansive and overlaps significantly with non-jurisdictional errors. Under Australian law, a tribunal undertaking a line of inquiry it was not specifically empowered to do can amount to a jurisdictional error.[40] Thus it would seem that Australian courts have managed to maintain both categories of error of law, even in the face of a convergence comparable to the effect of *Anisminic*.[41] Similarly, in the Scottish case of *Watt* (1979), Lord Emslie cited *Anisminic* as authority for the determination of a statutory tribunal being a nullity if the tribunal, having properly entered an inquiry, subsequently misconstrues the law and asks questions it is not entitled to,[42] whilst affirming that errors within jurisdiction were unreviewable. *Watt* provides a clear rebuttal to the notion that *Anisminic* abolished the distinction between errors made within jurisdiction and errors that exceeded jurisdiction by necessary implication. Scottish judges were able to reconcile the expansion of jurisdictional error seen in *Anisminic* with preserving the two categories of error of law,[43] at least in principle, demonstrating that it was not inevitable to conclude that *Anisminic* abolished the distinction.

<u>*Anisminic*: the modern consensus</u>

By *Page* (1993) and *Boddington* (1998), there was clear consensus that the effect of *Anisminic* had been to abolish the distinction the categories of error of law, therein depriving ouster clauses of any practical effect.

In *Page*, the leading opinion of Lord Browne-Wilkinson was clear that *Anisminic* had the effect of making all errors of law jurisdictional, and thus reviewable, therein effectively abolishing error on the face of the record.[44] Whilst providing clarity on how *Anisminic* was to be interpreted in

---

[38] Op. Cit. [n12].

[39] *Craig v South Australia* [1995] 184 CLR 163 (HCA).

[40] *Minister for immigration and Multicultural affairs v Yusuf* [2001] HCA 30 (2001) 206 CLR 323.

[41] It is worth noting that the distinction maintained by the courts in Australia is theoretical does not necessarily reflect the practical reality. Chapter 6 will demonstrate that in Australian federal law, there is little practical scope for an error to be made within jurisdiction, as a result of Australian federal courts taking an expansive view of jurisdictional error throughout the second half of the 20th century.

[42] *Watt v Lord Advocate* [1979] S.C. 120.

[43] Until the differing approaches of Scotland and England to jurisdictional error were reconciled in *Eba v Advocate General for Scotland* [2011] UKSC 29.

[44] *R v Lord President of the Privy Council Ex p. Page* [1993] A.C. 6.

English and Welsh law, *Page* recognised an exception to the rule by holding that University Visitors had the authority to err within their jurisdiction. Potential exceptions to the rule in *Anisminic* will be discussed further in Chapter 6.

Boddington,[45] a case concerning the permissibility of challenging the lawfulness of a by-law or administrative act that had created the criminal offence for which the defendant was being charged, overturned the case of *Bugg* (1993).[46] In *Bugg*, the High Court had held that Magistrates could find administrative acts to be substantively ultra vires but not procedurally ultra vires, with the latter competence being reserved for the High Court. Lord Irvine strongly criticised the decision in *Bugg*:

> 'The decision in *Anisminic* freed the law from a dependency on technical distinctions between different types of illegality. The law should not now be developed to create a new, and unstable, technical distinction between "substantive" and "procedural" invalidity.'[47]

By rejecting an attempt to formally revive separate categories of error of law, *Boddington* provides a clear example of what *Anisminic* had come to mean in the decades following the decision itself. Judges had long emphasised the difficulty and artificiality of maintaining the two categories of error of law. *Anisminic* had, in a sense, been the last straw, a final convergence of the two categories to the point where the distinction was deemed to be unsustainable and was thus abandoned. Regardless of the correct reading of *Anisminic*, by *Cart* and *Eba* (2011)[48] the abolition of the distinction in the context of tribunal and authority decisions, outside some narrow exceptions, was judicial orthodoxy in Scotland, England and Wales.

It has long been held that an ouster clause will have no effect on decisions made outside of jurisdiction of the decision maker in question, whereas errors of law made within jurisdiction were historically unreviewable unless the error was on the face of the record. By finding that no decision maker had the jurisdiction to make any error of law, *Anisminic* and the line of cases that followed provided a clear path to circumvent ouster clauses, effectively stripping them of meaning. As put by Lord Dyson in *Lumba* (2012):

> 'The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires'[49]

Ultra vires, literally meaning 'outside the powers', has the same meaning as exceeding jurisdiction. *Lumba* captures what this thesis calls the 'nullity' approach to ouster clauses, wherein all errors of law are considered jurisdictional and are thus reviewable notwithstanding an ouster clause. With all errors of law going to jurisdiction, the only decisions of a tribunal that are protected by an ouster clause under *Anisminic* are decisions deemed by the courts as not erring in law, giving ouster clauses little, if any, practical effect. No Certiorari clauses, having previously prevented review of error on

---

[45] *Boddington v British Transport Police* [1998]. 2 WLR 639.

[46] *Bugg v Director of Public Prosecutions* [1993] Q.B. 473.

[47] Op. Cit. [n45].

[48] *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2011] UKSC 28.

[49] *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245.

the face of the record, were rendered 'entirely inoperative' by *Anisminic*.[50] As established, a successful ouster clause pre-*Anisminic* prevented the review of errors on the face of the record. However, *Anisminic* has been taken to mean that there is a single category of error of law, meaning that all errors of law go to jurisdiction and can be reviewed notwithstanding the existence of an ouster clause. At least in the context of tribunals, errors of law on the face of the record have been 'rendered obsolete'.[51] There is no need for it to be considered whether an error of law is on the face of the record, because all errors of law are jurisdictional and can thus circumvent an ouster clause. This 'nullity' approach to ouster clauses, whilst effective at circumventing ouster clauses, presents serious issues that will be discussed in Chapter 3.

Revaluating *Anisminic*

The abolition of the distinction between the categories of error of law brought about by *Anisminic* had significant constitutional implications; implications that have not gone unqualified in subsequent decisions. By finding that administrative tribunals had no jurisdiction to make errors of law, *Anisminic* and the line of cases that followed established the courts as the 'sole arbiters of all questions of law',[52] a position that was altered by the Supreme Court's decision in *Cart*.[53] In *Cart*, the Supreme Court ruled that decisions of the Upper Tribunal on an application for permission or leave to appeal were judicially reviewable, but only on the second-tier appeals criteria. The criteria for second-tier appeals is as follows:

> '(a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal.'[54]

Although Lady Hale's leading opinion expressly affirmed that the distinction between errors of law and errors of jurisdiction had been abolished by *Anisminic*,[55] the effect of the judgement in *Cart* essentially revives a distinction in a limited context-based capacity.[56] By imposing the second-tier appeals criteria as a bar on judicial review, the Supreme Court tacitly accepted that the Upper Tribunal had jurisdiction to make some errors of law that would not be subject to review, meaning that not all errors of law lay outside the jurisdiction of the Upper Tribunal. Whilst Lady Hale was committed to avoiding the Upper Tribunal becoming a 'final arbiter of the law',[57] the approach of the Supreme Court amounts to a context-based shift away from the basis of the nullity approach

[50] Op. Cit. [n24].

[51] Op. Cit. [n44].

[52] S Sedley 'Lions under the Throne: Essays on the History of English Public Law' Cambridge University Press 2015 43.

[53] Op. Cit. [n48].

[54] Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834) article 2.

[55] Op. Cit. [n48] [18].

[56] (Lord Brown makes it clear that this is the effect of the judgement at [100]).

[57] Ibid [44].

that no inferior court or tribunal has the jurisdiction to make errors of law. The nature and composition of the Upper Tribunal meant that the Supreme Court was willing to limit judicial review, with the ultimate question being what level of judicial scrutiny the rule of law required. In *Cart*, *Anisminic* was not overturned, but was it qualified. Whilst *Cart* itself was subject to legislative overruling via the Judicial Review and Courts Act 2022, the decision nonetheless reflects an important example of how *Anisminic* as an authority has been treated in recent years, particularly with regard to the potential for variable standards of review to play a greater role in the future relationship between courts and ouster clauses, as is discussed in Chapter 5.

The applicability of *Anisminic* to inferior courts remains controversial, and was a point of contention in the recent ouster clause focussed decision in *Privacy*. *Anisminic* was a case that concerned a tribunal, and *Racal* overturned Lord Denning's attempt in *Pearlman* to apply the abolition of the distinction between the categories of error of law to inferior court decisions. However, in *Cart* the Supreme Court found that the fact that the Upper Tribunal had been designated a 'superior court of record'[58] did not in principle mean that it could make errors of law within jurisdiction in the pre-*Anisminic* sense, as inferior (and superior) courts are able to according to Lord Diplock in *Racal*. In her submission in *Privacy*, Dinah Rose KC had argued that Lord Diplock's distinction between tribunals (where he argued there was now a single category of errors of law) and inferior courts (where he argued the pre-*Anisminic* distinction remained intact) was both *obiter dicta* and *per incuriam*, a view that the plurality led by Lord Carnwath endorsed. Whilst Lord Lloyd-Jones did not go as far as the plurality, he contended that excessive weight had been placed on *Racal* as an authority, given that the case had been decided at a time where key principles of administrative law were 'still evolving'.[59] Lord Sumption's dissent argued that the Investigatory Powers Tribunal was 'indistinguishable from a court in every respect',[60] an assessment that has been questioned.[61] However, it is certainly true to state that it is difficult to draw a clear line between what counts as a tribunal, and what counts as an inferior court for the purpose of deciding what errors of law are reviewable.

Conclusion

Anisminic undoubtedly remains good law, even if its full extent is contested. *Anisminic* was, or at least has taken to be, the culmination of centuries of jurisprudence concerning the scope of jurisdictional error and how ouster clauses should be treated. Whilst *Anisminic* is a key part in the development of the judicial treatment of ouster clauses, the nullity approach that has stemmed from the decision has serious deficiencies, as shall be discussed in the next chapter.

[58] Tribunals, Courts and Enforcement Act 2007 Section 3(5).

[59] Op. Cit. [n1].

[60] Ibid.

[61] B Ong 'The ouster of Parliamentary sovereignty?' (2020) Jan P.L. 41.

Chapter 3: The nullity approach

Introduction: the nullity approach and the problems with *Anisminic*

The nullity approach is the term this thesis employs for the effect *Anisminic* has come to have, wherein all errors of law made are considered to go to jurisdiction (see previous chapter). The nullity approach, as discussed previously, has allowed for ouster clauses previously found to be effective at excluding review of error of law on the face of the record to have no practical effect. Whilst *Anisminic* and the nullity approach has had wide-ranging implications on judicial review generally, this chapter will address the nullity approach as it pertains to ouster clauses. In doing so, this chapter will demonstrate: (1) the artificiality of labelling all errors of law jurisdictional; (2) the challenge of reconciling the nullity approach with Parliamentary sovereignty; and (3) the underlying constitutional tensions brought about by the application of the nullity approach. The chapter will conclude with a preliminary discussion of the possibility of moving beyond *Anisminic* and the nullity approach in order to have address the deficiencies with the existing judicial approach to ouster clauses.

The artificiality of labelling all errors of law as nullities

Anisminic has the effect, with some exceptions (see Chapter 2), that all errors of law are jurisdictional, leading to the determinations made in good faith, that do not breach natural justice, and made by highly qualified legal professionals being found to be 'purported' determinations. Labelling a determination 'purported' can in some circumstances be difficult to defend and appear to be an excessive distortion of the term 'jurisdiction'.

Prior to *Anisminic*, there was strong precedent of courts finding the determinations of inferior courts and tribunals to be in excess of jurisdiction, and thus not a true determination at all. As discussed in Chapter 2, jurisdiction could be exceeded if the inquiry was started improperly,[1] or had improper composition[2] or if the decision was made in bad faith, to give but a few examples of the pre-*Anisminic* scope of jurisdictional error. By labelling a determination 'purported' or a nullity, a court is finding that the decision has no legal effect whatsoever, an effect *Anisminic* extended to all errors of law. Labelling a determination made in bad faith or with an improper composition 'purported' is justifiable from the standpoint that the jurisdiction assigned to the body in question has been abused; what is less convincing is labelling a determination purported for a mere error of law made in good faith in the course of the inquiry. In *Anisminic* there was no indication of any of the traditional grounds for declaring a determination to be purported, such as bad faith or improper composition, as put by Lord Morris:

> 'The application of the appellants was the subject of an oral hearing which took four days. At the hearing the applicants were represented by counsel. In due course the commission, in provisional determinations, gave their decision… The commission had been properly

[1] *R v Bolton* (1841) 1 Q.B. 66.

[2] *R v The Commissioners for Paving, Lighting, &c., the Town of Cheltenham, and for Regulating the Police thereof* (1841) 1 Queen's Bench Reports 467 113 E.R. 1211.

> constituted and had been presided over by its appointed chairman - an eminent Queen's Counsel.'[3]

Lord Morris' implication is clear: there is an artificiality in labelling the determination of the FCC a purported determination when, on its face, there was a fair process and the FCC did exactly what it was empowered to do, namely to decide whether an applicant was entitled to make a claim for compensation. To totally disregard the determination of the FCC on the basis of an alleged misconstruction, which not all the Law Lords could even agree was an error of law in the first place (Chapter 2), is a significant distortion of the term 'purported determination' as it had traditionally been used. The term had previously been reserved for excess or abuse of jurisdiction, not mere errors of law, which were viewed as being within the jurisdiction of the inferior court of tribunal in question. In the ordinary sense of the term, the FCC did make a determination in *Anisminic*, labelling determinations of this kind 'purported', meaning they are not determinations at all, could therefore be seen as a legal fiction.

Tribunals often have a highly qualified composition. To be a member of the Investigatory Powers Tribunal (IPT) one is required to hold or have held high judicial office, or have at least seven years of judicial-appointment eligible experience.[4] However, the impressive composition of the IPT did not prevent an error of law, which would likely have not have exceeded jurisdiction in the pre-*Anisminic* sense of the word, from rendering the determination of the IPT 'purported' in *Privacy*. Whilst holding that the determination of the IPT was a 'purported' determination, the plurality led by Lord Carnwath expressed concern with the nullity approach:

> 'Taking the present case, it is highly artificial, and somewhat insulting, to describe the closely reasoned judgment of this eminent tribunal as a "nullity", merely because there is disagreement with one aspect of its legal assessment.'[5]

Lord Carnwath's use of the word 'insulting' is in reference to the lack of respect the nullity approach affords the determinations of tribunals. The only determinations that are not be deemed to be nullities are the ones the court deems to be correct, regardless of how qualified the tribunal was, or the quality of the deliberations. The nullity approach affords no formal deference or respect to the legal interpretations of specialised tribunals, something that will be discussed further in Chapter 6.

Another important objection to labelling any determination deemed to err in law as 'purported' is how this approach is reconciled with judicial treatment of statutory time limits on judicial review. On its face, the nullity approach should allow a statutory time limit on judicial review to be circumvented: if the determination contains an error of law, it goes beyond the jurisdiction of the body in question, rendering it a nullity and therefore not protected by a time limit. However, in *Ostler*[6] the Court of Appeal unanimously held that *Anisminic* did not have this effect on ouster

---

[3] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 Lord Morris.

[4] Regulation of Investigatory Powers Act 2000 Schedule 3, Membership of the Tribunal, paragraph 1.

[5] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219.

[6] *R v The Secretary of State for the Environment, ex Parte Ostler* [1976] EWCA Civ 6.

clauses, with *East Elloe*[7] remaining good law. As articulated by the plurality in *Privacy*, it is 'difficult to reconcile'[8] the court's treatment of statutory time limits on judicial review with the nullity approach, such as the anomalous result of a determination that would have been considered a nullity becoming legally valid once the statutory time limit has expired. *Ostler* demonstrates the legal fiction of the nullity approach, with the labels of 'nullity' or 'jurisdictional error' being employed by the courts in an artificial and inconsistent manner in order to ensure that determinations can be reviewed notwithstanding an ouster clause.

The nullity approach and Parliamentary sovereignty

Reconciling the nullity approach with Parliamentary sovereignty is a significant challenge on three fronts; (1) the approach vitiates the jurisdiction Parliament assigned to a tribunal; (2) the approach permits ouster clauses very little, if any, practical effect; finally (3) there has been little judicial attention put into reconciling the nullity approach with Parliamentary sovereignty in a satisfactory manner. The nullity approach, therefore, has raised serious questions regarding Parliamentary sovereignty, questions which the approach itself seems incapable of addressing.

As discussed in the previous chapter, prior to *Anisminic* there were two grounds for reviewing the decision of a tribunal or inferior court: error on the face of the record and error of jurisdiction. Of these two, only excess of jurisdiction could still be used if there was an effective ouster clause, as established. Whilst both error on the face of the record and jurisdictional error saw pressure to be interpreted expansively, ultimately jurisdictional error had greater utility as its reviewability was not inhibited by an ouster clause. The temptation to expand jurisdictional error to include all errors of law, as was done in *Anisminic* and the cases that followed it, is easy to understand from a judicial perspective of seeking to correct legal errors, but that does not make it justifiable, particularly when Parliamentary sovereignty is considered.

Prior to *Anisminic*, Parliament could assign jurisdiction to inferior courts or tribunals in a meaningful sense. So long as the body in question made a decision within the jurisdiction assigned to it by Parliament, and so long as the decision did not have an error of law on its face, it was unreviewable.[9] With *Anisminic* coming to mean that no decisionmaker had the jurisdiction to make what the courts deem to be errors of law, the nullity approach strips away the jurisdiction Parliament had assigned to a body. Pre-*Anisminic*, Parliaments legislated against the backdrop of this long-standing orthodoxy, only for the jurisdictions it allocated to be stripped away, a clear violation of the will of Parliament. The jurisdictions assigned to inferior courts and tribunals by Parliament were hollowed out by *Anisminic*, becoming merely the jurisdiction to make a determination the courts viewed as legal.

[7] *Smith (Kathleen Rose) v East Elloe Rural District Council* [1956] AC 736.

[8] Op. Cit. [n5] [129].

[9] For the orthodox expression of this position see *R v Bolton* (1841) 1 Q.B. 66.

Prior to *Anisminic*, an ouster clause found to be explicit enough to exclude judicial review would be given the effect of excluding the review of errors on the face of the record, as established in the previous chapter. Therefore, prior to *Anisminic* ouster clauses were given some effect, and indeed likely the effect that Parliament intended.[10] The strong presumption against excluding review could be argued to strain Parliamentary sovereignty, with 'finality' clauses on an ordinary interpretation clearly excluding the possibility of review but not being given that effect in court. However, the nullity approach takes a step further than this and is therefore even harder to justify. The effect of *Anisminic* is that ouster clauses that had been effective at prohibiting review of error on the face of the record now no longer prohibited judicial review in any circumstances. The no certiorari clause from the Merchant Seaman Act 1846 represents a standard form 19th century ouster clause:

> 'And be it enacted, That no such Conviction shall be quashed for Want of Form, or be removed by Certiorari or otherwise into any of Her Majesty's Superior Courts of Record; and no Warrant of Commitment shall be held void by reason of any Defect therein, provided it be therein alleged that the Party has been convicted, and there be a good and valid Conviction to sustain the same.'[11]

Prior to *Anisminic* and the nullity approach, the direct reference to 'certiorari' would have made this provision an effective bar on the review of errors on the face of the record. Given that all errors are jurisdictional and therefore reviewable under the nullity approach, provisions such as this were made completely ineffective, despite being explicit and Parliamentary intention being clear. The effect the nullity approach gives to no certiorari clauses and similarly express ousters such as the 'shall not be called in question in any court of law' clause at question in *Anisminic* is difficult to reconcile with Parliamentary sovereignty.[12] After *Anisminic*, the only effect of an ouster clause previously held to exclude review of errors on the face of the record is to protect the determinations that do not err in law at all, *Anisminic* and the nullity approach therefore departed from established Parliamentary expectations as to the effect of ouster clauses. Therefore, the nullity approach means that a seemingly express ouster clause may not have an impact on the reviewability of a decision at all, with reviewability instead depending merely on whether the court deems there to be an error of law.[13] It is difficult to accept that the various forms of ouster enacted by Parliament have no effect on reviewability whatsoever, a clear indication of the difficulty of reconciling the nullity approach with Parliamentary sovereignty.

The effect given to even seemingly explicit ouster clauses under the nullity approach could potentially be justified if there had been more judicial attempts to reconcile it with Parliamentary sovereignty. Whilst *Anisminic* brought about the nullity approach, it did not do so expressly. None of

---

[10] H W R Wade, C F Forsyth *Administrative Law* (11th Ed Oxford University Press 2014) 611.

[11] Merchant Seaman Act 1845 Section 14.

[12] J A G Griffith 'Judicial Review for Jurisdictional Error' (1979) 38 Cambridge Law Journal 11.

[13] M Elliott, J Varuhas *Administrative Law Text and Materials* (5th Ed Oxford University Press 2017) 538.

the Law Lords in *Anisminic* spoke of reconciling the abolition of the distinction between the two categories of error of law with Parliamentary sovereignty, leaving the first judge to do so Lord Denning in *Pearlman*. In *Pearlman* Lord Denning expressly referred to abolishing the distinction, and provided justification:

> 'I would suggest that this distinction should now be discarded. The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant. But also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends.'[14]

Lord Denning's justification for the nullity approach is grounded firmly in a rule of law-based rationale, with his Lordship focussing on justice for complainants, consistency in the law and the core notion that courts should correct errors of law. Whilst access to courts and the rule of law are closely linked concepts,[15] and it is understandable from an institutional standpoint for Lord Denning to emphasise rule of law related justifications, there is no attempt in *Pearlman* to reconcile the nullity approach with Parliamentary sovereignty. By contrast, Lord Diplock's justification for the nullity approach in *Racal* does at least touch on Parliament, arguing that the decision in *Anisminic*:

> 'proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.'[16]

Whilst an improvement on Lord Denning's justification, Lord Diplock's rationale for the nullity approach is still not fully satisfactory. There is a preliminary issue with such a presumption in favour of the courts being the final arbiter of the law is to be taken from *Anisminic*, given that a member of the majority (Lord Wilberforce) in that case was clear that he did not think that questions of law were necessarily reserved for ordinary courts.[17] Furthermore, presumptions, like the traditional presumption against the removal of certiorari, must give way where statutory language is sufficiently explicit, whereas the nullity approach has led to ouster clauses that could be regarded as highly

---

[14] *Pearlman v Keepers and Governors of Harrow School* [1978] 3 W.L.R. 736.

[15] Op. Cit. [n10] 533.

[16] *Re Racal Communications Ltd* [1981] A.C. 374; [1980] 3 W.L.R. 181.

[17] Op. Cit. [n3].

explicit being deprived of any meaning. *Anisminic* was held to apply to the ouster clause in question in *Privacy*, despite its explicit language:

> 'determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.'[18]

If the nullity approach operates through a presumption in favour of the courts deciding questions of law, the presumption should have given way to explicit words in RIPA 2000, and yet *Anisminic* was invoked by the majority in *Privacy* to deprive the provision of this effect. The words 'shall not be…liable to be questioned in any court' are very clear; if determinations are not to be questioned in any court, the IPT must be empowered to decide questions of law put before it. As stated above, the IPT also has a highly qualified membership, a point that further undermines the presumption by pointing to the fact that clearly Parliament intended the IPT to be able to decide issues of law. More generally, the most logical purpose of an ouster clause is to designate a body as being able to decide questions of law within its jurisdiction (in the pre-*Anisminic* sense of the word); in this sense, any ouster clause of comparable strength to those seen in *Anisminic* and *Privacy* should be taken as overriding the presumption Lord Diplock derives from *Anisminic*. Lord Diplock's retrospective justification for the nullity approach is not satisfactory: a presumption does not go far enough to explain the defiance of even clear Parliamentary language the approach has caused. In *Page*, an important case for solidifying the effect of *Anisminic*, Lord Browne-Wilkinson endorsed Lord Diplock's presumption,[19] but did not attempt to further reconcile the approach with Parliamentary sovereignty.

Outside the discussion of a presumption against a tribunal being the final arbiter of the law, there has been little judicial effort at reconciling the nullity approach with Parliamentary sovereignty, a position which has led some to conclude that the approach amounts to a breach of Parliamentary sovereignty. Endicott goes as far as to say that, by disregarding the distinction between ultra vires and intra vires, the courts 'talked themselves into a sophisticated way of disregarding legislation'.[20] Considering the effect of *Anisminic* and *Pearlman* on even explicit ouster clauses, Griffith argued that the courts faced a 'formidable task'[21] reconciling this with Parliamentary sovereignty; given that the presumption developed by Lord Diplock in *Racal* is demonstrably insufficient for such a purpose, it would be fair to say that the courts have failed to adequately address this issue. Therefore, regardless of whether or not the nullity approach produces desirable results in some circumstances, an approach to ouster clauses that can be better reconciled with Parliamentary sovereignty would be more appropriate.

---

[18] Regulation of Investigatory Powers Act 2000 Section 67(8).

[19] *R v Lord President of the Privy Council Ex p. Page* [1993] A.C. 6.

[20] T Endicott *Administrative Law* (5th Ed Oxford University Press 2021) 342.

[21] Op. Cit. [n12].

Constitutional showdown

By making all errors of law jurisdictional, the courts destroyed what had been a relatively stable status quo. There had been longstanding expectations about the effect given to ouster clauses, with Parliament being able to rely on the effect of 'no certiorari' and similarly express ousters. By defying the clear Parliamentary language without providing a convincing rationale for doing so, the nullity approach invited a response from Parliament. That response has raised significant constitutional questions about the relationship between the courts and Parliament, and about theoretical limits on Parliamentary sovereignty.

As discussed, the majority's decision in *Anisminic* relied on the view that the use of the word 'determination' did not include purported determinations. The nullity approach, in reliance on *Anisminic*, was employed in *Privacy*; in both *Anisminic* (House of Lords) and *Privacy* (Supreme Court), the court's use of the nullity approach as a method to circumvent the ouster clauses in question evoked a direct response from Parliament. Following *Anisminic*, Parliament quickly passed the Foreign Compensation Act 1969, which included a new ouster clause to protect the determinations of the FCC from judicial review in direct response to the House of Lords' decision in *Anisminic*.[22] The provision goes as far as to prohibit the review of purported determinations:

> 'In this section "determination" includes a determination which under rules under section 4(2) of the Foreign Compensation Act 1950 (rules of procedure) is a provisional determination, and anything which purports to be a determination.'[23]

Similarly, in the aftermath of *Privacy*, then Attorney General Suella Braverman stated that the decision 'strained the principle of Parliamentary sovereignty',[24] with the Government subsequently introducing and passing a series of ouster clauses making use of the term 'purported determination'- section 3 of the Calling and Dissolution of Parliament Act 2022 (preventing the review of the revived prerogative of dissolution) and section 2 of the Judicial Review and Courts Act 2022 (preventing the review of Upper Tribunal's permission-to-appeal decisions), with two similarly worded provisions being found in the Illegal Migration Bill 2024. Thus, Parliament has responded to the nullity approach with new ouster clauses that attempt to strip away the High Court's ability to review jurisdictional errors, or even to judicially review at all.

By making all errors of law jurisdictional, the nullity approach forced Parliament to attempt to exclude judicial review altogether merely to protect determinations that prior to *Anisminic* would have been regarded as within jurisdiction and thus would have been unreviewable even if there was no ouster. As discussed, the temptation of the nullity approach is clear to see, but the approach is also short-sighted; by holding that all errors of law are jurisdictional, the courts invited Parliament to

[22] D Feldman 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective.' in S Juss, M Sunkin (Eds) *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017).

[23] Foreign Compensation Act 1969 Section 3(3).

[24] The Attorney General, the Rt Hon Suella Braverman QC MP delivered a keynote speech to the 2021 Public Law Project Conference. Judicial Review Trends and Forecasts 2021: Accountability and the Constitution.

exclude review of excess of jurisdiction, which amounts to judicial review being fully ousted. In turn, the prospect of Parliament fully excluding judicial review has spurred judicial commentary about the potential for Parliamentary sovereignty to be in some way qualified by higher legal principles such as the rule of law, as seen in the *dicta* of Lord Hope in *Jackson*,[25] this is discussed in Chapters 4 and 5.

By prompting the development of ouster clauses using the word 'purported' or expressly ousting supervisory jurisdiction, the nullity approach has led to the very thing it sought to circumvent, ouster clauses that, on the face of it, fully exclude judicial review. By not being satisfactorily reconcilable with Parliamentary sovereignty, the nullity approach invites the view that Parliament and the courts are engaged in a constitutional struggle.

Beyond *Anisminic* and the nullity approach

Anisminic did not create the nullity approach expressly and in so doing failed to engage with its broader implications, making reconciling the approach with Parliamentary sovereignty a challenging prospect. The flaws with the nullity approach warrant the further discussion of new approaches for a new generation of ouster clauses, as was discussed in *obiter* in *Privacy*. New approaches to the interpretation of ouster clauses are needed which deal overtly and satisfactorily with rule of law and Parliamentary sovereignty.

An approach to ouster clauses that is more overtly based on the rule of law is one possible solution. Whilst embracing the *Cart* based view that the limits of judicial review were to be made with consideration of the requirements of the rule of law, a plurality led by Lord Carnwath in *Privacy* applied the principle to challenge the notion that Parliament could ever fully oust the supervisory jurisdiction of the High Court. Albeit *obiter*, Lord Carnwath (with whom Lady Hale and Lord Kerr agreed) contended that, in accordance with the rule of law, a legislative provision purporting to fully oust the supervisory jurisdiction of the High Court could never be given effect, as it was for the courts alone to decide the scope of judicial review. Lord Carnwath's obiter was nothing short of 'revolutionary',[26] advocating a new approach to ouster clauses based overtly on the rule of law, a clear departure from *Anisminic* and the nullity approach as operated through the presumption in favour of the courts being the final arbiters of the law. As established, a mere presumption cannot deny effect to an explicit ouster, but perhaps the rule of law approach suggested by the plurality in *Privacy* could be more effective. Going beyond the *Anisminic* and the nullity approach means courts can take a context dependent approach and respect the jurisdiction of highly specialised and competent tribunals to interpret the law, as seen in *Cart*.[27] But moving beyond the nullity approach and *Anisminic* also offers the potential for a greater degree of finality when it comes to ouster clauses that purport to fully oust the jurisdiction of the High Court, with it being settled that no such clause can be held to have effect in a manner that is reconcilable with Parliamentary sovereignty.

[25] *R (Jackson) v Attorney General* [2005] UKHL 56.

[26] B Ong 'The ouster of Parliamentary sovereignty?' (2020) Jan P.L. 41.

The rule of law-based approach discussed by Lord Carnwath in *Privacy* is one possible post-nullity approach to ouster clauses, but the possibility of an approach based on conceptual limits of Parliamentary sovereignty will also be explored in Chapter 4. The conceptual limits approach, as expressed by Laws LJ in the divisional hearing of *Cart*, is based on the idea that much like the conceptual limit on Parliament binding itself, Parliament cannot fully oust supervisory jurisdiction.[28] The conceptual limits approach is 'controversial',[29] and at times difficult to distinguish from Lord Carnwath's rule of law-based approach to ouster clauses, but still warrants further consideration.

Conclusion

Anisminic as a decision was based on a 'sleight of hand',[30] effectively abolishing the distinction between errors of law and jurisdictional error without discussing the constitutional implications of such a radical development in the law. Furthermore, the very core of the nullity approach, the notion that decisionmakers have no jurisdiction to err in law, is fraught with conceptual difficulties. The nullity approach that arose in the aftermath of *Anisminic* is no longer, if it ever was, fit for purpose; the approach has prompted fundamental questions on the nature and relationship of the rule of law and Parliamentary sovereignty to which it is not capable of responding to. As will be explored in Chapter 6 a return to the pre-*Anisminic* settlement is not desirable, leaving the only option being to adopt new approaches for the judicial treatment of ouster clauses.

[28] *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2009] EWHC 3052 (Admin).

[29] Ibid [73] Lord Phillips.

[30] S Sedley *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press 2015) 43.

Chapter 4: Conceptual limits on ousting judicial review

Introduction

Ouster clauses expose constitutional tensions between the courts and Parliament, as explored in Chapter 3. Litigation and commentary on ouster clauses have invited the question whether Parliament is capable of fully ousting judicial review, as raised by Laws LJ in *Cart* and discussed by both the plurality and dissents in *Privacy*. A conceptual limit on ousting judicial review squarely confronts the issue of Parliamentary sovereignty and therefore offers the potential to be a more satisfactory approach to ouster clauses than the nullity approach and could thus form part of a future approach to ouster clauses.

This Chapter will assess the more generally accepted and discussed conceptual limit on Parliamentary sovereignty, that Parliament cannot bind itself, before moving on to discuss whether Parliament is conceptually limited from fully ousting judicial review. The Chapter will conclude by arguing that it is likely that Parliament is conceptually bound from fully exclude judicial review, but that the exact scope of the conceptual limit is subject to debate.

It is important to separate the proposed conceptual limit from proposed normative limits on Parliamentary sovereignty, which have been subject to considerably more academic commentary and which will be addressed in Chapter 5. Distinguished effectively by Lord Sumption in *Privacy*, a conceptual limit is a limit that is 'necessary to sustain Parliamentary sovereignty',[1] whereas a normative limit would be a limit on Parliamentary sovereignty based on 'higher law'[2] preventing Parliament from achieving certain legislative outcomes. An example of a normative limit on Parliamentary sovereignty would be a hypothetical higher law principle that prevented Parliament from abolishing the right to freedom of speech; a normative limit on Parliamentary sovereignty requires the subordination of Parliament to an external power or principle. The difficulty in separating proposed conceptual and normative limits on Parliamentary sovereignty is highlighted by the fact that the plurality in *Privacy* conflated them, as shall be demonstrated. Further compounding the risk of conflation is the fact that proposed normative limits have been invoked in response to the prospect of Parliament fully ousting review, the same context in which the proposed conceptual limit would operate. In *Jackson*, Lord Steyn stated:

> 'In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'[3]

This is a clear and well cited example of a proposed normative limit on Parliamentary sovereignty, though it is important to note the comment was made in *obiter*. Lord Steyn was suggesting that in the face of Parliament attempting to abolish judicial review, higher constitutional principles could be invoked in order to limit Parliament's legislative competence. Laws LJ himself also considered

---

[1] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219 [208].

[2] Ibid.

[3] *R (Jackson) v Attorney General* [2006] 1 AC 262 [102].

normative limits on Parliamentary sovereignty in the context of abolishing judicial review, writing that the ouster in the Asylum and Immigration (Treatment of Claimants, etc) Bill of 2003 (Clause 10) was potentially within a category of provisions 'so outrageous that any conscientious judge would think it contrary to his or her judicial oath to uphold it'.[4]

Laws LJ articulated the proposed conceptual limit on ousting review in the divisional decision in *Cart* (though this Chapter will demonstrate that the history of the proposed limit pre-dates the decision considerably):

> 'If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion... Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another.'[5]

As can be seen, Laws LJ presents the proposed conceptual limit as being analogous with the traditional view that Parliament cannot bind its successors, a conceptual limit that is more widely accepted and discussed than the conceptual limit being proposed here. It is therefore necessary to consider whether Parliament can bind its successors before moving on to the more controversial conceptual limit against ousting review. Discussion of whether Parliament can bind itself can also offer insight into how the conceptual limit on ousting review could operate in practice.

The conceptual limit on ousting review could provide a way for the courts to circumvent total ouster clauses without relying on *Anisminic* and the nullity approach, which as explored in Chapter 3 has a series of deficiencies. The conceptual limits approach to ouster clauses offers an approach which squarely confronts the issue of compatibility with Parliamentary sovereignty. Furthermore, unlike the nullity approach, the conceptual limits approach does not rely on the convergence of error of law and error of jurisdiction.

Is Parliament conceptually limited from binding itself?

The orthodox understanding of Parliamentary sovereignty is the 'the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[6] For Dicey, sovereignty also

[4] J Laws *The Constitutional Balance* (Hart publishing 2021) 115.

[5] *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2009] EWHC 3052 (Admin) [35].

[6] A V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed Macmillan 1915) 36.

meant that Parliament 'cannot, while retaining its sovereign character, restrict its own powers by any particular enactment'.[7] In other words, a concomitant of Parliament's sovereign power is the inability to bind itself. In more recent years, Parliament's supposed inability to bind itself has been understood through regarding its sovereignty as 'continuing'.[8] If Parliamentary sovereignty is understood to be continuing, Parliament is not capable of binding itself, as Parliament cannot detract from its own continuing sovereignty. This section will present the argument that it is not possible for Parliament to fully bind itself; with the existence of one conceptual limit on Parliamentary sovereignty lending legitimacy to the notion that there could be others. The impact of European Union membership, as given effect by the European Communities Act 1972, give the initial impression of Parliament successfully binding itself, but this will be explored and proven to be an unsound conclusion.

An inability for Parliament to bind itself is squarely a conceptual, as opposed to a normative, limit on sovereignty. The limit is not grounded in any normative justification, or in reliance on the existence of some form of higher law that Parliament is subordinate to, but rather the proposition that a legislature with unlimited law-making power cannot, by definition, bind itself with its own laws. There are normative justifications for Parliament being unable to bind itself, perhaps most obviously that it is desirable for Parliament to be free to amend or repeal archaic legislation. However, the Diceyan notion that Parliament cannot bind itself is based on a conceptual limit of Parliamentary sovereignty, and the fact that such a limit has normative benefits does not detract from its conceptual basis.

The notion that Parliament cannot bind itself has been subject to challenge. There are differing understandings of Parliamentary sovereignty. A notable contrast with the Diceyan approach, which prevents Parliament from binding itself, is the approach of Jennings, sometimes referred to as the 'self-embracing' model of sovereignty. Jennings contended that Parliament's sovereign law-making power included the power to 'change the law affecting itself', resulting in Parliament being capable of binding its successors.[9] In this section it will be shown that Parliament's demonstrable ability to alter the law affecting itself does not amount to the ability to meaningfully bind its successors.

The effective disapplying of the Merchant Shipping Act 1988 in *Factortame*[10] led Wade to state that Parliament, through section 2(4) of the European Communities Act 1972 (ECA), had 'evidently succeeded in binding its successors'.[11] The formula of words used in the ECA to achieve such a radical result were as follows:

---

[7] Ibid 24.

[8] J Goldsworthy 'The "manner and form" theory of parliamentary sovereignty' (2021) P.L., Jul, 586.

[9] I Jennings *The Law and the Constitution* (5th Ed University of London Press 1959) 153.

[10] *R v Secretary of State for Transport ex p Factortame* (*No 2*) [1992] 3 WLR.

[11] H W R Wade 'What Has Happened to the Sovereignty of Parliament?' (1991) 107 L.Q.R. 1, 4.

> 'any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section'[12]

Reconciling the evident effect of the ECA with a traditional understanding of Parliamentary sovereignty, wherein Parliament cannot bind itself, is challenging. It is understandable to take the operation of s2(4) ECA as evidence that Parliament is capable of binding itself. Laws LJ's 'constitutional statutes' doctrine, developed in *Thoburn*[13] can be seen as an attempt to reconcile the effect of s2(4) ECA with Parliamentary sovereignty. In *Thoburn*, Laws LJ held that there was a category of statutes that were immune from the doctrine of implied repeal, and could only be repealed expressly, or if their repeal was the 'irresistible' implication of a future statute.[14] Whilst the scope of *Thoburn* has been subject to academic debate,[15] by prescribing that certain statutes can only be repealed expressly or by necessary implication the doctrine could be argued to have demonstrated that Parliament can bind itself to only repeal statutes via a particular form of words, rebutting the traditional understanding of Parliamentary sovereignty.

Whilst the ECA clearly was an attempt by Parliament to bind its successors at least to some extent, the same cannot be said for all statutes that have been labelled 'constitutional' in the *Thoburn* sense of the word. In *Thoburn*, Laws defined constitutional statutes as statutes which:

> '(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.'[16]

There is no definitive list of constitutional statutes, but the existing lists invariably include statutes that do not contain a provision that interferes with the normal rules of implied repeal, as was the case for the ECA. For example, in *HS2* it was suggested that the Constitutional Reform Act 2005 (CRA) is a constitutional statute,[17] despite the CRA containing no provision with analogous effect to that of s2(4) ECA. Most statutes commonly labelled as 'constitutional' do not include provisions that purport to bind future Parliaments. Furthermore, there is a convincing argument to be made that Parliamentary designation that an Act is 'constitutional' does not necessarily confer constitutional statute status, with the designation of constitutional status instead being reserved for the courts.[18] In *Thoburn*, Laws LJ stated that Parliament is incapable of binding itself,[19] leading to the view that the

---

[12] European Communities Act 1972 Section 2(4).

[13] *Thoburn v Sunderland CC* [2003] QB 151.

[14] Ibid [63].

[15] F Ahmed, A Perry 'The quasi-entrenchment of constitutional statutes' (2014) C.L.J. 73(3), 514.

[16] Op. Cit. [n13] [62].

[17] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 Lords Neuberger and Mance [207].

[18] T Khaitan '"Constitution" as a Statutory Term' (2013) 129 LQR 589.

[19] Op. Cit. [n13] [59].

partial binding allowed by constitutional statute status is achieved by the courts rather than Parliament, as confirmed by Laws LJ himself in the decision.

Whilst it is submitted that Parliament cannot bind its successors, this conceptual limit does not prevent the modification of the normal rules of implied repeal, which can give an effect similar to Parliament binding its successors. The Diceyan orthodoxy could be simplified to the following:

1) Parliament is sovereign and is thus capable of making and unmaking any law.
2) Parliament, being sovereign, cannot detract from its own sovereign law-making power.

It is clearly well within the power of a sovereign Parliament to alter the common law, including the way judges interpret legislation, a clear example being the Interpretation Act 1978. It would also seem that it is possible for Parliament to modify the doctrine of implied repeal. The interpretative obligation found in section 3(1) of the Human Rights Act 1998 (HRA) requires, where possible, that all Acts enacted before or after the HRA be interpreted to be compatible with Convention rights; as noted by Kavanagh, by giving effect to s3(1) judges are required to depart from the ordinary operation of implied repeal.[20] The case for Acts to be labelled constitutional and thus protected from implied repeal where there is no provision with the effect of limiting the operation of implied repeal is 'profoundly weaker'[21] than protecting Acts from implied repeal because that is a part of the Act itself. The concept of constitutional statutes thus wrongly groups statutes that might be said to be of constitutional significance with statutes whose provisions necessitate a departure from the normal operation of implied repeal, which as explored does not necessarily undermine the view that Parliament cannot bind itself.

Whilst previously being approved by the Supreme Court,[22] constitutional statutes have been subject to a recent judicial re-evaluation. In *Re Allister*,[23] the unanimous Justices seemed dismissive of the concept of constitutional statutes, holding that:

> 'Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament … The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme.'[24]

Whilst the full implications of *Re Allister* remain to be seen, the apparent departure from constitutional statute doctrine seen in the decision lends support to the notion that Parliament cannot bind itself. The Supreme Court was willing to recognise that statutory provisions can be afforded the presumption that Parliament does not intend to repeal them, but this does not

---

[20] A Kavanagh *Constitutional Review Under the Human Rights Act* (Cambridge University Press 2009) 296.

[21] J Mcgarry, S Spence 'Constitutional Statutes—Roots and Recognition' (2020) Statute Law Review, Volume 41, Issue 3, October, 378.

[22] Op. Cit. [n17].

[23] *Re Allister* [2023] UKSC 5.

[24] Ibid [66].

necessarily mean that constitutional statutes are subject to a modified standard of implied repeal. Under *Re Allister*, so long as an enactment is 'clearly expressed', it will be found to override a previous statute of contradictory wording, regardless of its constitutional importance. Whilst *Re Allister* recognised that fundamental constitutional rights could arise from statute law, it does not necessarily follow from this proposition that Acts of Parliament containing fundamental constitutional rights should be protected from implied repeal in their entirety. As raised by Feldman,[25] one of the potential issues with the constitutional statute doctrine is the idea that the full constitutional statute is protected from implied repeal, rather than merely the provisions of genuine constitutional significance.

The temptation to view the ECA, *Factortame* and *Thoburn* as evidence of Parliament being capable of binding its successors is understandable, particularly given that constitutional statute status has at times been construed meaning that constitutional statutes can only be repealed expressly,[26] something that was not the intention of Laws LJ in *Thoburn*, who as mentioned previously stated that constitutional statutes could also be repealed by irresistible implication.[27] The very term 'constitutional statute' can be seen as a distraction from the discussion of whether Parliament can bind itself; by being overly inclusive, the concept detracts from the core question of how Acts of Parliament that directly alter the operation of implied repeal can be reconciled with Parliamentary sovereignty. Ultimately, discussion of implied repeal often lacks acknowledgement of the fact that there is an existing presumption against implied repeal which pre-dates *Thoburn*, with judges presuming that Parliament does not intend to contradict its previous enactments. According to Bennion, the presumption against implied repeal becomes stronger the more significant the piece of legislation in question,[28] with there being evidence of judges prior to *Thoburn* expressing reluctance at the idea of the ordinary operation of implied repeal applying to constitutionally significant statutes.[29] Courts presume that Parliament does not seek to remove constitutional rights, whether they emanate from statute or common law, but ultimately must uphold the clear words of a contradictory Act of Parliament. This is the likely position of the law post *Re Allister*, diminishing the role of constitutional statutes and their potential to be perceived as binding Parliament.

Parliament can modify the application of the doctrine of implied repeal, but this should not be seen as evidence that Parliament can bind itself. The operation of implied repeal can evidently be subject to modification, but this is quite distinct from Parliament binding itself in a meaningful sense, such as the current government passing a law that would prevent the next government from undoing its legislative agenda. The wording of s2(4) ECA does not make an exception for enactments that purported to repeal the ECA, on this basis it could be argued that the provision required even an Act that expressly repealed the ECA to be interpreted to give effect to the ECA. However, the ECA was successfully repealed as part of the process of leaving the European Union by the European Union (Withdrawal) Act 2018. Section 2(4) ECA was successful in protecting the ECA from pro tanto repeal

---

[25] D Feldman 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343.

[26] *BH (AP) (Appellant) and another v The Lord Advocate and another* [2012] UKSC 24.

[27] Op. Cit. [n13].

[28] F Bennion *Bennion on Statutory Interpretation* (5th Ed Butterworths 2008).

[29] *Petition of the Earl of Antrim* [1967] 1 AC 691 (HL) 724.

by later Acts of Parliament, but this did not ultimately detract from Parliament's ability to make and unmake any law, as demonstrated by its ultimate repeal. Despite considerable academic commentary, it therefore seems likely that Parliament continues to be unable to bind itself, allowing the tentative conclusion that there is at least one conceptual limit on Parliamentary sovereignty, therein leaving the possibility open for further conceptual limits.

Is Parliament conceptually limited from ousting review?

Having presented an argument in favour of Parliament being incapable of binding itself, the proposed conceptual limit on Parliamentary sovereignty that has received greater recognition, the prospect of Parliament being conceptually limited from fully ousting judicial review will now be explored. The modern articulation of the proposed conceptual limit on ousting review is found in the divisional hearing of *Cart*, as previously mentioned. However, an earlier discussion of the proposed conceptual limit can be found in the speech of Farwell LJ in *Shoreditch* (1910):

> 'No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe.'[30]

It is significant that Farwell LJ speaks of 'inferior' tribunals, by this he refers to tribunals of limited jurisdiction. If a tribunal has a limited jurisdiction there is the possibility of it exceeding its jurisdiction, and therefore it must be subject to the supervisory jurisdiction of judicial review to ensure its determinations remain within its jurisdiction. An inferior tribunal that is immune from judicial review is a contradiction in terms, because Parliament has assigned a limited jurisdiction to the tribunal but provided no possibility for the jurisdiction to be controlled. It is important to note that the term 'inferior' in the jurisdictional sense should not be taken to mean diminutive or insignificant, the powerful Investigatory Powers Tribunal has a defined jurisdiction limited by statute, classing it as an inferior tribunal despite its broad and at times exclusive jurisdiction.

The early Bill version of what would become the Foreign Compensation Act 1969 contained what was believed at the time to be full ouster, a provision introduced following the House of Lord's decision in *Anisminic* aimed at fully excluding the judicial review of determinations of the Foreign

[30] *R v Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859.

Compensation Commission. In the face of this complete ouster, Lord Wilberforce (who sat in the majority in *Anisminic*) said the following in the House of Lords debate of the Bill:

> 'the question in every case, great or small, must arise and does arise quite often: what is to happen when the tribunal departs outside the area which Parliament has laid down for it?'[31]

Lord Wilberforce was referring to the fact that a core aspect of judicial review is ascertaining whether the body in question has acted within the jurisdiction allocated to it by Parliament, and that by depriving the courts of the power to judicially review a body, Parliament would create difficulties in terms of how to regulate a potential breach or abuse of the body's jurisdiction. If the courts are prevented from reviewing a body, the question that arises is what happens if the body exceeds its jurisdiction. The conceptual limit that prevents Parliament from binding its successors is a necessary component of Parliamentary sovereignty; Parliament cannot be said to be capable of making and unmaking any law if Parliament could make a law that it could not unmake. By analogy, a conceptual limit against Parliament fully ousting review can be seen as upholding Parliamentary sovereignty: Parliament cannot fully exclude judicial review, because doing so would mean the jurisdictional limits established by Parliament would not be enforced. For Parliament to be sovereign in any meaningful sense the clear words of recent Acts of Parliament must take precedence over words of older statutes; in the same sense, giving effect to Parliamentary sovereignty means the jurisdictional limits created by Parliament must be enforced and given precedence over clauses aimed at preventing judicial review.

Putting the proposed conceptual limit in the simplest of terms can be done as follows: the inherent contradiction of a defined limited jurisdiction and an ouster clause should be resolved by giving effect to the limited jurisdiction and not to the ouster. Allowing a limited jurisdiction to go unsupervised would seriously undermine Parliamentary sovereignty, because government agencies, courts and tribunals empowered by Parliament would not need to confine themselves to the words of the statute, depriving those words of meaning. By not giving effect to ouster clauses, the courts would be embracing the lesser of two evils: better for a single provision of an Act of Parliament to not have effect than for the general thrust of the legislation to be undermined by a single provision. The role of the courts is to give effect to Parliamentary sovereignty. In the face of a limited jurisdiction protected from review by an ouster clause, the choice between these two contradictory provisions that gives fullest effect to Parliamentary sovereignty is clear.

<u>The conceptual limit on ousting review as discussed in *Privacy*</u>

Beyond theoretical discussion, the case that has involved the most extensive discussion of the proposed conceptual limit is *Privacy*, where there were differing views on the existence and scope of the proposed conceptual limit. The contrasting perspectives taken on the proposed conceptual limit offer an insight into how it could be employed in practice, and further illustrate the risk of conflating the proposed conceptual limit with a normative limit on Parliamentary sovereignty.

[31] HL Deb 04 February 1969 vol 299 cc11-72 [56-57].

The understanding of the proposed conceptual limit presented by Lords Sumption and Reed (the current President of the Supreme Court) was the most conservative of the Justices:

> 'If Parliament on the true construction of an enactment has created a tribunal of legally limited jurisdiction, then it must have intended that those limits should have effect in law. The only way in which a proposition can have effect in law, is for it to be recognised and applied by the courts. Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent with the courts lacking the capacity to enforce the limits.'[32]

Lord Sumption went onto argue that this was an entirely hypothetical situation, as Parliament had not by his interpretation fully excluded judicial review in the case in question.[33] Lord Sumption was willing to go as far as agreeing in principle that there was a conceptual limit on Parliament fully ousting review of jurisdictional error. The conceptual limit discussed by Lords Sumption and Reed is conservative because it takes a narrow view, holding that the conceptual limit would only come into play in the face of a total ouster. It could be argued that the approach taken by Lords Sumption and Reed artificially narrows the scope of the conceptual limit, which is better understood as coming into play whenever an ouster clause purports to prevent the review of jurisdictional error in the pre-*Anisminic* sense of the term. Under Lords Sumption and Reed's approach, a partial ouster clause that excluded only a particular category of jurisdictional error would be effective; a result that is inconsistent with an important aspect of the conceptual limit: that Parliament cannot prevent the courts from enforcing the jurisdiction of bodies it creates. It does not matter whether an ouster clause is comprehensive or partial; giving the fullest possible effect to Parliamentary sovereignty means the clauses cannot be given effect in the face of jurisdictional errors. The approach taken by Lords Sumption and Reed is thus artificially constrained, acknowledging the conceptual limit but denying it any practical usage.

Lord Lloyd-Jones did not offer a view on the proposed conceptual limit in his speech. His Lordship's silence on the matter is significant, as it means there was no majority view in the Supreme Court as to the correct approach to the proposed conceptual limit, leaving the matter uncertain and unresolved.

The plurality led by Lord Carnwath took a different approach, one wherein Parliament could not exclude review of either jurisdictional error or error of law within jurisdiction:

> 'Parliament cannot entrust a statutory decisionmaking [sic] process to a particular body, but then leave it free to disregard the essential requirements laid down by the rule of law for such a process to be effective.'[34]

---

[32] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219 [209].

[33] Ibid [210-211].

[34] Ibid [123].

The problem with Lord Carnwath's position is that it strays into normative territory, as identified by Young and Elliott.[35] Lord Carnwath's reference to the rule of law prevents his proposed limit on sovereignty from being fully conceptual in nature, as it relies on an invoked higher law to subordinate Parliament. Rather than being necessary to sustain Parliamentary sovereignty, the plurality's position crosses into the more radical territory of a normative constraint, a position that Chapter 5 will demonstrate is ultimately indefensible.

Furthermore, the plurality's view that Parliament cannot prevent the review of intra vires errors is difficult to support. The conceptual limit's basis is giving effect to Parliamentary sovereignty; it is one thing to argue that Parliament cannot prevent the jurisdictions it assigns from being enforced, it is quite another to argue that Parliament cannot effectively permit a body to make errors within its own jurisdiction. Whilst this thesis ultimately contends that the conceptual limit on ousting review can be extended to include errors made within jurisdiction in some circumstances, namely the determinations of executive officials, such a view can only be taken with considerable justification, something that is not attempted by the plurality, who as previously noted rely on an invocation of the rule of law to justify their position.

Lord Wilson was sceptical of the plurality's rule of law-based argument, citing a lack of precedent.[36] However, Lord Wilson did not dismiss the submission that Parliament could not fully oust review, arguing that Parliament could not exclude review of jurisdictional error (in the pre-*Anisminic* sense of the term) of an inferior tribunal. Lord Wilson's formulation of the proposed conceptual limit did not apply in *Privacy* given that the error of law of the IPT did not constitute a jurisdictional error in the pre-*Anisminic* sense, as his Lordship emphasised. The ouster clause in question in *Privacy* was effective in the eyes of Lord Wilson because the error of law did not exceed jurisdiction in what his Lordship called 'the proper sense of the word',[37] and because he had concluded that 'Parliament does have power to exclude judicial review of any ordinary errors of law made by the IPT'.[38] However, had the error been jurisdictional in the pre-*Anisminic* sense, Lord Wilson would have, it seems likely, corrected the error despite the fact the ouster refers specifically to jurisdiction.

Lord Carnwath's framework is tainted by normative elements, failing to effectively distinguish conceptual and normative limits on Parliamentary sovereignty, and is thus ultimately impossible to defend. Lords Reed and Sumption approach is overly restrictive, as explored. Lord Wilson's view of the conceptual limit represents the sound middle ground, a clear model of how the conceptual limit could be employed in the future in a manner that would not radically challenge the prevailing understanding of Parliamentary sovereignty. Lord Wilson's approach relies on being able to distinguish between errors of law and errors going to jurisdiction, further highlighting the need to

---

[35] M Elliott, A Young 'Privacy International in the Supreme Court: jurisdiction, the rule of law and parliamentary sovereignty' (2019) C.L.J. 78(3), 490.

[36] Op. Cit. [n32] [237].

[37] Op. Cit. [n32] [227].

[38] Op. Cit. [n32] [253].

depart from *Anisminic* and the nullity approach in order to adopt the conceptual limits approach to ousting judicial review.

Conceptual limits in practice

If Parliament is incapable of fully ousting judicial review, the practical effect of such a conceptual limit would need to be explored. How should courts deal with legislative provisions fully ousting the review of inferior tribunals? The answer lies in the increasing judicial willingness to justify decisions on the basis of giving effect to Parliamentary sovereignty. In addition, this section will address some important rebuttals to the operation of the proposed conceptual limit.

Parliamentary sovereignty operates through common law rules such as implied repeal.[39] Whilst it does not necessarily follow from this that Parliamentary sovereignty is a common law construct, it does follow that judges can rule to give effect to Parliamentary sovereignty. *Miller* (ii) was, in essence, the Supreme Court giving effect to its understanding of Parliamentary sovereignty. In *Miller* (ii), the unanimous Supreme Court were willing to take an expansive view of giving effect to Parliamentary sovereignty,[40] deciding that prorogation could be unlawful if it interfered excessively with Parliament's dual function as a legislature and a scrutiniser of the executive. It is not inconceivable that in the face of a total ouster, the senior courts of the United Kingdom could intervene in order to give effect to Parliamentary sovereignty, which would require the ouster in question to be at least partially disregarded in order that potential jurisdictional errors of the body it purported to protect could be reviewed and corrected.

A potential rebuttal of the notion that a conceptual limit on ousting review could have practical effect are the numerous statements from senior judges in the United Kingdom indicating the possibility of judicial review being fully excluded. In her leading judgement in *Cart*, Lady Hale stated that:

> 'it does of course lie within the power of Parliament to *provide* that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer'[41] (emphasis added)

On its face, judicial comments such as this seem to eliminate the possibility of the conceptual limit on ousting review being enforceable. However, an important consideration is the distinction between 'legislative validity' and 'legislative effectiveness'.[42] Parliament's sovereign law-making power leaves no doubt that Parliament can validly enact a provision that fully excludes the judicial review of a particular body, but whether or not such a provision would be effective is a separate matter. Writing in the context of attempts by Parliament to bind its successors, Goldsworthy argues it is likely that

[39] *Ellen Street Estates Ltd v Minster of Health* [1934] 1 KB 590.

[40] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 [44].

[41] *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2011] UKSC 28 [40].

[42] A McHarg 'Can Holyrood bind its successors?' 2021 25(2) Edin. L.R. 245.

such provisions would be found 'not to be binding' on a future Parliament.[43] In the face of the contradiction of a tribunal of A) limited jurisdiction being B) fully protected from judicial review, the option that most effectively sustains Parliamentary sovereignty is to find B) to be non-binding on the courts. The ouster in question would not have been 'struck down' or removed from the statute books, but rather it would have been found to be unenforceable given the Court's duty to sustain Parliamentary sovereignty. Acts of Parliament found to be impliedly repealed are not given effect by the courts. This is rightly not regarded as an infringement of Parliamentary sovereignty, but instead as giving effect to it, and the same can be said of not giving effect to ousters that protect tribunals of limited jurisdiction.

Commonwealth jurisprudence offers potential insight into the conceptual limit against ousting review. In the context of Australian, New Zealand and Canadian case law, Peiris observed:

> 'There is necessarily an appearance of inconsistency between a provision that defines and restricts the power of a tribunal and prescribes the course it must pursue, and a provision which declares that the validity of the tribunal's actions cannot be challenged or called into question on any account whatever. The resulting contradiction has to be resolved by giving effect to the legislative instrument as a whole.'[44]

Whilst not identifying this phenomenon in terms of a conceptual limit on Parliamentary sovereignty, Peiris summarises the theory effectively: in the face of the contradiction between a full ouster and a tribunal of limited jurisdiction, giving effect to the jurisdictional limits of the tribunal is the way the reviewing courts can give the greatest effect to the Act of Parliament in question. Beyond theory, the conceptual limit against ousting review has seen some approval in the Canadian Supreme Court:

> 'Even if it wished, the legislature could not declare the absurdity that a tribunal which acts without jurisdiction can be immunised against the application of a writ… Its decision is null, and no text of a statute can give it any validity or decide that, in spite of its nullity, that decision should nonetheless be recognised as valid and carried into effect.'[45]

The 'determination' of a tribunal of limited jurisdiction which goes beyond its jurisdiction is void, a nullity, and a purported determination. The enforcement of the jurisdictional limits created by Parliament requires that determinations made in excess of said jurisdiction are not given effect; a provision that purports to give such nullities effect is irreconcilable with the statutory scheme as a whole and thus cannot be effective. The limit on law-making power proposed in *Alliance des Professeurs Catholiques de Montréal* is conceptual. It does not rely on the invocation of any higher law that Parliament is subordinate to; rather, it is analogous to Jennings' famous example of

---

[43] Op. Cit. [n8].

[44] G L Peiris 'Statutory exclusion of judicial review in Australian, Canadian and New Zealand Law' (1982) P.L. Spring 451.

[45] *Alliance des Professeurs Catholiques de Montréal v Quebec Labour Relations Board* [1953] 2 SCR 140.

Parliament banning smoking in Paris[46] by being a practical limit on legislative power, as opposed to a normative one.

Another potential rebuttal of the proposed conceptual limit on ousting review can be summarised as follows:

> In a scenario where Parliament has fully ousted judicial review of a body, why can't Parliament itself determine whether the body is acting outside of its jurisdiction? Parliament has the full competence to do so if necessary and can pass all the stages of a Bill in one day in order to correct the perceived error.

On its face, this is a powerful rebuttal. Parliament, as the supreme law-making body of the United Kingdom, is capable of unilaterally overruling the determinations of a body that it has completely protected from judicial review. However, the hypothetical possibility of Parliament being able to police the jurisdiction of an inferior tribunal by legislating on an ad hoc basis to correct its jurisdictional errors can hardly be seen as upholding of Parliamentary sovereignty; it is contradictory for Parliament to face the prospect of passing repeated Acts in order to maintain adherence to an original Act. Furthermore, the mere possibility of Parliament being able to correct the jurisdictional errors of an unreviewable tribunal does not completely deprive the court of the justification to intervene to uphold Parliamentary sovereignty. The rebuttal fails to reflect the recent approach to the sustaining of Parliamentary sovereignty employed by the Supreme Court. In *Miller* (ii), the unanimous Supreme Court were willing to find the prorogation to be unlawful, despite the acknowledgement that the prorogation had, in principle, left time for Parliament to respond to it if had disapproved.[47] Therefore, the mere possibility that Parliament could prevent a measure that would impede on its continuing sovereignty does not prevent the courts from acting.

The proposed conceptual limit should not be taken as depriving Parliament of the power to alter judicial review, another important point on the practical effect of the proposed conceptual limit. The conceptual limit is strictly limited to giving effect to Parliamentary sovereignty by ensuring that limited are jurisdictions enforced. In his original description of the proposed conceptual limit, Laws LJ showed recognition of the proper scope of it:

> 'None of this, of course, is to say that Parliament may not modify, sometimes radically, the procedures by which statute law is mediated. It may impose tight time limits within which proceedings must be brought… It may create new judicial authorities with extensive powers. It may create rights of appeal from specialist tribunals direct to the Court of Appeal. The breadth of its power is subject only to the principle I have stated.'[48]

It has been recognised by the Supreme Court that Parliament can successfully reallocate judicial review to a body other than the High Court.[49] The conceptual limit on ousting review does not

---

[46] Op. Cit. [n9] 170–1.

[47] Op. Cit. [n40] [33].

[48] Op. Cit. [n5].

[49] *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2010] 2 W.L.R. 1.

prevent the alteration of the grounds of review, so long as review of jurisdictional error is left intact. The exact scope of jurisdictional error is subject to debate, particularly following *Anisminic*; allowing for a broad view of the conceptual limit (with Parliament being unable to bar review of jurisdictional error in the post-*Anisminic* sense, including ordinary errors of law), and a narrow view (with Parliament being unable to bar review of jurisdictional error in the pre-*Anisminic* sense of the term, an approach favoured by Lord Wilson in *Privacy*). It remains to be seen whether the narrow or broad form of the conceptual limit is favoured by the judiciary. As will be argued in Chapter 6, this thesis advocates the broad approach to the conceptual limit in the context of executive decisionmakers, and the narrow approach in the context of specialised tribunals and courts.

Bradlaugh – a historical basis

In the case of *Bradlaugh* (discussed in Chapter 2), the court was unwilling to give effect to an ouster clause because the error in question was jurisdictional. On its face, the decision in *Bradlaugh* is not particularly notable; there is a long and well-established history of ouster clauses being found to not prohibit review of jurisdictional errors, as previously discussed. What makes *Bradlaugh* potentially significant in this context is the strength of the ouster clause, which could be seen as excluding review of jurisdictional error:

> 'And be it enacted, That no Information, Conviction, or other Proceeding before or by any of the said Magistrates shall be quashed or set aside, or adjudged void or insufficient, for Want of Form, or be removed by Certiorari into Her Majesty's Court of Queen's Bench.'[50]

The provision bars convictions from being 'adjudged void', but this is exactly what the court did in its decision. The court in *Bradlaugh* found that the Magistrate had 'exceeded the limits of its jurisdiction',[51] a decision that has the same effect and meaning as finding the determination to be void. Cockburn CJ was clear that the ouster 'does not apply' where jurisdiction has been exceeded. Whilst the judges in *Bradlaugh* did not expressly engage with the idea of a conceptual limit on Parliamentary sovereignty, the decision can, with caution, be put forward as a model for how a modern court could respond to a provision fully ousting the review of a body of limited jurisdiction; the provision would not have effect in so far as it prevented the review of jurisdictional error, even if it specifically prohibited review of jurisdictional error.

As explored in the section above, the treatment of ousters that exclude review of jurisdictional error does not involve any form of judicial strike down of primary legislation, but rather the acknowledgement that the ouster cannot be held to apply to jurisdictional errors. *Bradlaugh* lends legitimacy to the notion that the conceptual limit on ousting review could play a role in the treatment of ouster clauses beyond mere hypotheticals.

Conclusion

[50] Metropolitan Police Courts Act 1839 Section 39.

[51] *Ex p Bradlaugh* (1878) 3 Q.B.D. 509.

Giving effect to the limited jurisdictions Parliament assigns to decisionmakers requires some form of judicial review. This is not a denial of Parliamentary sovereignty, but rather a necessary component of maintaining it. The scope of the conceptual limit on ousting review is tied to the scope of jurisdictional error, leaving a degree of uncertainty that has yet to be judicially resolved. The conceptual limit on ousting review could play a role in future ouster clause cases; the approach has the advantage of affirming Parliamentary sovereignty, a point that cannot be said of the nullity approach. The conceptual limits approach to ouster clauses opens up the prospect of even total ouster clauses being circumvented and could thus provide a degree of finality to the question of how strongly worded an ouster clause must be to fully oust review.

Chapter 5: Ouster clauses and the rule of law

Introduction

The rule of law is an integral aspect of the constitution of the United Kingdom, and as explored in Chapter 3 the concept has been invoked to justify the current judicial approach to ouster clauses. This chapter will set out the appropriate relationship between ouster clauses and the rule of law; an approach that rebuts the view that the rule of law can impose normative limits on Parliamentary sovereignty whilst affirming the valuable role the rule of law can play in varying the intensity of judicial review depending on the context, thereby giving effect to ouster clauses in some circumstances.

It will be demonstrated that alongside the express words of a statute, contextual factors can also override the presumption against ousting review, with the result being that reviewability is more dependent on rule of law-based considerations as opposed to the strength, or even existence of, an ouster clause. Whilst the case law supporting this argument can be traced to the mid-20th century, in *Cart* and *Privacy* the Supreme Court dealt more overtly with the idea that reviewability depended on the proportional application of the rule of law.

The relationship between ouster clauses and the rule of law primarily concerns identifying the presumptions judges use when interpreting ouster provisions, and ascertaining what statutory language or context is necessary to override these presumptions. The intensity of judicial review and the rule of law are closely entwined,[1] and there are circumstances other than an express ouster where the courts are willing to limit judicial review. There is a clear tension between the concept of the rule of law, which amongst other aspects necessitates that public bodies act within the law, and legislative provisions which purport to prevent courts reviewing the legality of a body's decisions. The fact that ouster clauses are 'inimical to the principle of the rule of law'[2] is not difficult to identify and goes some way to explaining the hostility such provisions often evoke from judges. However, this chapter will also demonstrate that there are instances where limiting judicial review is justifiable and beneficial from a rule of law perspective, it is not as simple as to state that ouster clauses are always injurious to the rule of law.

The judicial treatment of ouster clauses, including those motivated by rule of law concerns, must be reconcilable with Parliamentary sovereignty; such reconciliations are typically achieved via judicially developed presumptions, such as the presumption that Parliament does not intend to exclude judicial review.[3] Legislative presumptions play an important role in the relationship between ouster clauses and the rule of law. The presumption against ousting review and the presumption in favour of the courts being the final arbiters of the law will be considered, in particular what words or context have the potential to override these presumptions.

Before the main argument of this chapter is approached, the limits of the rule of law must first be considered. The possibility of the rule of law being invoked to invalidate an ouster clause, in

---

[1] *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28 [37].

[2] *De Smith's Judicial Review* (8th Ed Sweet & Maxwell 2021) 4-016.

[3] M Elliott, J Varuhas *Administrative Law Text and Materials* (5th Ed Oxford University Press 2017) 533.

a sense analogous to American-style judicial review, will be ruled out in order to focus on the practical relationship between judicial review and the rule of law.

Rule of law and Parliamentary sovereignty

In the previous chapter, it was argued that Parliament is conceptually limited from fully ousting the judicial review of a body of limited jurisdiction; giving effect to Parliamentary sovereignty requires that public bodies are confined to the jurisdiction assigned to them by Parliament. As stated in Chapter 4 (page 26), this is a separate contention from the view that Parliamentary sovereignty is in some sense subordinate to the rule of law, and that therefore the rule of law can be invoked in order to invalidate portions of Acts of Parliament. Despite some judicial commentary to the contrary (Chapter 4), the rule of law, whilst an essential consideration, is not capable of invalidating portions of Acts of Parliament, including ouster clauses.

In *Jackson*, Lords Steyn and Hope suggested that the courts could prevent Parliament from abolishing judicial review (Chapter 4, page 26), a clear invocation of the view that Parliamentary sovereignty is subordinate to the rule of law in the context of Parliament attempting to oust judicial review. However, it is worth noting that Lord Bingham firmly rejected this proposition in his own opinion in the case:

> 'The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament. It is, as Maurice Kay LJ observed in para 3 of his judgment, unnecessary for present purposes to touch on the difference, if any, made by our membership of the European Union. Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.'[4]

Lord Bingham's account of Parliamentary sovereignty represents the orthodox, broadly accepted view. It is difficult, if not impossible, to see how the courts could depart from this position, given the repeated judicial affirmation of the fact that Parliament is the highest legal authority in the United Kingdom. Citing *Miller* (i), Lord Sumption's dissent in *Privacy* provides a powerful rebuttal of the 'higher law' view of the rule of law:

> 'In this court, sitting in banc for the first and only time, the proposition was common ground between the majority and the dissenting minority. The joint judgment of the eight judges of the majority recognised (para 43) that Parliamentary sovereignty was "a fundamental principle of the UK constitution", and adopted the celebrated statement of A V Dicey (Introduction to the Study of the Law of the Constitution , 8th ed (1915), p 38, that it comprised "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."'[5]

[4] *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56.

[5] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219 [209].

Lord Sumption went as far as to say that to argue against this prevailing account of the supremacy of Parliament would be a 'mountain' to climb,[6] and such a view as of the present has not succeeded in court. Moving beyond theoretical *obiter* discussion, in the recent administrative court decision of *R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber)*[7] Saini J clearly rejected the Claimant's submission that Parliament is not capable of ousting the supervisory jurisdiction of the High Court owing to higher law principles:

> 'Putting aside obiter observations in certain cases and academic commentaries, in my judgment, the legal position under the law of England and Wales is clear and well established. The starting point is that the courts must always be the authoritative interpreters of all legislation including ouster clauses. That is a fundamental requirement of the rule of law and the courts jealously guard this role. However, the rule of law applies as much to the courts as it does to anyone else. That means that under, our constitutional system, effect must be given to Parliament's will expressed in legislation. In the absence of a written constitution capable of serving as some form of "higher" law, the status of legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. The common law supervisory jurisdiction of the High Court enjoys no immunity from these principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with section 11A. In short, there is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen.'[8]

The rejection of the Claimant's submission is clear and leaves no room for it to be contended that Parliamentary sovereignty is in some manner controlled by rule of law principles, and that such overarching rule of law principles allow ouster clauses to be disapplied. The formula of words found to effectively exclude judicial review, Section 11A of the Tribunals, Courts and Enforcement Act 2007 as amended by Section 2 of the Judicial Review and Courts Act 2022, will be discussed later in this chapter. It is worth noting that the Court of Appeal chose not to overturn *Oceana* in *R (LA (Albania)) v Upper Tribunal*,[9] with the court instead endorsing the conclusion reached by Saini J in *Oceana*; this is discussed in more detail later in the Chapter.

The rule of law undoubtedly plays an important role in the judicial treatment of ouster clauses, but the temptation to view the rule of law as being capable of invalidating ouster clauses must be recognised as a distraction from the legitimate role that rule of law principles play in the interpretation of ouster clauses. In the face of express words in an Act of Parliament excluding judicial review, the rule of law must, and has been proven to, give way, leaving instead the prospect

---

[6] Ibid.

[7] [2023] EWHC 791 (Admin).

[8] Ibid [54].

[9] [2023] EWCA Civ 1337

of the conceptual limit against excluding review being utilised, as explored in the previous chapter. Rather than the rule of law being seen as a competing power against United Kingdom's sovereign Parliament, it is more beneficial to highlight the realistic role that the rule of law can play in the relationship between ouster clauses and courts, namely in defining legislative presumptions and allowing for the scope of judicial review to be reduced in some circumstances.

Presumption against ousting review

As discussed in detail in Chapter 2, there is a long line of cases supporting the proposition that only express statutory language will be found to exclude judicial review. This presumption precedes the presumption in favour of the courts being the final arbiter of the law, which Lord Diplock held to have derived from *Anisminic*.[10] As was discussed in Chapter 2, prior to *Anisminic*, 'no certiorari' clauses were found to be effective at excluding the review of errors on the face of the record, evidently being sufficiently express to override the presumption against ousting review. In the decades following *Anisminic*, the formula of words necessary to override the presumption was not entirely clear. For example, both the Divisional[11] and Court of Appeal[12] decisions in *Privacy* found Section 67(8) of RIPA 2000 to be sufficiently express to oust review, but the Supreme Court came to the opposite view. *Oceana* seems to have addressed the issue by deciding that Section 11A of the Tribunals, Courts and Enforcement Act 2007 successfully excluded review of Upper Tribunal decisions on permission to appeal from the First Tier Tribunals. The relevant portions of Section 11A is as follows:

> '(2) The decision is final, and not liable to be questioned or set aside in any other court.
>
> (3) In particular—
>
> (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
>
> (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.
>
> …
>
> (7) In this section—
>
> "decision" includes any purported decision;'

Whilst the ouster provision inserted into the Tribunals, Courts and Enforcement Act 2007 is clearly effective at excluding review, the language is considerably more robust than is necessary to override

[10] *Re Racal Communications Ltd* [1981] A.C. 374.

[11] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin).

[12] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868.

the presumption against ousting review. In *Oceana*, Saini J held that Section 11A is effective at ousting judicial review but did not pass comment on what part of the section has the effect of bringing about this result. It is likely that only subsection 3(b) in combination with subsection 7 is necessary to oust review; the additional material in the section speaks to the post-*Anisminic* ambiguity as to what statutory wording would be necessary to oust review. In other words, the excessively thorough statutory wording is the product of decades of judges affirming that sufficiently clear language could override the presumption against ousting review, whilst simultaneously finding increasingly robust ouster clauses, such as the one considered in *Privacy*, to be largely ineffective. The overly robust language of the ouster also speaks to the constitutional struggle between Parliament and the courts in the years succeeding *Anisminic*, as discussed in Chapter 3.

Subsection 2, if not accompanied by the rest of the section, would likely not be effective at excluding judicial review, given historic judicial treatment of both finality clauses and 'shall not be questioned' clauses (as in *Anisminic* itself- see Chapter 2). Instead, it is likely that the function of subsection 2 is signaling, a role that ouster clauses can play that is discussed in Chapter 6 (page 67). Subsection 3(a) is an attempt to rule out the *Anisminic* derived nullity approach to judicial review, wherein an error made in the course of making the determination is considered jurisdictional (which is to the same effect of 'exceeding its powers') and can thus be reviewed notwithstanding the operation of an ouster clause. The combination of subsections 2 and 3(a), in the absence of subsection 3(b), would probably also not be fully effective at excluding review. In *Privacy*, the Supreme Court held that the words in parenthesis in Section 67(8) RIPA 2000 ('including decisions as to whether they have jurisdiction'[13]) did not have the effect of preventing *Anisminic* style review of jurisdictional errors; it is therefore likely that in the absence of subsection 3(b), subsection 3(a) would not be sufficiently express in order to oust judicial review. The portion of the ouster provision which effectively excludes review is subsection 3(b), by expressly limiting the supervisory jurisdiction of the High Court and the Court of Session. Judicial review operates through the supervisory jurisdiction, expressly limiting the supervisory jurisdiction is therefore effective at ousting judicial review. The only possibility of evading subsection 3(b) would be by contending that the subsection only applies to a 'decision' and not to a purported decision, an argument employed in *Privacy*, but subsection 7 is clear that 'decision' also includes a 'purported decision'.

Anisminic effectively abolished the distinction between errors within jurisdiction (of which errors of law on the face of the record are a category) and errors that went to jurisdiction, leaving no room for an ouster clause to be found to only be effective at excluding errors within jurisdiction given that all errors are now considered jurisdictional. Therefore, a successful statutory overriding of the presumption against ousting review will now mean all errors of law are unreviewable, unless the potential conceptual limit against ousting review is considered (chapter 4). It is worth noting that both *Oceana* and *Albania* viewed the ouster clause inserted into the Tribunals, Courts and Enforcement Act 2007 as compatible with the rule of law, this is discussed later in the Chapter.

Presumption in favour of the courts being the final arbiters of law

The presumption in favour of the courts being the final arbiters of law is an important aspect of the relationship between ouster clauses and the rule of law, and serves to demonstrate where the

[13] Regulation of Investigatory Powers Act 2000.

rule of law may allow for a reduced scope of judicial review. This presumption was discussed in Chapter 3 in the context of it being insufficient to justify the effect of *Anisminic* on ouster clauses, in this section the proper scope of the presumption will be considered. The presumption was first described by Lord Diplock in *Racal* (Chapter 3, page 21) as emanating from *Anisminic*. This section will consider the context in which this presumption operates, and what circumstances could result in a court finding it to have been overridden.

In *R v Surrey Coroner Ex p. Campbell*,[14] Watkins LJ builds on Lord Diplock's speech in *Racal*, agreeing that *Anisminic* creates a presumption in favour of the courts being the final arbiters of the law, but also clarifying the scope of this presumption:

> 'The passages from that decision and from in *re Racal Communications* which we have cited make it clear, in our view, that the principle is limited to tribunals established by statute, and probably to those tribunals from whose decisions, under the relevant statute, there is no right of appeal.'[15]

The observation of Watkins LJ that the presumption is probably limited to tribunals whose decisions are not subject to appeal is natural component of the presumption in favour of the courts being the final arbiters of law. If a tribunal's decisions are subject to an appeal, the tribunal has not been made the final arbiter of the law. *Campbell* provides a clear example of a presumption employed in the interpretation of ouster clauses being capable of being overridden not by express words of a statute, but instead by the context and nature of the decisionmaker the ouster sought to protect from review. Under *Campbell*, the specific words employed in an ouster clause are not necessarily as important as the context of the ouster; an ouster provision that protects the determinations of a tribunal whose decisions are amenable to appeal is more likely to be given effect than an ouster that if given effect would mean a tribunal is the final arbiter of the law, regardless of the comparative linguistic strengths of the ouster clauses. The notion that the context of an ouster clause should play a major role in deciding what effect it should have forms part of the conclusion of this thesis (Chapter 6).

<u>Presumption in favour of access to justice</u>

Though not discussed as widely in the context of ouster clauses as the presumptions against ousting review and in favour of the courts being the final arbiters of law, the presumption in favour of access to justice has the potential to further demonstrate the way rule of law-based presumptions concerning the interpretation of ouster clauses can be satisfied by contextual factors, and not necessarily the specific wording of the ouster.

In *Unison*, the Supreme Court considered the validity of a statutory instrument[16] which imposed a fee regime on bringing and continuing claims at both the employment tribunals and the employment appeal tribunal. The Supreme Court quashed the statutory order, holding that it was an intrusion into the constitutional right of access to justice, something that Parliament could only bring

[14] [1982] Q.B. 661.

[15] Ibid.

[16] Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

about via express authorisation. Whilst the case did not concern ouster clauses, there is clear overlap between the presumption in favour of access to justice and the presumption against ousting review. In addition, the Supreme Court considered whether infringement of the right to access to justice was justifiable in a manner that well demonstrates the possibility of rule of law-based presumptions being overridden not by express words but instead by policy reasons and contextual factors.

The majority in *Unison* considered the possibility of the fee regime being a justifiable intrusion into the right of access to justice.[17] Although the Justices were not convinced that the intrusion was necessary, it does raise the prospect of the courts permitting an intrusion into the right of access to justice, despite the absence of clear Parliamentary authorisation, so long as the intrusion was justifiable. Just as the presumption in favour of access to justice could be overridden by legitimate policy concerns, so too can the presumptions surrounding the ousting of review.

Whilst not directly applicable to ouster clauses, the presumption in favour of access to justice and the precedent set in *Unison* does have the potential to be used in cases surrounding statutory limits on judicial review. *Unison* did not concern an absolute bar on access to justice, but rather a substantial risk of limitation:

> 'It follows from the authorities cited that the Fees Order will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals. That is indeed accepted by the Lord Chancellor.'[18]

Unison serves to demonstrate the willingness of courts to consider possible justifications that could override rule of law-based presumptions, which is comparable to the judicial treatment of time limit ousters, as shall be demonstrated later in this Chapter. Although *Unison* concerned the lawfulness of a statutory instrument, the core issue was whether the parent Act contained express authorisation to limit the right of access to justice, and more importantly whether policy justifications could result in the statutory instrument still being given effect despite the evident lack of said express statutory authorisation. *Unison* leaves open the possibility of an infringement of access to justice being upheld in court, despite a lack of express statutory authorisation, so long as the infringement was justifiable on policy grounds, a clear demonstration of a rule of law-based presumption being overridden by context rather than express statutory language.

<u>Uno Flatu and the implied ousting of judicial review</u>

Craies on Legislation states that it is possible to remove jurisdiction of a court via implication:

> 'To confer jurisdiction on a court of law or to remove jurisdiction from a court of law requires express words *or the clearest of implications*.'[19] (emphasis added)

---

[17] *R (on the application of Unison) v Lord Chancellor* [2017] 3 W.L.R. 409 [99-102].

[18] Ibid [87].

[19] *Craies on Legislation* (12th Ed Sweet & Maxwell 2020). 1.17

However, there are decisions that contradict this viewpoint, at least in the context of removing the supervisory jurisdiction of the High Court. In *Gilmore* Lord Denning stated that 'the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words',[20] a position unanimously affirmed by the Court of Appeal in *Sivasubramaniam*:[21]

> 'All the authorities to which we have been referred indicate that this remains true today. The weight of authority makes it impossible to accept that the jurisdiction to subject a decision to judicial review can be removed by statutory implication.'[22]

It seems likely given the considerable weight of authority behind the notion that judicial review can only be ousted by express language that there is no path for the ousting of review by mere statutory implication. What complicates the equation is two scenarios that give the appearance of the courts permitting judicial review to be impliedly ousted: judicial unwillingness to allow judicial review to be a tool to circumvent a statutory appeals regime, and where rights and a remedy have been provided uno flatu by statute.

In *Sivasubramaniam*, the Court of Appeal unanimously held that section 54(4) of the Access to Justice Act 1999 had not impliedly ousted High Court jurisdiction to judicially review decisions of the County Court; however, the court ruled that applications to judicially review County Court decisions should be dismissed if the statutory appeals regime had not been exhausted, or if the appeal court (in this case the Court of Appeal) had refused permission to appeal. Lord Phillips MR, with whom the other Lord Justices of Appeal agreed, cited proportionality and an unwillingness to undermine a statutory appeals regime:

> 'Under the 1999 Act, and the rules pursuant to it, a coherent statutory scheme has been set up governing appeals at all levels short of the House of Lords. One object of the scheme is to ensure that, where there is an arguable ground for challenging a decision of the lower court, an appeal will lie, but to prevent court resources being wasted by the pursuit of appeals which have no prospect of success. The other object of the scheme is to ensure that the level of judge dealing with the application for permission to appeal, and the appeal if permission is given, is appropriate to the dispute. This is a sensible scheme which accords with the object of access to justice and the Woolf reforms. It has the merit of proportionality. To admit an applicant to by-pass the scheme by pursuing a claim for judicial review before a judge of the Administrative Court is to defeat the object of the exercise. We believe that this should not be permitted unless there are *exceptional circumstances* — and we find it hard to envisage what these could be.'[23] (emphasis added)

---

[20] *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574.

[21] *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475.

[22] Ibid [44].

[23] Ibid [48].

In *Sivasubramaniam* the Court of Appeal was willing to limit judicial review at least partially motivated by the fact that the judges believed the statutory regime was proportional and 'sensible'.[24] In the face of an appeals regime that denied access to justice, or was in another sense injurious to the rule of law, it seems likely that the judiciary would be more sympathetic to the notion of allowing judicial review to circumvent the appeals regime. As originally enacted, RIPA 2000 allowed for appeals from decisions of the IPT but only at the discretion of the Secretary of State,[25] unlike the comparatively proportionate appeals regime in question in *Sivasubramaniam* the Supreme Court in *Privacy* did not restrict the scope of judicial review to respect this appeals regime. Although it was not a major point of discussion in *Privacy*, the Supreme Court effectively allowed judicial review to circumvent an appeals regime, the distinguishing factor between this situation and *Sivasubramaniam* clearly being that circumventing an appeals structure entirely at the discretion of the Government can be more readily justified than circumventing an appeals structure the court deems to be proportionate and fair. *Cart*, which cites *Sivasubramaniam*, further demonstrates the willingness of judges to limit access to judicial review based on contextual factors and in the absence of an ouster clause, as shall be explored in the next section. Whilst confirming that statutory provisions could not impliedly oust review, *Sivasubramaniam* simultaneously demonstrated that contextual factors, in this case the quality of an existing statutory appeals regime, can lead a court to limit the scope of judicial review, even in the absence of an express ouster provision.

Uno flatu meaning 'within one breath', is a term that encapsulates another scenario in which courts may give the appearance of allowing the implied ousting of review without actually doing so. If a statute creates a new right, but also allocates the enforcement of the right to a body other than the High Court, the High Court's existing supervisory jurisdiction has not been ousted and thus the usual presumptions concerning ouster provisions do not apply. In *A v B*, the principal issue was the correct reading of Section 7(1)(a) of the HRA 1998:

> '(1)A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal'

In conjunction with Section 65(2)(a) of RIPA 2000, which concerns the jurisdiction of the Investigatory Powers Tribunal (IPT):

> '(2) The jurisdiction of the Tribunal shall be—
>
> (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section'

[24] Ibid.

[25] Regulation of Investigatory Powers 2000 Section 67(8).

And finally Section 65(3)(a) RIPA 2000:

> '(3) Proceedings fall within this subsection if—
>
> (a) they are proceedings against any of the intelligence services'

The ordinary reading of these provisions is that the IPT has exclusive jurisdiction to hear proceedings made against the intelligence services over breaches of Convention rights, which are unlawful by virtue of Section 6 HRA 1998. Lord Brown, with whom the rest of the Justices agreed, was unconvinced by the submission that Section 65(2)(a) constituted an ouster provision, and should thus be subject to the strict presumptions concerning ouster provisions (as discussed earlier in the Chapter):

> 'A and JUSTICE argue that to construe section 65 as conferring exclusive jurisdiction on the IPT constitutes an ouster of the ordinary jurisdiction of the courts and is constitutionally objectionable on that ground. They pray in aid two decisions of high authority: Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 and Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147. To my mind, however, the argument is unsustainable. In the first place, it is evident, as the majority of the Court of Appeal pointed out, that the relevant provisions of RIPA, HRA and the CPR all came into force at the same time as part of a single legislative scheme. With effect from 2 October 2000 section 7(1)(a) HRA jurisdiction came into existence (i) in respect of section 65(3) proceedings in the IPT pursuant to section 65(2) (a), and (ii) in respect of any other section 7(1)(a) HRA proceedings in the courts pursuant to section 7(9) and CPR r 7.11. True it is, as Rix LJ observed, that CPR r 7.11(2) does not explicitly recognise the exception to its apparent width represented by section 65(2)(a). But that is not to say that section 65(2)(a) ousts some pre-existing right.'[26]

Prior to Section 65(2)(a) coming into effect, there had been no statutory right to bring proceedings against a public body for a breach of Convention rights, there was not a period where the High Court had such jurisdiction only for it to be ousted by the provision in question. Where rights and their corresponding remedies are created uno flatu offers an important insight into the operation of the presumptions surrounding ouster clauses. The Supreme Court was explicit that *Anisminic* did not apply:

> 'Nor does Anisminic assist A. The ouster clause there under consideration purported to remove any judicial supervision of a determination by an inferior tribunal as to its own jurisdiction. Section 65(2)(a) does no such thing.'[27]

Although not doing so expressly, this statement supports the line of authorities following *Racal* that *Anisminic* creates a presumption in favour of the Courts being the final arbiters of the law, which by definition only applies where an ouster purports to remove the supervisory jurisdiction of an inferior tribunal. If Section 65(2)(a) had been intended to oust an existing High Court jurisdiction to hear proceedings against public bodies over breaches of Convention rights, it is unlikely the provision would have been found to be effective given that more strongly worded ousters have also failed to have that effect; but because of the context, the provision can give an effect that is analogous to

---

[26] *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2010] 2 W.L.R. 1 [21].

[27] Ibid [23].

ousting judicial review in its ordinary operation and not engage the presumption emanating from *Anisminic*.

Cart, ghost ousters and the variable intensity of judicial review

Cart solidified the notion that the courts would decide the level of judicial scrutiny required by the rule of law, including in cases involving ouster clauses. Particularly when considered alongside the major decisions concerning the interpretation of statutory time limits on judicial review (*East Elloe* and *Ostler*), *Cart* serves to demonstrate that the intensity of judicial scrutiny depends more on the contextual factors surrounding the decisionmaker than on the strength of the ouster clause, or even its presence at all.

As established in Chapter 2, the effect of *Cart* was a restriction on the supervisory jurisdiction of the High Court, but it is significant to note that this effect was not necessitated by an ouster clause, but instead by the Supreme Court's determination of what the appropriate level of judicial scrutiny the rule of law required in the context.[28] *Cart* concerned the Upper Tribunal as established in the Tribunals, Courts and Enforcement Act 2007, enacted following the recommendations of the Leggatt Report. A crucial detail in *Cart* was that the Act in question did not at the time include any express ouster clause. In the Divisional hearing of *Cart*, the Treasury Counsel advanced the argument that the fact that the Upper Tribunal is designated a 'superior court of record'[29] excluded the body from judicial review, an argument denounced by Laws LJ and then again by Lady Hale in the Supreme Court,[30] both of whom were firm that there was no express ouster provision. The decision of the Supreme Court to create what would later be called '*Cart* judicial review', wherein refusals of permission to appeal by the Upper Tribunal could only be reviewed if the criteria for second-tier appeals were met (Chapter 2, page 15), was motivated by rule of law-based considerations, rather than an ouster clause:

> 'the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. Noone is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum? In particular, should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?'[31]

In this extract, Lady Hale provides clarity on an important aspect of the relationship between judicial review and the rule of law. The intensity of judicial review should, at least in the view of the Supreme Court in *Cart*, be decided proportionally with consideration of what is necessary to maintain the rule of law.

---

[28] Op. Cit. [n1] [57].

[29] Tribunals, Courts and Enforcement Act 2007 Section 3(5).

[30] Op. Cit. [n1] [37].

[31] Ibid.

There are factors that have the potential to sway Courts in favour of limiting the intensity of judicial review, even if there is not an explicit ouster clause. In *Cart*, composition was a major consideration,[32] the fact that the newly created tribunal structure was presided over by a Court of Appeal Judge with High Court judges sitting in the Upper Tribunal was an important factor in swaying the Justices in favour of restricting judicial review. Much as in *Sivasubramaniam* (which was cited as justification for the approach ultimately taken by the Supreme Court),[33] the fact that the Justices evidently regarded the relevant statutory regime as being a sensible, proportionate, and an improvement on the previous situation motivated their unwillingness to allow the full range of judicial review grounds, which could undermine the new tribunal structure:

> 'the adoption of the second-tier appeals criteria would be a rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected.'[34]

Woolas, a case concerning the amenability of a Parliamentary election court to judicial review, built on *Cart* and *Muldoon* by holding that the composition of a body was an important, albeit not decisive, factor for deciding the appropriate scope of judicial review of the body:

> 'Even though the judges may not be exercising their powers as High Court judges, it is clear from R v Cripps, Ex p Muldoon [1984] QB 68 and R (Cart) v Upper Tribunal (Public Law Project intervening) [2011] QB 120 that a factor to be taken into account is whether High Court judges sit in the court. That is because it may be considered inappropriate that a Divisional Court of the Queen's Bench Division should exercise powers of judicial review over a tribunal comprising other judges of the Queen's Bench Division… This is a powerful factor, but we agree with the view expressed in Ex p Muldoon that it is not conclusive'[35]

Whilst in *Woolas*, there was a 'shall be final' clause,[36] consideration was still given to whether the composition of the election court was a sufficient factor to exclude judicial review, further demonstration of contextual factors playing a significant role in the decision as to what extent judicial review is available, and that an ouster clause is more likely to be given effect if a court is convinced there are sound rule of law based reasons for limiting judicial review.

Treatment of time limits on judicial review provides another clear example of factors other than the strength of an ouster provision being the decisive consideration for deciding the appropriate intensity of judicial review. As discussed in Chapter 3 (page 18), it has been pointed out that the fact that courts have been willing to give effect to time limit ouster clauses, such as in *East*

---

[32] Op. Cit. [n1] [91].

[33] Op. Cit. [n1] [94].

[34] Op. Cit. [n1] [57].

[35] *R (on the application of Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin); [2012] Q.B. 1 [33].

[36] Representation of the People Act 1983 Section 144(1).

Elloe,[37] is difficult to reconcile with the approach adopted in *Anisminic*. *Ostler*, in particular the speech of Lord Denning, demonstrates that the reconciliation of *Anisminic* and *East Elloe* can be done via proper consideration of the role the rule of law plays in the effect given to ouster provisions. In *Ostler*, the Court of Appeal unanimously held that *Anisminic* had not overturned *East Elloe*, and that Schedule 2 of the Highways Act 1959 was effective at establishing a time limit on judicial review claims, despite it being a 'shall not…be questioned in any legal proceedings whatever'[38] provision which on its face does not seem to be explicit enough to oust review, particularly when *Anisminic* is taken into consideration (Chapter 2). Lord Denning took the view that in its context, the time limit ouster was reasonable:

> 'Looking at it broadly, it seems to me that the policy underlying the statute is that when a compulsory purchase order has been made, then if it has been wrongly obtained or made, a person aggrieved should have a remedy. But he must come promptly. He must come within six weeks. If he does so, the court can and will entertain his complaint. But if the six weeks expire without any application being made, the court cannot entertain it afterwards. The reason is because, as soon as that time has elapsed, the authority will take steps to acquire property, demolish it and so forth. The public interest demands that they should be safe in doing so.'[39]

The fact that the statutory regime left room for an error to be corrected by judicial review, alongside the strong policy argument for limiting the time period for judicial review, convinced Lord Denning that that *East Elloe* should apply, allowing the time limit to have effect. Once again, it is not the strength of the words in the ouster provision that proved to be decisive, but instead the contextual factors and the justification for limiting review. In *Ostler*, the time limit ouster was given effect because it was justifiable in the context and still allowed for errors to be corrected. However, it is possible to imagine an excessively short statutory time limit on judicial review not being similarly justifiable, therefore needing to be fully explicit to override the rule of law-based presumptions surrounding the ousting of review.

Lord Denning's speech in *Ostler* supports the view that courts are more willing to allow an ouster provision to have effect if the provision leaves the potential for, or facilitates, the correction of certain errors of law. There are a number of ouster clauses that include exceptions, circumstances where they do not apply and the normal application of judicial review is permissible. In *Oceana* Saini J called such exceptions 'jurisdictional gateways', encapsulating the fact that such provisions allow the normal operation of supervisory jurisdiction.[40] An early example of a jurisdictional gateway can be found in the Foreign Compensation Act 1969, which contains a robust ouster clause aimed directly at reversing the result of *Anisminic*, but which is not effective on decisions that breached 'natural justice'.[41] The ouster provision inserted into the Tribunals, Courts and Enforcement Act 2007

---

[37] *Smith v East Elloe Rural District Council* [1956] AC 736.

[38] Highways Act 1959 Schedule 2 paragraph 4.

[39] Op. Cit. [n37].

[40] Op. Cit. [n7] [30].

[41] Foreign Compensation Act 1969 Section 3(10).

(the provision under discussion in *Oceana*) contains a number of jurisdictional gateways, including natural justice, improper composition and bad faith.[42] Although not discussed in *Oceana*, the fact that the ouster provision in question allowed for some errors to be corrected probably made it more likely to be given effect, much as in *Ostler*. An ouster that prohibits some grounds of review whilst allowing others is more justifiable from a rule of law perspective than a provision that fully ousts review, making it more likely for an ouster provision that contains jurisdictional gateways to be given effect.

In *Albania*, a case where *Oceana* was considered and ultimately approved by the Court of Appeal, Lord Dingemans emphasised that the ouster clause relevant in *Oceana* did not fully exclude judicial review, but instead restricted it to '"pre-Anisminic" excess of jurisdiction and fundamental denial of justice'.[43] In other words, whilst the ouster provision was effective at excluding review, the jurisdictional gateways it created meant that review of jurisdictional error in the pre-*Anisminic* sense was still available. Lord Dingemans also noted that decisions of the Upper Tribunal were made by 'expert Upper Tribunal judges',[44] highlighting the relevance of composition when considering how an ouster clause should be interpreted. Ultimately, it is clear in *Albania* that the fact that the Upper Tribunal still remains amenable to judicial review for jurisdictional error in the pre-*Anisminic* sense, and given the judicial expertise of the Upper Tribunal, that the Court of Appeal saw no need to attempt to circumvent the ouster provision; rule of law based considerations made accepting the bindingness of the ouster clause acceptable.

In the absence of provisions which directly remove supervisory jurisdiction, as seen in *Oceana*, the decisive factor in deciding the scope of judicial review is not an ouster clause, but the contextual factors surrounding the public body in question. As in *Cart*, giving effect to the rule of law may result in the courts providing a result that would be akin to an ouster clause, even if one is not present; conversely, if giving effect to an ouster clause would be damaging to the rule of law, as in *Privacy*, the court may attempt to circumvent it. A 'ghost ouster clause' describes the phenomenon of an ouster clause not necessarily playing a major role in the court's decision as to the reviewability of a body's determinations, or even a court being willing to give an effect akin to an ouster clause even where there is not one. The term encapsulates the fact that unless ouster clauses are explicit to the same extent as the one seen in *Oceana*, there is no guarantee of them being given full effect.

Allocating judicial scrutiny

As discussed, the composition of a tribunal or inferior court is a factor considered when deciding the appropriate degree of judicial oversight; this is a concept that is distinct from High Court supervisory jurisdiction being allocated to another body. *A v B* is a clear example of a court determining judicial review to have been allocated to a different body, in that case the IPT.[45] In the

[42] Tribunals, Courts and Enforcement 2007 Section 11A.

[43] Op. Cit. [n9] [32]

[44] Op. Cit. [n9] [31]

[45] Op. Cit. [n26] [23].

case of allocating judicial review, there is no single test, but instead a variety of factors to consider, as described by Goff LJ in *Muldoon*:

> 'The most that can be said is that it is necessary to look at all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court in order to decide whether the tribunal should properly be regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court. As we have already indicated, in considering that question the fact (if it be the case) that the tribunal is presided over by a High Court judge is a relevant factor, though not conclusive against the tribunal being classified as an inferior court; just as relevant are the powers of the tribunal and its relationship with the High Court which can ordinarily be ascertained from the statute under which the tribunal is set up.'[46]

On the question of jurisdiction, it is clear that if Parliament designates a body as having unlimited jurisdiction, it cannot be subject to judicial review in the same sense that the High Court is immune from judicial review.[47] Beyond this, whether judicial review has successfully been allocated to a body other than the High Court depends on rule of law-based considerations. In *Farley*, a case approved in *A v B*, Lord Nicholls was particularly candid on the relationship between the allocation of jurisdiction and *Anisminic*:

> 'The need for a strict approach to the interpretation of an ouster provision … was famously confirmed in the leading case of Anisminic … This strict approach, however, is not appropriate if an effective means of challenging the validity of a maintenance assessment is provided elsewhere. Then section 33(4) is not an ouster provision. Rather, it is part of a statutory scheme which allocates jurisdiction to determine the validity of an assessment and decide whether the defendant is a 'liable person' to a court other than the magistrates' court.'[48]

In other words, the court will not apply the same strict approach to provisions which allocate review as they do to provisions which oust review; therefore, less explicit statutory language is needed to allocate review than is needed to oust it. The allocation of judicial review to a body with limited jurisdiction is conceptually challenging, because a body with limited jurisdiction would ordinarily itself be subject to judicial review. Whilst *Anisminic* is not applicable to cases where judicial review has been reallocated, it is possible that other rule of law presumptions, such as access to justice, could be invoked in order to read down a provision reallocating judicial review so as to preserve High Court jurisdiction, if doing so proved necessary due to rule of law-based concerns.

Conclusion

[46] *Ex p Muldoon* [1984] QB 68.

[47] *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)* [2009] EWHC 3052 (Admin) [71].

[48] *Farley v Secretary of State for Work and Pensions* (No 2) [2006] 1 WLR 1817 [18].

The rule of law as a principle should not be taken as blindly favouring as much judicial scrutiny as possible. There is recognition amongst judges that the rule of law involves taking a proportional approach to correcting errors, as put by Laws LJ in the divisional hearing of *Cart*:

> 'The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.'[49]

It is in the best interest of judges and the rule of law for judicial review to be limited in certain circumstances. In the United Kingdom, judicial review is typically seen as a way of protecting or giving effect to the rule of law - an understandable position given the role judicial review has played in the late 20th and early 21st centuries. In recent decades, judicial review has famously been utilised to prevent the Royal prerogative from undermining statutory regimes,[50] to protect Parliament from an unlawful prorogation,[51] and to protect access to justice,[52] to name just a few examples of judicial review upholding rule of law values. The trap of viewing judicial review as being a progressive tool to advance the rule of law should be avoided. Judicial restraint has the potential to enhance fairness and the predictability of the law. Judicial review was a major impediment in the early years of Roosevelt's 'New Deal';[53] this should come of no surprise given that moneyed interests typically enjoy better access to courts. Judicial review operates through adjudication, meaning it is focussed on an individual or group's case against a public body, rather than on how the public body impacts on society as a whole. In other words, judicial review as a process is well equipped to deal with the grievances of individual applicants, but this does not necessarily translate into advancing the legal interests of communities or broader society. *Anisminic* is often seen as a breakthrough in judicial review, but the result itself was a significant payout from the Foreign Compensation Commission's limited fund to the investment company that had acquired Anisminic Ltd[54] which had been achieved in such a way that it rendered the statutory regime for the FCC largely useless (seeing that applicants who had not been granted compensation could now take their grievances to the High Court), disrupting legitimate expectations about the application of a seemingly explicit ouster clause and necessitating the rapid enactment of the FCA 1969.[55] Judicial review can make the law less clear, unsettling seemingly settled legal decisions of public bodies, and can advance the interests of the powerful at the expense of others. Both of these results are hard to reconcile with the rule of law and serve to demonstrate why limiting judicial review can in some circumstances be beneficial from a rule of law perspective.

---

[49] Op. Cit. [n47] [100].

[50] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

[51] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41.

[52] Op. Cit. [n17]

[53] T Merrill *The Chevron Doctrine: Its rise and fall, and the future of the administrative state* (Harvard University Press 2022) 37.

[54] D Feldman 'Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective.' in S Juss, M Sunkin (Eds) *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017).

[55] Ibid.

As has been demonstrated, there are factors that can lead to a court being willing to limit the intensity of judicial review in the absence of an ouster clause or give effect to an ouster clause which in other circumstances would be found to be insufficiently explicit. Such factors are the lens through which the courts decide the level of judicial scrutiny required by the rule of law. They include but are not limited to:

1) The composition of the body in question, in particular whether the determinations are made by superior judges, or officials with analogous experience to superior judges.
2) The likelihood of the body in question making errors of law.
3) Whether the ouster provision leaves scope for some errors of law to be corrected.
4) Whether a speedy decision is desirable.
5) Whether the original determination will be relied upon.
6) Whether there are any policy justifications for limiting access to judicial review.
7) Whether there is an existing appeals process, and whether such appeals process is fair and proportionate.

In *Privacy*, the plurality built on *Cart* by coming to the conclusion that it was 'ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review'.[56] The view of the plurality in *Privacy* largely reflects the decisions explored in this chapter; whether or not an ouster clause will be given effect is largely dependent on rule of law-based factors, with the courts showing a willingness to limit review where there is no ouster at all, or where review has only been impliedly ousted, should doing so align with proportionally giving effect to the rule of law. The significant role played by the rule of law in the interpretation of ouster provisions does not amount to the rule of law being a superior or higher form of law, *Oceana* demonstrates that even the strongest of rule of law-based presumptions must give way to the express words of a statute. However, in the absence of ouster clauses that explicitly strip away supervisory jurisdiction, the rule of law has a major role to play in deciding the appropriate level of judicial scrutiny, which can involve giving effect to or circumventing an ouster clause, or even giving an effect akin to an ouster clause when there are such provisions relevant to the case at hand. It is this role that the rule of law can play in the future relationship between courts and ouster clauses.

[56] Op. Cit. [n5] [131].

Chapter 6: Comparing approaches across jurisdictions and conclusion

Introduction

The Chapter will highlight the issues of a formalised doctrine of judicial deference in administrative law whilst advocating a flexible, context based approach to deciding the intensity and scope of review, demonstrating the risk of jurisdictional error being expanded in order to circumvent ouster provisions, and encouraging the development of a 'constitutional' approach to ouster clauses that allows courts to circumvent even total ousters in some circumstances. This chapter will also demonstrate that the appropriate scope of judicial review in a given constitutional system, including the appropriateness of deference and defining scope of jurisdictional error, depends on consideration of the separation of powers. The appropriate relationship between ouster clauses and courts in the United Kingdom must be made with consideration of the balance of institutional power. The conclusions reached in this Chapter will be supported by analysis of comparative jurisdictions, namely Canada, the United States and Australia; a comparative approach is valuable because it highlights contrasting approaches to administrative law, with elements both to be avoided and potentially incorporated into a future judicial approach to ouster clauses in the United Kingdom.

The United States and Canadian judiciaries have developed formal doctrines of deference, restricting scope and intensity of court powers to review the determinations of administrative and executive bodies. An approach to administrative law that places a strong emphasis on deference is more likely to give effect to ouster provisions; courts are less willing to circumvent and more likely to respect ouster clauses if they are willing to defer to the determinations of the original decision-maker. The post-*Anisminic* approach taken by courts in the United Kingdom can be contrasted with the Canadian and American deference. This Chapter expresses scepticism in the value and appropriateness of a formal doctrine of judicial deference to administrative determinations in the United Kingdom.

In contrast to the formalised deference seen in Canada and the United States, the approach Australian federal courts have taken with ouster clauses can be seen as a middle ground between deference and the 'evisceration'[1] approach seen in the United Kingdom following the decision in *Anisminic*. It will be demonstrated that by maintaining a distinction between errors made within jurisdiction and errors that go beyond jurisdiction, courts in Australia have, in principle, allowed space for ouster clauses to continue to have effect, and that such an approach, achieved via the *Hickman* provisos, affords a degree of respect to the determinations of specialised administrative agencies and tribunals. Nevertheless, this chapter will argue that Australia's attempt to maintain distinct categories of error of law is inherently collapsible and has led to further difficulties, highlighting the risk of jurisdictional error being employed expansively.

The chapter will ultimately conclude that the approaches taken to review in Canada, Australia and the United States demonstrate that a formal doctrine of deference in administrative

[1] R Bauman, T Kahana *The Least Examined Branch The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006) 508.

law would not be appropriate in the United Kingdom. However, the principle of courts affording the determinations of specialised administrative agencies, courts and tribunals a greater degree of respect could be incorporated into the United Kingdom's approach to ouster provisions and administrative law more broadly without the implementation of a formal doctrine of deference, as shall be demonstrated. The chapter will also conclude that it is necessary for the judiciary of the United Kingdom to not employ jurisdictional error expansively in order to ensure review is possible, or to circumvent an ouster clause. Finally, this chapter concludes that the conceptual limits approach (Chapter 4) could act as a final layer of security and an underlying basis for judicial review in the United Kingdom courts, in lieu of a written entrenched constitution protecting original jurisdiction. This thesis contends that it is possible to achieve the best of both worlds, a degree of informal case by case deference to reflect the ever-changing nature of the administrative state, combined with a final 'constitutional' stopgap allowing the courts to circumvent total ousters in certain circumstances.

The chapter and the thesis as a whole will end be presenting an approach to ouster clauses and administrative law that could be taken by the courts of the United Kingdom in the future, an approach that addresses the pitfalls of *Anisminic* and the nullity approach whilst embracing its advantages, and incorporating the respect for specialised determinations seen in other jurisdictions.

Australia

I: The decision in *Hickman*

The Australian approach to ouster clauses at first glance appears to be significantly different from the approach taken in the United Kingdom, with the point of divergence being traced to two equally pivotal British and Australian cases in the mid-20th century. On closer reflection the apparent gulf between Australian and British approaches is narrowed, particularly with reference to the Australian understanding of jurisdictional error, leading to the conclusion that the Australian approach possesses the same inherent collapsibility and artificiality of the pre-*Anisminic* settlement in the United Kingdom. Whilst the modern approach taken to ouster clauses in the United Kingdom was established in *Anisminic*, the Australian High Court set a different course in the comparably significant case of *Hickman:*

> 'Well before the case of Anisminic, Australia's High Court had occasion to consider the effect of similar privative clauses. The High Court had not, however, gone as far as the House of Lords was to go in Anisminic, for it had attempted to construe the relevant privative clauses in a way which, arguably, gave them a wider sphere of operation than the House of Lords was to allow them.'[2]

[2] E Campbell, M Groves 'Privative Clauses and the Australian Constitution' (2004) 4 Oxford University Commonwealth Law Journal 51.

The *Hickman*[3] decision is a 'reconciliation approach … that tries to give genuine effect to the privative clause instead of reading it out of the statute',[4] as summarised by Campbell and Groves:

> 'the High Court had held that a privative clause which, on its face appeared to preclude judicial review of administrative decisions was effective to do so only if the clause met certain conditions. These conditions, known as the 'Hickman conditions', were effective to preclude judicial review only if the decision was one which: represented a bona fide attempt to exercise the power conferred by statute; related to the subject matter of the legislation containing the privative clause; and was reasonably capable of reference to the power given to the administrative body.'[5]

Hickman does not allow ouster provisions to prevent the review of jurisdictional errors,[6] which by a traditional understanding of the United Kingdom and Australia's shared case law are reviewable notwithstanding an ouster clause (Chapter 2, page 7). What *Hickman* aims to do is set out the conditions needed to be met for a determination to be protected by an ouster provision, if the *Hickman* provisos are not met, the court in question is empowered to review the determination notwithstanding the ouster clause. Significantly, the Australian approach to ouster clauses has left the distinct categories of error of law intact (errors exceeding jurisdiction, errors within jurisdiction, and errors of law on the face of the record), a contrast with the United Kingdom.

Applying *Hickman* to the facts of *Anisminic* likely would have resulted in a reversal of the result, highlighting the mid-century divergence of the British and Australian approaches to ouster clauses.[7] Taking the provisos in the order they were first presented by Dixon J, it is first necessary to establish whether the determination of the FCC was a 'bona fide attempt to exercise its power'.[8] Lord Wilberforce in *Anisminic* (majority) emphasises that determinations must be made in good faith and in adherence of the requirements of natural justice,[9] but specifically rules this out as an issue in the case. Furthermore, the majority's decision that the FCC acted beyond its jurisdiction did not rely on the notion that the FCC acted in bad faith. The second proviso, that the determination 'relates to the subject matter of the legislation'[10] does not provide a major hurdle. The determination of the FCC, despite being found to be in error of law by the majority of the House of Lords, was clearly closely related to the subject matter of the legislation. The final proviso, whether the determination is

[3] *R v Hickman* (1945) 70 CLR 598.

[4] Op. Cit. [n1]

[5] Op. Cit. [n2].

[6] Ibid.

[7] For a detailed analysis of *Anisminic*, see Chapter 2.

[8] Op. Cit. [n3].

[9] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 223.

[10] Op. Cit. [n3].

'reasonably capable of reference to the power given to the body'[11] offers more of a challenge. Lord Pearson, disagreeing with the majority of the House of Lords, believed that the FCC had correctly interpreted the relevant Order in Council:

> 'I would say therefore that the commission construed the article correctly and did not ask themselves any wrong question or exceed their jurisdiction in any way.'[12]

Whilst Lord Morris' dissent did not comment as to the correctness of the FCC's determination, the fact that one Law Lord in the case believed the determination to be legally valid, a significant step beyond it merely being 'reasonably capable of reference to the power given to the body', would suggest that a strong case could be made that the FCC's determination would satisfy the final proviso. As explored in Chapter 2, *Anisminic* left open the question of what effect, if any, ouster provisions had; by contrast, the Australian approach to ouster provisions attempts to accommodate the provisions and give them some tangible effect. As mentioned in the introduction, there is a strong relationship between court treatment of ouster provisions and the general approach the judiciary takes to administrative law. The final *Hickman* proviso, with its reference to reasonableness, embeds a degree of respect for the determinations of decisionmakers, demonstrating a judicial willingness to allow specialised tribunals and administrative bodies to have a role, albeit in a limited manner prescribed by the courts, in developing and interpreting the law.

It is important to not overstate the conciliatory approach Australian courts have taken with ouster provisions. Alongside the expansion of the concept of jurisdictional error, the Australian approach to interpreting ouster clauses must also be considered. Courts in Australia have still typically regarded ouster provisions with 'suspicion',[13] manifesting in a strong interpretative presumption against ousting review, as seen in the United Kingdom (Chapter 2). In *Plaintiff S157*, a significant recent Australian ouster clause case, Gleeson CJ noted the 'strong presumption' against review being ousted.[14] In parallel to the approach of courts in the United Kingdom, the words 'final and conclusive' were found to not oust review in the Australian case *Casey*,[15] providing further evidence that Australian courts have shown an unwillingness to accept a reduction of their supervisory jurisdiction. *Hickman* is only relevant provided the ouster provision in question has passed the difficult hurdle of being sufficiently express, when the ouster clause then faces the issue of a highly expansive view of jurisdictional error that has developed in Australian jurisprudence, as discussed in the following section.

II: Expansion of jurisdictional error and redundancy of *Hickman*

---

[11] Op. Cit. [n3].

[12] Op. Cit. [n9].

[13] *Svecova v Industrial Commission of New South Wales* (1991) 39 IR 328, 330.

[14] *Plaintiff S157/2002 v Australia* [2003] H.C.A. 2.

[15] *Totalisator Agency Board of New South Wales v Casey* (1994) 54 IR 354, 359.

Whilst there was a mid-20th century divergence in approaches to ouster clauses in Australia and the United Kingdom, over the course of the late 20th century Australian courts continued to expand the category of errors of law considered to be jurisdictional, leading to a reconverging of the United Kingdom and Australia. Given that jurisdictional errors have always been reviewable under Australian law notwithstanding an ouster clause, expanding the scope of jurisdictional error reduces the potential instances where the *Hickman* provisos are necessary to establish whether a determination is reviewable in spite of an ouster provision, making it more likely courts are able to review. The import of *Anisminic* and its abolition of the distinction between the two categories of error of law was unanimously rejected by the Australian High Court in *Craig*,[16] with the court offering a list of errors of law that could be considered jurisdictional:

> 'If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'[17]

It is highly significant to note that an error of law that leads a tribunal to ask the wrong question is considered to be a jurisdictional error in modern Australian law, given that this was the form of error deemed to be jurisdictional by the majority in *Anisminic* (Chapter 2). In other words, in spite of *Hickman*, Australian courts continued to expand the scope of jurisdictional error to the point that it arguably is at the same extent as *Anisminic*, leaving little room for error of law within jurisdiction, and therefore leaving little room, if any, for ouster provisions to have effect. It is also worth noting that the list of potential jurisdictional errors in *Craig* are not considered to be exhaustive,[18] with scope for further expansion of jurisdictional error in Australia, and clear judicial incentive to do so. Gouliaditis' view of ouster clauses in modern Australia reflects the conclusions made so far in this Chapter:

> 'There is now therefore little value in including true privative clauses in federal or state legislation. While they still may be effective in restricting review for non-jurisdictional error of law on the face of the record, *the ever-expanding concept of jurisdictional error*, combined with the limited meaning given to the term 'record', makes it hardly worthwhile.'[19] (emphasis added)

Australia and the *Hickman* provisos serve to highlight the risk of jurisdictional error being expanded in order to allow reviewing courts to circumvent ouster clauses and review errors that would otherwise have been considered to be made within jurisdiction. *Hickman*, as demonstrated, started

---

[16] *Craig v South Australia* [1995] 184 CLR 163.

[17] Ibid.

[18] *Minister for immigration and Multicultural affairs v Yusuf* [2001] HCA 30 (2001) 206 CLR 323.

[19] N Gouliaditis 'Privative clauses: epic fail' (2010) Melbourne University Law Review, Vol.34 (3), 870.

its life with the potential to serve as a healthy antidote to *Anisminic*, allowing ouster clauses to retain effect and thus avoiding the constitutional issues of the nullity approach (Chapter 3). However, the failure of the Australian judiciary to restrain jurisdictional errors in the decades following *Hickman* have resulted in a situation far more akin to *Anisminic* and the nullity approach than the original conciliatory position taken in *Hickman*. A conclusion that can be derived from the Australian approach to ouster clauses is therefore that any attempt to depart from *Anisminic* and the nullity approach in order to give ouster clauses some effect must also be effective at narrowing the scope of jurisdictional error.

III: Australia and the conceptual limit on ousting review

Unlike in the United Kingdom Australia an entrenched and codified constitutional document (The Australian Constitution). The Australian Constitution includes a provision that seems, on its face, to influence the approach Australian courts take when interpreting ouster clauses:

> 'In all matters:
>
> I. arising under any treaty;
> II. affecting consuls or other representatives of other countries;
> III. in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
> IV. between States, or between residents of different States, or between a State and a resident of another State;
> V. in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction.'[20]

Section 75(v) of the Australian Constitution is operative when it comes to interpreting ouster provisions. Original jurisdiction is jurisdiction that cannot be removed by ordinary legislation, which means that the Australian Parliament, unless via constitutional amendment, is barred from fully ousting judicial review. As has been demonstrated, Australian courts are willing to allow ouster clauses to have some effect via *Hickman*. This is because 'The High Court has held that the supervisory jurisdiction invested in it by section 75(v) of the Constitution extends only to review on the ground of jurisdictional error'.[21]

Section 75 is significant primarily for its apparent lack of influence on the Australian approach to ouster clauses. As has been discussed, Australia inherited and has continued to uphold the principle that an ouster clause cannot protect a determination that exceeds the jurisdiction in

[20] The Australian Constitution Chapter III Section 75.

[21] Op. Cit. [n2].

question, a principle with a long history in British common law as discussed in Chapter 2. The United Kingdom has no entrenched codified constitution, but British courts have long held that ouster clauses do not prevent the review of jurisdictional error; a constitutional provision analogous to Section 75 of the Australian constitution has never been needed to achieve this result. It seems likely Section 75 was intended to be declaratory, describing the existing relationship between ouster clauses and courts that had existed in the Australian states and the United Kingdom prior to the enactment of the Australian constitution, without seeking to reform.

A purported determination is a nullity, and no words of a statute can change this fact. This is an essential element of the conceptual limit on ousting review as discussed in Chapter 4. There is some recognition of the contradiction of ousting the review of a body of limited jurisdiction by the Australian judiciary:

> **'**A provision that defines and limits the jurisdiction of a tribunal may be difficult to reconcile with a provision that states that there is no legal sanction for excess of jurisdiction'[22]

A more developed approach to the conceptual limit on ousting review has not been necessary in Australia, seeing as courts can rely on the 'entrenched minimum provision of judicial review' that Section 75 provides.[23] Although not typically invoked, Section 75 provides the foundation of the Australian judiciary's approach to judicial review. The conceptual limit on judicial review could play the same role in the UK. Both Section 75 and the conceptual limit on ousting review have the same effect: ouster clauses are prevented from barring the review of jurisdictional errors. In addition, there is a strong argument to be made that the function of Section 75 was to confirm the existing relationship between ouster clauses and jurisdictional error, as explored in the previous paragraph, a conclusion that would mean that conceptual limit against ousting review and Section 75 have the same historical basis. It is therefore logical to view the effect Section 75 has on the Australian constitution as analogous with the potential effect the conceptual limit on ousting review could provide for the United Kingdom; a constitutional principle that defined the limit on legislative powers to oust review that left scope for ouster clauses to bar the review of errors made within jurisdiction.

IV: Conclusion

Australia offers a valuable insight into the future approaches United Kingdom courts could take with ouster provisions. *Hickman* and the subsequent expansion of jurisdictional error point to the difficulty of moving beyond *Anisminic* without simultaneously restraining jurisdictional error; whilst Section 75 serves to demonstrate how the proposed conceptual limit on ousting review could operate in practice.

Canada

[22] Op. Cit. [n14].

[23] Ibid.

I: *CUPE* and formal judicial deference

As in the case of Australia, the Canadian approach to ouster provisions can be traced to the historical approach in the United Kingdom wherein jurisdictional errors were held to not be protected by ouster clauses and there was a strong general suspicion against ouster clauses (see Chapter 2). In further similarity with Australia, Canada also diverged from the United Kingdom in its approach to ouster provisions in the 20th century; crucially, however, the Canadian approach to ouster clauses was not undermined by an expansionary approach to jurisdictional error, as shall be explored. Starting in the landmark decision of *CUPE*, the Canadian Supreme Court 'overtly advocated a deferential approach',[24] particularly in decisions involving ouster clauses.

The decision in *CUPE* concerned the determination of the Public Service Staff Relations Board, a specialised labour and collective bargaining tribunal. Determinations of the tribunal were protected by ouster provisions, sections 101(1) and 102(2) Public Service Labour Relations Act 1973 respectively:

> 'Except as provided in this Act, every order, award, direction, decision, declaration, or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.'
>
> …
>
> 'No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board, the Arbitration Tribunal or an adjudicator in any of its or his proceedings.'[25]

The language employed in these provisions is robust but by no means insurmountable by a court in the British common law tradition determined to intervene, particularly when historic cases such as *Bradlaugh* are considered (Chapters 2 page 7). However, the Canadian Supreme Court found that in the case of a specialised tribunal protected by an ouster provision being reviewed by an ordinary court, the following question had to be asked:

> 'was the ... interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?'[26]

---

[24] P Daly 'Divergence and Convergence in English and Canadian Administrative Law' in S Jhaveri and M Ramsden (Eds) *Judicial Review of Administrative Action Across the Common Law World: Origins and Adaptation* (Cambridge University Press 2021).

[25] Public Service Labour Relations Act 1973 Sections 101(1) and 102(2).

[26] *Canadian Union of Public Employees, local 963 v. New Brunswick Liquor Corporation* [1979] 2 S.C.R 227.

In a single decision, the Canadian Supreme Court set Canada on a 'deferential course'.[27] The test in *CUPE* sets a very high bar for judicial review, limiting the involvement of the courts and strengthening the role of specialised tribunals in interpreting and developing the law. In the United Kingdom post-*Anisminic*, an interpretation of the law made by a tribunal that was deemed to be incorrect by a reviewing court would be considered to be a nullity; United Kingdom courts had the final say on the law. The same cannot be said in Canada post-*CUPE*, where so long as the determination of a tribunal was not patently unreasonable it was unreviewable, despite any misgivings the reviewing court may have. The point is well put by Daly, who writes that 'unlike in Canada, in England, the courts had the last word on questions of law',[28] a result that was a direct consequence of *CUPE*.

In addition to establishing a higher standard necessary for review, there was recognition in *CUPE* of the historic trend of expanding the category of errors considered to be jurisdictional in order to circumvent ouster provisions. Dickson J stated that courts 'should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so',[29] therein recognising the long history of jurisdictional error being viewed expansively by judges (Chapter 2). Jurisdictional error remains reviewable in Canada, however it was no longer at the forefront in the same sense as it is in Australia and the United Kingdom as an expansionary approach was not taken. It was necessary that restraining the scope of jurisdictional error came alongside the creation of formal deference in *CUPE*; if an expansive approach to jurisdiction was taken, the newly created formal standard of deference could have been circumvented. Without Dickson J's restraint on jurisdictional error, *CUPE* would likely have suffered the same fate as *Hickman*, remaining part of the law of Canada but being largely circumvented by an expansive view of jurisdictional error. Any attempt in the United Kingdom to depart from *Anisminic* and the nullity approach should therefore follow the example of *CUPE* by recognising the historic trend of jurisdictional error being employed expansively and aiming to curtail this.

II: The applicability of *CUPE* in the United Kingdom

The problem with *CUPE* is its formalism. However, the United Kingdom could incorporate the degree of respect the decision affords the determinations of specialised tribunals without such a rigid framework. As explored in Chapter 5, there are various factors including composition and policy concerns that have historically convinced courts in the United Kingdom to limit the scope of judicial review of a particular body, as was demonstrated in the case of *Cart*, *Muldoon* and others. There are benefits to the rule of law for judicial review to be limited by the courts in some circumstances (Chapter 5), but such an admission does not necessarily support the proposition that *CUPE* style formal standards of deference should be adopted by United Kingdom courts. Administrative law is a rapidly changing field of law, most obviously because the structure and function of administrative bodies tends to be highly dynamic. In light of this reality, a more proportionate approach than fixed standards of deference is to decide on a case-by-case basis to what extent a body should be

[27] P Daly 'The Unfortunate Triumph of Form over Substance in Canadian Administrative Law' (2012) Osgoode Hall Law Journal Volume 50, Issue 2, Article 1.

[28] Op. Cit. [n24].

[29] Op. Cit. [n26].

amenable to judicial review, with reference to a recognised and predictable set of contextual factors, as explored in Chapter 5.

The decision in *CUPE* was good on its face, but the decision would have been better framed as a series of contextual factors that make it more or less likely for the determinations of a tribunal to be respected, as opposed to as establishing a formal general standard of review. Dickson J would justified decision in *CUPE* as follows:

> 'The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized [sic] tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.'[30]

The reasons given by Dickson J for restricting the scope of judicial review of the tribunal in question are convincing, but that it does not follow from this that creating the *CUPE* standard of deference was the best way of giving effect Dickson's conclusion. The Public Service Staff Relations Board was, in the view of the Canadian Supreme Court, an expert body that was well equipped to enforce and develop the law on labour relations. However, instead of taking this proposition to justify imposing a high bar on review on all specialised tribunals protected by an ouster provision, it would be better to merely impose the standard on the tribunal in question. The mere fact that the Public Service Staff Relations Board was well equipped to develop its specialised area of law does not mean that all specialised tribunals in Canada were in the same position, hence the benefit of taking a case-by-case flexible approach to limiting the scope of judicial review, as advocated in the previous Chapter.

III: Conclusion

The Canadian approach is not without its benefits; the departure from an excessive focus on jurisdictional error heralded by *CUPE* avoids the main pitfall of the nullity approach, wherein all errors of law are deemed to be jurisdictional. Shifting the focus away from jurisdictional error has also prevented Canada from having the same ever-expanding scope of the category of error of law, as seen in United Kingdom and Australian law. An overt acknowledgment by the judiciary that jurisdictional error should not be viewed expansively in order to ensure all determinations are subject to judicial review is an important step that could be taken in order to maintain distinct categories of error of law.

CUPE and the Canadian approach also recognises the signalling function an ouster clause can play:

[30] Op. Cit. [n26].

> '[the] Canadian or "deferential" approach, which understands the privative clause as one kind of signal Parliament can send judges about the appropriate standard for reviewing administrative decisions.'[31]

This is another innovation from the Canadian approach to ouster clauses that could be incorporated in the UK, being acknowledged as a contextual factor in favour of limiting review, but not necessarily a conclusive one.

The *CUPE* standard of deference was appropriate for the tribunal in the decision, reflecting the tribunal's ability to competently develop its specialised area of law. However, as explored, it does not follow that all inferior tribunals should be protected from review to the same extent; the best approach for the judiciary of the United Kingdom is, as advocated, to continue to be willing to limit the scope of judicial review depending on a series of contextual factors, but not to impose a general *CUPE* style formal deference. The following section, focussing on the United States, will offer further reasons for why a formal doctrine of deference would not be appropriate in the United Kingdom.

United States

I: *Chevron* and deference to agency interpretations of law

In *Chevron*[32] the Supreme Court of the United States created *Chevron* deference, a formal doctrine of deference to the interpretations of law made by federal agencies. Whilst *Chevron* is justifiable in the United States, such a principle of formal deference would not be appropriate in the United Kingdom, owing to separation of powers based considerations.

The principle underlying *Chevron* is articulated by Merrill as follows:

> 'If an agency is not undermining settled expectations and is acting within the scope of its delegated authority, then the decision is one the agency should make, not the court. Thus, whereas courts should give only respectful consideration to agencies with regard to the boundaries of agency authority, as long as the agency acts within the scope of its authority as defined by those boundaries, courts should accept the agency's interpretation of the law.'[33]

In other words, the determination of an agency made within its jurisdiction is to be respected and accepted by the courts, as opposed to being amenable to judicial review. The principle underlying *Chevron* is given effect via a two staged test:

> 'First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the

[31] Op. Cit. [n1].

[32] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.* 467 U.S. 837.

[33] T Merrill *The Chevron Doctrine: Its rise and fall, and the future of the administrative state* (Harvard University Press 2022) 28.

> court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'[34]

The first element of the test is uncontentious: there is no scope for an agency to make its own interpretation of the law where the empowering legislation is unambiguous. The second element of the test represents the innovation of *Chevron*: much as in the case of *CUPE*, it imposes a formal standard of deference. So long as an interpretation of law is 'permissible' or reasonable, it is to be respected by the courts.

Under *Chevron*, American federal courts are not free to substitute their interpretation of the law for that of an agency, thereby acknowledging the role of administrative bodies to develop the law. It cannot be doubted that *Chevron* has played a major role in administrative law in the United States, but its future is uncertain. In some recent decisions,[35] the Supreme Court has refused to apply the *Chevron* test. In *Biden v Nebraska*,[36] the Supreme Court held that the HEROES Act[37] did not empower the Biden administration to cancel in excess of $400 billion in outstanding student loans. *Nebraska* was a clear invocation of the 'major questions doctrine', a developing notion that *Chevron* is not applicable to interpretations of law that would have major economic or political implications.

II: *Chevron* and the separation of powers

Whilst the future of the *Chevron* test is uncertain, there is a strong case to be made that such a model of formal deference is far more appropriate in the American constitutional settlement than it would be in the United Kingdom. Such a conclusion requires consideration of the appropriate separation of powers in within a constitutional settlement.

The United States has a strict separation of powers, with an executive President serving as both head of state and government and a bicameral Congress of legislators; there are no Senators or Congresspeople leading federal departments or agencies. The American approach is in stark contrast to the United Kingdom, wherein there is a 'nearly complete fusion of executive and legislative powers'.[38] By longstanding convention the Prime Minister of the United Kingdom is not only a member of Parliament, but also the person best capable of commanding a majority in the House of Commons; control of Parliament is therefore necessary in order to form an executive government in the United Kingdom. Leading the federal executive in America comes with no guarantee of control over the legislative process, whereas in the United Kingdom, the executive by definition controls the legislative process. A glance at American political history will reveal frequent periods of divided

[34] Op. Cit. [n32].

[35] *David King, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al.* 576 U.S. 988.

[36] *Joseph R. Biden, President of the United States, et al. v. Nebraska, et al.* [2023] 600 U.S. 477.

[37] Higher Education Relief Opportunities For Students Act of 2001

[38] W Bagehot *The English Constitution (Oxford World's Classics)* (Oxford University Press 2009) 11.

government, with the party of the executive lacking control over Congress. The United Kingdom and the United States thus have contrasting approaches to the constitutional separation of powers, this thesis contends that the appropriate role of judicial review depends on the separation of powers within a constitutional settlement.

The executive of the United Kingdom can, both in theory and in practice,[39] amend primary legislation on a very short timeframe in order to achieve policy objectives. The executive of the United States, whilst free to introduce urgent legislation, has no guarantee that it will be passed. It is much harder to justify being deferential to executive interpretations of law in a constitutional system where executive power is tied to legislative power, as is the case in the United Kingdom. Given that the interpretations of law by agencies can only be reviewed if deemed to go beyond what is reasonable, it is easy to see why *Chevron* may have led to agencies taking more aggressive or adventurous interpretations of law,[40] something that is more understandable for an executive that does not also control the legislative process. It is more justifiable for an executive with no inherent control over the legislative process to interpret existing law expansively in order to address immediate issues, this may effectively be its only option. Furthermore, there is a practical element to *Chevron*, with there being no guarantee of consensus between Congress and the executive, expansive interpretations of existing legislation may be the only method available to the executive for dealing with contemporary issues. *Chevron* can therefore be seen as being an acknowledgment of the limited powers of the President and their administration over the legislative process.

The executive of the United Kingdom wields extraordinary power, power that would be unjustifiably expanded by adopting a *Chevron* or *CUPE* style formal deference to executive interpretations of law. A fused executive-legislative government cannot be afforded the same space to develop the law as an executive government which has no inherent legislative powers.[41] *Chevron* thus serves to demonstrate that the appropriate relationship between courts and administrative decisionmakers should be decided with reference to separation of powers based considerations. The American presidential administration is not fused with the American legislature; affording its determinations of law a greater degree of respect is therefore more appropriate than it would be in the United Kingdom. The doctrine of deference developed in *Chevron* was in part motivated by an understanding of the distinct roles played by the courts and executive agencies, a separation of powers based consideration:

> ‘When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made

[39] For example, all stages of the Prevention of Terrorism (Additional Powers) Bill 1996 were passed in a single day.

[40] Op. Cit. [33] 38

[41] The power of the President of the United States to veto is a legislative but is not relevant to the present discussion.

> by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones'[42]

This statement is crucial in elucidating a core principle of administrative law: that it is impossible to draw a clear line between interpreting law, the traditional role of the courts, and making policy, the role of the executive. Whilst an orthodox understanding of the separation of powers would find it is the role of the courts to interpret the law, unless some leeway is given the courts risk usurping the policymaking competences that agencies and officials have been empowered to make. *Chevron* acknowledges that some interpretations of law are more about policy than law, and the court entering this domain would be overstepping its role within the separation of powers.

Chevron reflects the reality of the modern administrative state. In the United States and the United Kingdom, the size and scope of the government has increased immeasurably over the course of the 20th century. If courts retain the ability to quash any determinations they find to be wrong in law, they find themselves playing an inappropriate role in the making of policy, a role courts are not equipped to undertake. However, as argued, *Chevron* deference would not be appropriate given the separation of powers in the United Kingdom; rendering it necessary to find an alternative method of limiting court powers to review administrative and executive determinations.

III: *Marbury* and *Anisminic*: finding the appropriate balance

Arguably the most significant decision in the history of the United States Supreme Court was *Marbury v Madison*.[43] *Marbury* established the judicial review in the United States, asserting the role of the judiciary as the final arbiters of the law. Chief Justice Marshall would famously state that 'It is emphatically the province and duty of the judicial department to say what the law is.'[44] By effectively destroying the distinction between errors of law within jurisdiction and errors exceeding jurisdiction, the House of Lords in *Anisminic* created a strong parallel with *Marbury*: both decisions affirmed the courts as the final arbiters of the law. If, as *Anisminic* was taken to mean, a decisionmaker has no jurisdiction to err in law, the role of the courts to 'say what the law is' is absolute.

Whilst the appropriate relationship between the judiciary and decisionmakers depends on the separation of powers within the constitutional settlement in question, as discussed, both *Anisminic* and *Marbury* as affirmations of judicial power to 'say what the law is' are difficult to reconcile with the highly specialised administrative states that have developed in both the United Kingdom and the United States. Endicott writes that:

> 'The rule that all administrative decisions are subject to judicial review for error of law unjustifiably presumes that judges will be better than the statutory decision maker at interpreting the rules of a statutory scheme.'[45]

---

[42] Op. Cit. [n32].

[43] *William Marbury v. James Madison, Secretary of State of the United States* 5 U.S. 137.

[44] Ibid.

[45] T Endicott *Administrative Law* (5th Ed Oxford University Press 2021) 352.

There is clear tension between the notion that the court's role is to say what the law is, and that decisionmakers should be given some deference when interpreting the law. A House of Representatives report noted the conflict between *Chevron* deference and the judiciary's duty under *Marbury* to say what the law is.[46] A modern understanding of executive and administrative power dictates that such power can only exist when enshrined in law. On this basis practically every action taken in an executive or administrative capacity involves an interpretation of the empowering source of law, be it common law, written constitution or statute. Courts that are free to 'say what the law is' in all cases of executive or administrative decision-making are likely to overstep their role within the separation of powers by undermining the ability of executive and administrative bodies to make policy decisions and govern effectively. The conflict illustrated is one that is inherent in a democratic society: unelected judges have a duty to correct legal errors, but in so doing face the risk of substituting their own view for that of a specialised administrative body or an elected official. This is not a conflict that can be fully resolved, but instead one that can be managed via a proper understanding of the appropriate separation of powers between the executive, legislative and judicial functions of government in a given constitutional settlement.

In concluding that *Chevron* would not be appropriate in the United Kingdom, it has been demonstrated that the appropriate standard of judicial review can only be decided with reference to the separation of powers within a constitutional settlement, with the United Kingdom's fused executive and legislative government not warranting a general deference to its interpretations of law.

Consideration of the separation of powers rules out *Chevron* deference in the United Kingdom, but the approach can also be applied to rule out a general 'nullity' approach brought about by *Anisminic*. Confining a body to its jurisdiction in the true sense of the term is the legitimate role of the judiciary in administrative law, substituting its interpretation of the law over that of a decisionmaker when the decision was made within the scope of the decisionmaker's jurisdiction is a violation of the proper separation of powers. It is for the courts to say what the law is, as *Anisminic* and *Marbury* affirm, but only so far as this does not impede the legitimate role of administrative and executive decisionmakers play.

IV: Conclusion

Much as in the case of *CUPE*, a core objection to *Chevron* is its generality. A general grant of judicial deference to administrative and executive interpretations of law would not be appropriate in the United Kingdom, given the executive's control of the legislative process, but this does not mean that courts should not afford individual decionmakers a greater degree of deference on a case-by-case basis, as discussed in the Canada section.

Chevron deference is a recognition of the appropriate separation of powers that exists within the American federal government; a federal executive with no inherent control over the legislative process should be afforded some deference over its interpretation of law, and although it is the role of courts to say what the law is, this function does not include preventing the proper functioning of executive and administrative bodies. By focussing on the appropriate role of institutions within the

[46] H.R. Rep. No. 114-622, at 4 (2016).

separation of powers, as was done in *Chevron*, the following conclusions can be deduced for the United Kingdom: that a general formal standard deference to executive and administrative legal determinations is not appropriate; and that review of errors within jurisdiction risks the judiciary assuming a role they are not equipped to undertake, and should thus be limited in some circumstances.

The future judicial approach to ouster clauses in the United Kingdom

As discussed in Chapter 2, *Anisminic* and the nullity approach can be seen as a natural extension of a long judicial history of jurisdictional error being expanded in order to circumvent ouster clauses, or to review errors that would otherwise be considered to be within the jurisdiction of the decisionmaker. As argued in Chapter 3, the nullity approach is not a sustainable approach to ouster provisions, creating tension between the judiciary and Parliament, undermining Parliamentary sovereignty, and failing to give adequate respect to the determinations of highly competent and specialised decisionmakers. Having grounded *Anisminic* and the nullity approach to ouster provisions in their historical context and demonstrated its fundamental flaws, it is now time to utilise the concepts developed in this Chapter and in Chapters 4 and 5 to propose a model for future court treatment of ouster clauses.

A tempting solution to the issues created by *Anisminic* is a general return to the pre-*Anisminic* regime of distinct categories of errors of law, restoring jurisdictional error to what Lord Wilson in *Privacy* calls its 'proper sense',[47] therein reviving errors made within jurisdiction. Returning to a pre-*Anisminic* understanding of the categories of error of law would likely give ouster clauses significantly more effect than they currently have. Prior to *Anisminic*, an ouster clause sufficiently clear to satisfy the presumption against ousting review could have the effect of protecting errors made within jurisdiction from review and there were common formulae for such clauses, including 'no certiorari' provisions (Chapter 2). In truth, however, there is no pre-*Anisminic* settlement to which to return. Chapter 2 demonstrates that the scope of jurisdictional error has long been contested and highly controversial; if anything, *Anisminic* can been taken as a resolving force in what had become a highly convoluted and technical debate as to the proper scope of jurisdictional error. With no pre-*Anisminic* settlement to return to, the best option is to develop a new approach to ouster clauses.

Whether or not an ouster clause has an effect should depend on the nature of the error of law, the qualities of the decisionmaker, and the contextual factors surrounding the determination. There is no single answer to whether or not an ouster clause should have an effect, but there are principles that should guide courts in determining the effect, if any, of an ouster provision.

This thesis advocates a three pillared approach to a post-*Anisminic* framework for the judicial treatment of ouster clauses: 1) a return to distinct categories of errors of law in a meaningful sense; 2) variable standards of review; and 3) the conceptual limit on ousting review. Each of these pillars have strong historical bases in the common law, this thesis therefore does not propose the importing

[47] *R (Privacy International) v Investigatory Powers Tribunal* [2019] 2 W.L.R. 1219.

of academic ideas, but rather placing greater emphasis on promising existing concepts that already play a role. The three pillared approach proposed by this thesis is flexible and context dependent, as opposed to being a series of rigid, all-encompassing principles. The pillars are also co-dependent, requiring each other to function as a coherent approach to ouster clauses.

Pillar I: Distinct categories of error of law

In *Page*, Lord Browne-Wilkinson's leading opinion affirmed that in the years following *Anisminic* the 'general rule' that had developed was that all errors of law were considered to be jurisdictional and were thus subject to judicial review.[48] However, despite acknowledging the convergence of the categories of error of law, the majority in *Page* acknowledged an exception, holding that university visitors retained the power to make errors of law within their jurisdiction that were unreviewable. The reasons why the House of Lords in *Page* was willing to allow such an exception to *Anisminic* and the nullity approach were rooted in the long history of the role of university visitors, and the fact that the visitor is 'applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance'.[49] The second point is of particular significance: a judicial acknowledgement that it can be appropriate to allow bodies to make errors of law within jurisdiction if the jurisdiction in question is separate from the general law.

Page should be viewed as the starting point for the reintroduction of a meaningful distinction between errors made within jurisdiction and errors made in excess of jurisdiction. The specialised status of university visitors should be expanded on a case-by-case basis to include other analogous bodies as arbiters of specialised areas of law. The logical starting point for expanding the *Page* exception would be specialised tribunals and inferior courts. Building on *Campbell*,[50] allowing a body to make errors of law within jurisdiction is more acceptable if there is the possibility of an appeal to a body empowered to correct such errors of law. A specialised tribunal whose decisions are subject to appeal to an appellate tribunal or court would therefore be highly appropriate for inclusion under the *Page* exception to *Anisminic*.

This thesis does not advocate overturning *Anisminic* in its entirety, but rather extending the currently very narrow exception for decisionmakers to retain the ability to make errors within jurisdiction. *Anisminic* and the nullity approach should not be abandoned in all contexts, but rather restricted from where it was never appropriate. The determinations of executive officials that err in law are jurisdictional errors, and are thus reviewable notwithstanding an ouster provision; this is a position that should be maintained. Whilst as argued in Chapter 3, there is an artificiality in describing the determinations of specialised tribunals as 'purported' merely because the reviewing court came to a different conclusion on interpreting the law, this same logic cannot be applied to all decisionmakers. As discussed in the context of *Chevron*, both executive and legislative power is

[48] *R. v Lord President of the Privy Council Ex p. Page* [1993] A.C. 6.

[49] Ibid.

[50] See Chapter 5 for analysis of the decision in *Campbell*.

wielded by the government of the United Kingdom, hence it it is unjustifiable to give executive officials and agencies the deference over their interpretations of law that allowing them to make errors of law within jurisdiction would afford.

It is not the role of this thesis to point to all the decisionmakers that should be afforded the pre-*Anisminic* authority to make errors within jurisdiction, though it is likely to be appropriate in the case of the Upper Tribunal, to give an example of the sort of decisionmaker in question. The general considerations are whether the decisionmaker in question is an arbiter of a specialised area of law, and whether there is scope for its errors of law to be corrected; both these factors lean in favour of allowing the body to make errors within jurisdiction. If the decisionmaker is making determinations that concern the general law, and if the decisionmaker can be considered to be executive or administrative in nature are factors that lean in favour of the preservation of *Anisminic* and the nullity approach for the purposes of reviewing its determinations, as shall be explored further under Pillar III.

Extending the *Page* exception to specialised tribunals and decisionmakers would not be a radical reform of the law, but instead an incremental process that would help to address the core deficiencies with *Anisminic* without completely overturning the decision. Given the separation of powers in the United Kingdom, it is appropriate to apply *Anisminic* and the nullity approach to executive and administrative decisions, but this does not mean that the approach should be used in the cases of specialised tribunals.

The impact of the first pillar on ouster clauses depends on the nature of the decisionmaker. In the case of a decisionmaker deemed to fall under the extended *Page* exception, an ouster clause would ensure that no determination made within jurisdiction would be subject to judicial review. As noted in Chapter 2, *Page* confirmed that errors of law on the face of the record were rendered obsolete by *Anisminic*; if all errors are jurisdictional, there is no need to confirm whether an error of law made within jurisdiction was on the face of the record. Errors on the face of the record would once again be relevant to bodies empowered to make errors within jurisdiction, as it would offer the only opportunity for errors made within jurisdiction to be reviewed. As explained in Chapter 2, ouster clauses found to be sufficiently express prior to *Anisminic* excluded review of errors on the face of the record, fully protecting errors within jurisdiction from being reviewed. In the case of a decisionmaker not deemed by the courts to be capable of making errors within jurisdiction, an ouster clause would continue to have the little practical effect, though a qualification to this will be explored in Pillar II.

A return to distinct categories of error of law requires careful consideration of the underlying pressure to expand jurisdictional error. It is important to consider the failure of *Hickman* and the success of *CUPE*. Preserving distinct categories of error of law requires judicial recognition of the pressure to see errors as jurisdictional in order for them to be reviewable. The approach to effectively separating errors within jurisdiction and errors exceeding jurisdiction should be less about lists of errors that are considered to be jurisdictional, and more about the implications of an error being classed as jurisdictional and a recognition that pressure to expand jurisdictional error should be resisted, an approach modelled on *CUPE*. Judges are protectors and enforcers of the rule of law, and it is therefore natural for them to expand the scope of jurisdictional errors in order to correct

what they regard as legal errors. However, an overly expansive approach to jurisdictional errors risks reviewing courts exceeding the role that is appropriate for them, as discussed in the context of *Chevron*. Expanding jurisdictional error in this scenario would only effect decisionmakers deemed by judges to fall under the extended *Page* exception, as ordinary decisionmakers would still be subject to review for all errors of law.

There is an artificiality to calling the determinations of specialised tribunals 'purported' merely because court disagrees with its interpretation of law, but there is also an artificiality in reviewing courts not being able to correct obvious legal errors because they were made within jurisdiction, Pillar I avoids both these problems. *Anisminic* and the nullity approach should continue to apply where it can safely be said that a decisionmaker should have no jurisdiction to make errors of law, allowing close judicial scrutiny and the correction of errors of law. However, as discussed, a decisionmaker that is an arbiter of a specialised area of law should be able to fall under the exception to *Anisminic* carved out by *Page*, allowing them to develop their own areas of law without reviewing courts substituting their own interpretation of the law whilst preserving court power to regulate jurisdiction, and allowing ouster clauses to have a palpable effect. For bodies falling within the expanded exception under *Page*, jurisdictional error would certainly include the pre-*Anisminic* grounds for jurisdictional error, such as an error in commencing the inquiry, improper composition or bad faith.

Pillar II: Variable intensity of review

Pillar II essentially advocates for the role of the rule of law put forward in Chapter 5, namely that the intensity of judicial review should depend on contextual factors ultimately derived from giving effect to the rule of law. As demonstrated in Chapter 5, the intensity of judicial review already depends on contextual factors, but as in the case of each of the pillars this thesis advocates for greater emphasis to be placed on existing common law constructs as opposed to proposing radical overhaul.

By itself, Pillar I could be seen as being insufficient at addressing the concerns raised in Chapter 3, namely that ouster clauses can easily be circumvented by the nullity approach. As Pillar I only restores the distinction between the two categories of error of law on a narrow basis, it still leaves many ouster clauses with no practical effect on the grounds that jurisdictional errors can be reviewed notwithstanding an ouster provision. There are determinations by decisionmakers that should in the view of this thesis be subject to reduced grounds of judicial review, but which are not suitable for being added to the exception under *Page* and thus empowered to make errors of law within jurisdiction. Chapter 5 offered a list of potential factors that could lead courts to limit the scope of judicial review, allowing an ouster clause to have effect, or even to give an effect analogous to an ouster clause where one is not present. There are decisionmakers and decisions which have the potential to fall under one or more of these contextual factors warranting reduction of the scope of review, without it being justifiable to allow them to make errors of law within jurisdiction. In cases where a speedy decision is desirable and it is likely that the original determination will be relied upon, a strong case can be made for limiting the scope of judicial review, even if it would be inappropriate to include the decisionmaker in question amongst those which are allowed to make

errors within jurisdiction. Determinations surrounding terrorism and national security could be considered as suitable candidates for a reduced standard of review, and indeed it is not uncommon for ouster clauses to be used in these contexts;[51] a reduced standard of review could therefore give ouster clauses in these contexts an effect.

Pillar II does not mandate the same reduced standard of review in all cases; the standard of review should depend upon the context. Chapter 5 covered a series of variable standards of review, such as allowing an ouster clause that would otherwise be deemed to be insufficiently express to have effect in *Ostler*, only reviewing in exceptional circumstances in *Siva* and the second-tier appeals criteria in *Cart*. The inherent variability of Pillar II offers an approach less rigid and inflexible than the formal standards of deference seen in the United States and Canada. Under Pillar II, the effect of an ouster clause will depend on the contextual factors at play, with the options ranging from the ouster having little practical effect to the ouster ensuring that a body is fully exempt from judicial review.[52]

An important principle to be derived from *CUPE* is the signalling function of ouster clauses. Ouster clauses point to legislative intent to reduce the scope of judicial review in a particular context, which is another factor that could influence courts in favour of limiting judicial review for a specific decisionmaker. An ouster clause should, in the view of this thesis, be seen as the start of a collaborative dialogue between Parliament and the judiciary. The presence of an ouster clause points to Parliament's intention to limit the scope of review, leading the courts to consider whether are there any contextual factors that would make it appropriate to limit the scope of review. Pillar II can also be seen as part of the process of ending the constitutional tension described in Chapter 3. By the courts demonstrating a willingness to limit the scope of review they demonstrate to Parliament that their role is to function collaboratively alongside the executive and legislature in upholding the rule of law, which as argued in Chapter 5 can include limiting the scope of judicial review.

Pillar II acknowledges that, as Endicott writes, there is sense in generally allowing courts to review error of law and avoid formal doctrines of deference, but that this does not mean that courts should never respect the determinations of decisionmakers:

> 'You may conclude that it is better to have review for error of law (and trust judges to apply it with an unstated respect for the initial decision maker's interpretation) than to have a complex doctrine of deference.'[53]

Pillar II seeks to avoid the rigidity of both maintaining distinct categories of error of law and formal doctrines of deference. Whilst Pillar I is limited to specialised areas of law, Pillar II has the potential for a much broader scope. There are many examples of where the inclusion of an ouster clause is

[51] Op. Cit. [n1] 506.

[52] Could be seen in the context of bodies seen as performing a comparable role to the High Court, see chapter 5.

[53] Op. Cit. [45] 534.

legitimate, signalling the fact that a reduced scope of judicial review is appropriate in the circumstances.

Pillar III: Conceptual limit on ousting review

Pillar III is the backstop; the constitutional guarantee that judicial review cannot be fully ousted, and the underlying basis for the proposed approach to ouster clauses. As discussed in the Australia section of this Chapter, the conceptual limit against ousting review could function similarly to the guarantee of original jurisdiction included in the written and entrenched constitution of Australia. The case for the conceptual limit against ousting review was made in Chapter 4. As argued in Chapter 4, the conceptual limit against ousting review has a historical basis in both the United Kingdom and Commonwealth jurisdictions; as in the case of Pillars I & II, this thesis argues for greater emphasis to be placed on existing ideas rather than a total overhaul, though it is acknowledged that pillar III is the most radical aspect of this thesis' proposals.

The impact of the conceptual limit against ousting review depends on the scope of jurisdictional error, as explored in Chapter 4. This thesis takes the view that there should not be a single definition of jurisdictional error, as argued under Pillar I. Instead, the scope of jurisdictional error should depend on the nature of the decisionmaker in question, with arbiters of specialised areas of law being capable of falling under an expanded *Page* exception to *Anisminic*. Barring a reduced scope of judicial review under Pillar II owing to contextual factors, Pillar III means that any error of law made by executive or administrative decisionmaker is considered jurisdictional and is thus reviewable notwithstanding an ouster clause. The conclusion that all executive and administrative determinations are subject to judicial review, regardless of even the most robust of ouster clauses is radical and warrants a detailed justification.

As discussed in this Chapter's section on the United States, the appropriate scope of judicial review should be decided with reference to separation of powers-based considerations. Aside from the prerogative powers, the executive of the United Kingdom does not hold any powers in its own right; the powers of the executive are granted by Parliament. Whilst royal prerogative is not directly granted by Parliament to the executive, Parliament is free to regulate or fully abolish prerogative powers, therefore it is safe to say that the prerogative powers left at the disposal of the executive only continue to operate at the behest of Parliament. In other words, executive power in the United Kingdom is entirely derivative, being either directly or indirectly granted by Parliament. As discussed in the context of *Chevron*, the executive of the United Kingdom must by convention control the legislative process, and that executive control of the legislative process makes it constitutionally inappropriate for executive interpretations of law to be afforded a general degree of respect and deference by the judiciary. The ability to make errors of law within jurisdiction can be reframed as the authority on a limited basis to have one's interpretations of law honoured, but an executive that is free at any time to amend the law to suit its purposes should not be granted such authority. Therefore, given the derivative nature of executive power in the United Kingdom, and the fact that the executive controls the legislative process, it is unjustifiable that executive and administrative interpretations of law be given a general respect and deference by the courts; outside of

circumstances deemed appropriate by courts under Pillar II, all executive and administrative determinations that err in law exceed the jurisdiction of the decisionmaker in question.

Anisminic, in a circuitous and uniquely British manner, has come to encapsulate an important principle in administrative and constitutional law, namely that it is ultimately the role of the courts to be the final arbiters of the law. Pillar III, the conceptual limit against ousting review, captures the essence of *Anisminic* without the pitfalls of having to label all errors of law, even those of specialised tribunals, as nullities. Parliament has unlimited lawmaking powers, but the principle of Parliamentary sovereignty is significantly undermined if courts cannot prevent decisionmakers from adhering to the limits of their powers as prescribed by Parliament. Parliament is free to grant executive and administrative agencies extraordinary powers, but Parliamentary sovereignty requires that it is ultimately for the courts to correct errors made in interpreting such statutory powers.

Anisminic and the nullity approach have been seen as a defiance of Parliamentary sovereignty, as discussed in Chapter 3. On the contrary, the conceptual limit on ousting review is an affirmation of Parliamentary sovereignty. To give the greatest possible effect to Acts of Parliament, ouster clauses that purport to protect the determinations of executive and administrative decisionmakers from judicial review cannot be given effect. This approach to Parliamentary sovereignty strengthens the role of Parliament; if the executive seeks a new power, it cannot acquire it in a negative sense, that is to say by stopping courts from correcting a legal error, but instead must acquire it in a positive sense by asking Parliament to legislate to give them the power they require. An executive government that controls the legislative process should govern by clearly and expressly empowering itself to act, rather than creating ouster provisions in order to act in manners it has not been directly authorised to.

The conceptual limit against ousting review in no sense limits the legislative power of Parliament, but instead merely reframes the manner in which executive and administrative decisionmakers are empowered by Parliament. The only way for an executive or administrative decisionmaker to be empowered to act should be in a positive sense: Parliament must expressly grant it the necessary power, as opposed to empowering decisionmakers by preventing their mistakes from being corrected.

Concluding comments

This thesis has aimed to assess whether the current judicial approach to ouster clauses is fit for purpose, and if not, what aspects should form part of a future approach. Finding the current *Anisminic* derived approach to be deficient (Chapter 3), the rest of the thesis (Chapters 4, 5 and 6) have been dedicated to building the case for a new approach. The approach to ouster clauses proposed by this thesis is multifaceted, reflecting the fact that ouster clauses do not seek to protect a single type of decision or decisionmakers.

The approach proposed provides finality to the constitutional debate surrounding ouster clauses. Unless, under pillar II, a court chooses to limit the scope of judicial review owing to contextual factors, jurisdictional review is reviewable, regardless of the existence or strength of an ouster clause. Under the approach, ouster clauses are thus most likely to have some effect where

they either protect a body deemed to fall under the extended exception to *Anisminic* under *Page*, or where, in relation to rule of law-based considerations courts are willing to limit the scope of judicial review (pillar II).

Ouster clauses are not just a section in a constitutional and administrative law textbook's chapter on judicial review, they represent a core tension within the constitution of the United Kingdom. Ouster clauses are an embodiment of the tension between the judicial duty to interpret the law and Parliament's ability to make and unmake any law; a tension that would be eased by a judicial approach to ouster clauses that gave greater respect to specialised determinations and was more reconcilable with Parliamentary sovereignty.

Bibliography

Primary sources

A v B (Investigatory Powers Tribunal: Jurisdiction) [2010] 2 W.L.R. 1.

Alliance des Professeurs Catholiques de Montréal v Quebec Labour Relations Board [1953] 2 SCR 140.

An Act to prevent and suppresse Seditious Conventicles 1670 Section 6.

Andrews and others appellants; and Mitchell respondent [1905] AC 78.

Anisminic Ltd v Foreign Compensation Commission [1967] 2 All E.R. 986.

Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 147.

Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 223.

Appeals from the Upper Tribunal to the Court of Appeal Order 2008, SI 2008/2834.

Benin and Another v Whimster [1975] 3 W.L.R. 54.

BH (AP) (Appellant) and another v The Lord Advocate and another [2012] UKSC 24.

Boddington v British Transport Police [1998]. 2 WLR 639.

Bugg v Director of Public Prosecutions [1993] Q.B. 473.

Canadian Union of Public Employees, local 963 v. New Brunswick Liquor Corporation [1979] 2 S.C.R 227.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al. 467 U.S. 837.

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.

Craig v South Australia [1995] 184 CLR 163 (HCA).

David King, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al. 576 U.S. 988.

Dissolution and Calling of Parliament Act 2022.

Eba v Advocate General for Scotland [2011] UKSC 29.

Ellen Street Estates Ltd v Minster of Health [1934] 1 KB 590.

Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

European Communities Act 1972.

Ex p Bradlaugh (1878) 3 Q.B.D. 509.

Ex p Muldoon [1984] QB 68.

Farley v Secretary of State for Work and Pensions (No 2) [2006] 1 WLR 1817.

Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962, SI 1962/2187.

Foreign Compensation Act 1969.

Foster's Case [1614] 11 Co Rep 56b.

H.R. Rep. No. 114-622, at 4 (2016).

Higher Education Relief Opportunities For Students Act of 2001.

Highways Act 1959.

Housing Act 1974.

Jackson and others (Appellants) v Her Majesty's Attorney General (Respondent) [2005] UKHL 56.

Joseph R. Biden, President of the United States, et al. v. Nebraska, et al. 600 U.S. 477.

Judicial Review and Courts Act 2022.

Merchant Seaman Act 1845.

Metropolitan Police Courts Act 1839.

Minister for immigration and Multicultural affairs v Yusuf [2001] HCA 30 (2001) 206 CLR 323.

O'Reilly and Others Appellants v Mackman and Others Respondents [1983] 2 A.C. 237.

Pearlman v Keepers and Governors of Harrow School [1978] 3 W.L.R. 736.

Petition of the Earl of Antrim [1967] 1 AC 691 (HL) 724.

Plaintiff S157/2002 v Australia [2003] H.C.A. 2.

Prevention of Terrorism (Additional Powers) Bill 1996.

Public Service Labour Relations Act 1973.

Pyx Granite Co. Ltd v Ministry of Housing and Local Government [1960] AC 260.

R (Exolum Pipeline System Ltd) v Crown Court at Great Grimsby [2023] EWHC 2811 (Admin).

R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3.

R (Jackson) v Attorney General [2005] UKHL 56.

R (Jones) v First Tier Tribunal [2013] UKSC 19.

R (LA (Albania)) v Upper Tribunal [2023] EWCA Civ 1337.

R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening) [2012] 1 AC 245.

R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41.

R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent) [2011] UKSC 28.

R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent) [2009] EWHC 3052 (Admin).

R (on the application of Evans) v Attorney General [2015] A.C. 1787.

R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber) [2023] EWHC 791 (Admin).

R (on the application of Privacy International) v Investigatory Powers Tribunal [2017] EWHC 114 (Admin).

R (on the application of Privacy International) v Investigatory Powers Tribunal [2017] EWCA Civ 1868.

R (on the application of Unison) v Lord Chancellor [2017] 3 W.L.R. 409.

R (on the application of Woolas) v Parliamentary Election Court [2010] EWHC 3169 (Admin); [2012] Q.B. 1 [33].

R (Privacy International) v Investigatory Powers Tribunal [2019] 2 W.L.R. 1219.

R (Sivasubramaniam) v Wandsworth County Court [2003] 1 WLR 475.

R v Bolton [1841] 1 Q.B. 66.

R v Hickman (1945) 70 CLR 598.

R v Lord President of the Privy Council Ex p. Page [1993] A.C. 6.

R v Lord President of the Privy Council Ex p. Page [1993] A.C. 6.

R v Medical Appeal Tribunal Ex p. Gilmore [1957] 1 Q.B. 574.

R v Medical Appeal Tribunal, Ex p Gilmore [1957] 1 QB 574.

R v Moreley [1760] 2 Burrow 1040 97 E.R. 696.

R v Nat Bell Liquors [1922] 2 A.C. 128.

R v Northumberland Compensation Appeal Tribunal, Ex p Shaw [1952] 1 KB 338.

R v Plowright [1686] 3 Mod Rep 94.

R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513.

R v Secretary of State for Transport ex p Factortame (*No 2*) [1992] 3 WLR.

R v Shoreditch Assessment Committee, Ex p Morgan [1910] 2 KB 859.

R v Surrey Coroner Ex p. Campbell [1982] Q.B. 661.

R v The Commissioners for Paving, Lighting, &c., the Town of Cheltenham, and for Regulating the Police thereof [1841] 1 Queen's Bench Reports 467 113 E.R. 1211.

R v The Secretary of State for the Environment, ex Parte Ostler [1976] EWCA Civ 6.

Re Allister [2023] UKSC 5.

Re Racal Communications Ltd [1981] A.C. 374.

Re Racal Communications Ltd [1981] A.C. 374; [1980] 3 W.L.R. 181.

Regulation of Investigatory Powers 2000.

Representation of the People Act 1983.

Ridge v Baldwin [1964] AC 40.

Smith (Kathleen Rose) v East Elloe Rural District Council [1956] AC 736.

Smith, Lluellyn v Comrs of Sewers [1669] 1 Mod 44.

Svecova v Industrial Commission of New South Wales (1991) 39 IR 328, 330.

The Attorney General, the Rt Hon Suella Braverman QC MP delivered a keynote speech to the 2021 Public Law Project Conference. Judicial Review Trends and Forecasts 2021: Accountability and the Constitution.

The Australian Constitution.

The Colonial Bank of Australasia and John Turner, the Official Agent of the Golden Gate Gold Mining Company, Registered v Robert Willan (1873-74) L.R. 5 P.C. 417.

The Constitution of the United States.

Thoburn v Sunderland CC [2003] QB 151.

Totalisator Agency Board of New South Wales v Casey (1994) 54 IR 354, 359.

Tribunals, Courts and Enforcement Act 2007.

Watt v Lord Advocate [1979] S.C. 120.

William Marbury v James Madison, Secretary of State of the United States 5 U.S. 137.

Secondary sources

A Kavanagh *Constitutional Review Under the Human Rights Act* (Cambridge University Press 2009).

A McHarg ‘Can Holyrood bind its successors?’ 2021 25(2) Edin. L.R. 245.

A V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed Macmillan 1915).

B Ong ‘The ouster of Parliamentary sovereignty?’ (2020) Jan P.L. 41.

Craies on Legislation (12th Ed Sweet & Maxwell 2020).

D Edlin ‘A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States’ (2009) The American Journal of Comparative Law, Volume 57, Issue 1, Winter, 67.

D Feldman ‘Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective.’ in S Juss, M Sunkin (Eds) *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017).

D Feldman ‘The Nature and Significance of "Constitutional" Legislation’ (2013) 129 LQR 343.

De Smith's Judicial Review (8th Ed Sweet & Maxwell 2021).

E Bjorge ‘Legislation purporting to oust the High Court's jurisdiction: Privacy International’ (2020) LQR, 136 (Jan), 12.

E Campbell, M Groves 'Privative Clauses and the Australian Constitution' (2004) 4 Oxford University Commonwealth Law Journal 51.

F Ahmed, A Perry ‘The quasi-entrenchment of constitutional statutes’ (2014) C.L.J. 73(3), 514.

F Bennion *Bennion on Statutory Interpretation* (5th Ed Butterworths 2008).

G L Peiris ‘Statutory exclusion of judicial review in Australian, Canadian and New Zealand Law’ (1982) P.L. Spring 451.

H W R Wade ‘What Has Happened to the Sovereignty of Parliament?’ (1991) 107 L.Q.R. 1, 4.

H W R Wade, C F Forsyth *Administrative Law* (11th Ed Oxford University Press 2014).

I Hare ‘The separation of powers and judicial review for error of law’ 113-140 in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998).

I Jennings *The Law and the Constitution* (5th Ed University of London Press 1959).

J A G Griffith ‘Judicial Review for Jurisdictional Error’ (1979) 38 Cambridge Law Journal 11.

J Beatson ‘The Scope of Judicial Review for Error of Law’ (1984) 4 Oxford Journal of Legal Studies 22.

J Goldsworthy ‘The "manner and form" theory of parliamentary sovereignty’ (2021) P.L., Jul, 586.

J Laws *The Constitutional Balance* (Hart publishing 2021).

J Mcgarry, S Spence ‘Constitutional Statutes—Roots and Recognition’ (2020) Statute Law Review, Volume 41, Issue 3, October, 378.

J Varuhas ‘The principle of legality’ (2020) The Cambridge Law Journal , Volume 79 , Issue 3, 578.

M Elliott, A Young ‘Privacy International in the Supreme Court: jurisdiction, the rule of law and parliamentary sovereignty’ (2019) C.L.J. 78(3), 490.

M Elliott, J Varuhas *Administrative Law Text and Materials* (5th Ed Oxford University Press 2017).

N Gouliaditis ‘Privative clauses: epic fail’ (2010) Melbourne University law review, Vol.34 (3), 870.

P Craig ‘Ultra Vires and the Foundations of Judicial Review’ (1998) CLJ, 57(1), 63.

P Daly ‘Divergence and Convergence in English and Canadian Administrative Law’ in S Jhaveri and M Ramsden (Eds) *Judicial Review of Administrative Action Across the Common Law World: Origins and Adaptation* (Cambridge University Press 2021).

P Daly ‘The Unfortunate Triumph of Form over Substance in Canadian Administrative Law’ (2012) Osgoode Hall Law Journal Volume 50, Issue 2, Article 1.

P Scott ‘Once More unto the Breach: R (Privacy International) v Investigatory Powers Tribunal’ (2020) Edin LR 24(1), 103.

P Scott ‘Ouster clauses and national security: judicial review of the Investigatory Powers Tribunal’ (2017) P.L., Jul, 355.

R Bauman, T Kahana *The Least Examined Branch The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006).

R Craig ‘Ouster clauses, separation of powers and the intention of Parliament: from Anisminic to Privacy International’ (2018) P.L., Oct, 570.

S Sedley *Lions under the Throne: Essays on the History of English Public Law* (Cambridge University Press 2015).

T Endicott *Administrative Law* (5th Ed Oxford University Press 2021).

T Hickman ‘The Investigatory Powers Tribunal: a law unto itself?’ (2018) P.L., Oct, 584.

T Khaitan ‘“Constitution” as a Statutory Term’ (2013) 129 LQR 589.

T Merrill *The Chevron Doctrine: Its rise and fall, and the future of the administrative state* (Harvard University Press 2022).

W Bagehot *The English Constitution (Oxford World’s Classics)* (Oxford University Press 2009).