Developing a Constitutionally Appropriate Method of Circumventing Statutory Ouster Clauses

WINEFIELD, CHARLIE,ROSS

DEVELOPING A CONSTITUTIONALLY APPROPRIATE METHOD OF CIRCUMVENTING STATUTORY OUSTER CLAUSES

Table of Contents

Introduction

Recent years have witnessed a growing discourse surrounding the constitutional position of the courts and the increasing tendency towards judicial activism.[1] A number of platforms for debate surrounding this topic have been introduced, including the Judicial Power Project[2] and the more recent Independent Review of Administrative Law.[3] The sentiment promoted by Judicial Power Project authors advances the argument that that the rise of judicial power not only departs from constitutional tradition,[4] but also compromises constitutional principle in unjustifiably encroaching on Parliamentary sovereignty.[5] Furthermore, the government has made clear, following the Independent Review of Administrative Law, its intentions to strengthen the functioning of ouster clauses,[6] and to remove what have become known as *Cart* judicial review applications.[7] A clear trend can be observed of suspicion and aversion to the development of judicial power in the academic and political sphere which appears to be linked to the perceived subversion of the traditional constitutional settlement by the courts. The 'traditional

[1] John Finnis, 'Judicial Power and the Balance of Our Constitution' Policy Exchange.

[2] <https://judicialpowerproject.org.uk/> Accessed on 28.09.21

[3] 'The Independent Review of Administrative Law' (CP 407, March 2021). The IRAL considered how far judicial review strikes the right balance between justice and the ability for the government to operate effectively. Following the publication of the IRAL, the Judicial Review and Courts Bill (JRCB) was brought forward, seeking to curtail the reach of judicial review through an ouster clause in s2. The IRAL and subsequent JRCB are evidence of the uncertainty surrounding the limits of judicial power. Therefore, the question of whether judicial power in its current state is being exercised legitimately is one central to the administrative law discourse, and one that this thesis will answer definitively.

[4] Richard Ekins and Graham Gee, 'Making the Case Against Expansive Judicial Power' (2015) Judicial Power Project <https://judicialpowerproject.org.uk/making-the-case-against-expansive-judicial-power/> Accessed on 29.05.21.

[5] Richard Ekins, 'Putting Judicial Power in its Place' (2017) 36 UQLJ 375.

[6] Mark Elliot, 'Judicial Review Reform II: Ouster Clauses and the Rule of Law' (2021) Public Law for Everyone <https://publiclawforeveryone.com/2021/04/11/judicial-review-reform-ii-ouster-clauses-and-the-rule-of-law/> Accessed on 29.05.21.

[7] Paul Craig, 'IRAL: The Panel Report and the Government's Response' (2021) UKCLA <https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/> Accessed on 29.05.21.

constitutional settlement' will be taken to imply a sovereign Parliament which observes no substantive or normative limitations on its power to legislate. This thesis will assume a strict hierarchy in which the courts are subordinate to the legislature and are in no position undermine the sovereignty of Parliament. This thesis will focus on an element of the discourse surrounding the power of the courts - ouster clauses - and seek to question the basis of this suspicion and aversion. It will attempt to show that the judicial propensity for circumventing ouster clauses has not subverted the traditional constitutional settlement and has not unduly encroached into Parliament's sovereign position. On the contrary, it will be shown that the courts work within the boundaries set for them by Parliament and reach decisions based on a careful evaluation of Parliamentary intention. In this way, the propensity for ouster clauses to be circumvented will be shown to occur along constitutionally appropriate lines. This discussion is intended to refute the suggestion that the courts have adopted unjustifiable methods of tackling ouster clauses and further demonstrate the needless nature of the proposed government actions to curtail the JR jurisdiction of the courts.

The focus on ouster clauses is necessary when considering the broader debate on judicial power. This is because ouster clauses represent the point at which the courts squarely address Parliamentary attempts to limit judicial intervention and consider the boundaries of their own power. It is possible to gauge the power dynamic between these two institutions through the Court's approach towards ouster clauses, showing how fundamental such clauses are to the broader discourse. In finding that the courts have not overstepped their constitutional boundaries in relation to ouster clauses, this will strongly indicate that judicial power is not being abused or unjustly extended. A brief note should be made of the reasons why the courts should circumvent ouster clauses at all, to ground this discussion in its constitutional context. Ouster clauses seek to prevent the courts from reviewing decisions made, in many cases, by administrative or quasi-administrative bodies. Were the courts to accept the functioning of the ouster clauses wherever they appeared, the branch of government tasked with implementing the laws of Parliament would also be able to decide for themselves the limits of those powers. It is this separation of powers issue which necessitates stricter judicial scrutiny, justifying the stringent assessment of the efficacy of ouster clauses by the courts.

The court has adopted a variety of methods for circumventing ouster clauses since the decision in *Anisminic*,[8] which is viewed by many as a seminal administrative law case.[9] *Anisminic*, alongside a number of other administrative law cases,[10] represented the beginning of more intensive forms of review by the courts towards administrative decisions, while confirming that ouster clauses would only be effective in limited circumstances. These different approaches, however, have been mired in uncertainty of application and undergone a number of changes over time. The first chapter will be dedicated to producing a coherent roadmap of the approaches taken by the courts to the circumvention of ouster clauses since the *Anisminic* case. Three main approaches will be considered; the post-*Anisminic* approach to administrative ouster clauses, the *Racal* approach[11] to judicial ouster clauses; and the holistic approach adopted after *Cart*.[12] Both the post-*Anisminic* and *Racal* approaches will be shown to rest on the same foundations, despite differing slightly in application. The notion of 'jurisdiction' and 'ultra vires' will be argued to form the focal point of these approaches, with the courts justifying the circumvention of the ouster clauses on the basis that the tribunal or court acted ultra vires (outside the jurisdiction afforded to it by Parliament's legislation). A marked split away from the focus on jurisdiction as delineating the boundaries of JR will be recognised in the case of *Cart*. The courts at this point will be shown to identify a new means of circumventing ouster clauses which utilises the RoL as a lens through which to view Parliamentary intent. In this way, a more holistic and encompassing approach towards JR will be shown to emerge and be adopted in the cases of *Cart* and *Privacy International*.[13] Following the discussion and clarification of this roadmap of approaches, a critique of

[8] *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147.

[9] Christopher Forsyth, 'The Rock, and the Sand: Jurisdiction and Remedial Discretion' (2013) 18 JR 360, 368.

[10] *Anisminic* was one of a number of cases which shifted the focus of administrative law onto a more intensive form of review. These cases include *Padfield v Ministry of Agriculture* [1968] AC 997, *Ridge v Baldwin* [1964] AC 40 and *Conway v Rimmer* [1968] AC 910.

[11] *In Re Racal Communications Ltd* [1981] AC 374.

[12] *R (Cart) v Upper Tribunal* [2012] 1 AC 663.

[13] *R (Privacy International) v Investigatory Powers Tribunal* [2019] AC 491.

the post-*Anisminic* and *Racal* approaches will be offered in order to evidence their inadequacy and the need for a change in methods by the courts.

The predominant criticisms of both the post-*Anisminic* and *Racal* approach will be based on the failure of the ultra vires theory to provide a stable theoretical foundation for the courts' circumvention of ouster clauses and the inflexibility of a focus on jurisdiction in practice.[14] Furthermore, it will be shown that the courts' focus on the notion of jurisdiction will cause an unjustifiably narrow approach towards errors of law, constraining their ability to make evaluative and thorough judgments. Such judgments will instead be shown to be based on the mere recognition of an error of law as conclusive of the ultra vires nature of the original decision. A link will be drawn to the Australian approach, which is argued by some critics to enshrine a workable standard of jurisdiction which is necessary to uphold Parliamentary sovereignty.[15] However, the argument that the Supreme Court should adopt a standard similar to that in Australia will be rejected in light of the failure of this approach to provide a holistic model of review and its reliance on conclusionary labels to guide judgments. In this way, the approaches founded on 'jurisdiction' will be squarely rejected.

The final chapter will act as a defence of the most recent cases regarding ouster clauses. The modified ultra vires theory will be introduced, emphasising the important role played by presumed parliamentary intention in discerning legislative intent.[16] It will be shown that Parliament's presumed intention to legislate in conformity with the RoL provides adequate grounds for the courts to read ouster clauses restrictively where the RoL is being undermined. In this way, the courts will be shown to uphold Parliament's traditionally held sovereign position in the constitution, in relying on a presumed form of intention to read ouster clauses in a restrictive manner. This position will be contrasted to the position

[14] TRS Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] PL 429, 430.

[15] Janina Boughey and Lisa Burton Crawford, 'Reconsidering *R (Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error' [2017] PL 592.

[16] Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review' [1996] CLJ 122, 135.

of common law theorists, who hint at normative limitations on the ability of Parliament to undermine the RoL[17] However, the refusal of the common law theorists to accept presumed Parliamentary intention as a legitimate means of restricting ouster clauses will prove to undermine their position and lead to a rejection of their standpoint. Having defended the modified ultra vires theory as the justifiable theoretical basis on which the courts may legitimately circumvent ouster clauses, the judgments in *Cart* and *Privacy International* will be considered. In both cases, the courts can be identified as utilising the RoL to interpret the scope of express legislative intention and to provide a wider scope of review for the courts. In viewing these cases through the lens of the modified ultra vires theory, the judgments, while appearing to some to be examples of unwarranted judicial activism,[18] will be shown to be constitutionally appropriate and entirely justifiable.

This thesis will seek to justify the actions of the courts with regard to the circumvention of ouster clauses, without purporting to disrupt the traditionally held notion of Parliamentary sovereignty. In doing so, the modified ultra vires theory will be promoted as the appropriate theoretical foundation for the circumvention of ouster clauses in future cases to come.

[17] Paul Craig, 'Competing Models of Judicial Review' [1999] PL 428, 429.

[18] Robert Craig, 'Ouster Clauses, Separation of Powers and the Intention of Parliament: From *Anisminic* to *Privacy International*' (2018) PL 570.

Chapter 1: A Roadmap of Ouster Clause Circumvention

Introduction

While the courts' aversion to ouster clauses has remained steadfast since the decision in *Anisminic*,[19] the approaches that the courts have taken to circumvent such ouster clauses have not. Rather, a distinct lack of continuity and clarity in the methods employed by the courts when implementing the presumption against ousters may be identified. This chapter will seek to reveal the distinct reasoning processes and approaches developed by the courts for ouster clauses pertaining to administrative and judicial decisions and evaluate how such approaches have changed over the period of 52 years since the *Anisminic* decision. The interrogation of the efficacy and adequacy of each of these approaches, however, will be undertaken in the subsequent chapters. The first trend which will be identified is the courts' recourse to the notion of 'jurisdiction' (the field within which a body is permitted to make decisions) as delineating the boundaries of judicial review.[20] The *Anisminic* judgment will be shown to rely on this notion, alongside the theory of ultra vires in order to justify the circumvention of ouster clauses. Where commentary has suggested that the *Anisminic* judgment made all errors of law beyond the jurisdictional reach of administrative bodies,[21] a closer inspection of Lord Reid's judgment will prove to undermine such an assertion. The notion that any administrative error of law equates to a jurisdictional error will be shown to receive judicial acceptance in the latter case of *Page*.[22] The approaches towards judicial ouster clauses will be shown to initially have emulated the *Anisminic* approach to ouster clauses, before developing multiple categories of jurisdictional error. This approach, however, will be shown to be referenced inconsistently, raising questions as to the clarity with which it

[19] *Anisminic (n 8).*

[20] Forsyth (n 9) 368.

[21] Paul Scott, 'Ouster Clauses and National Security: Judicial Review of the Investigatory Powers Tribunal' (2017) PL 355, 357.

[22] *R v Lord President of the Privy Council, Ex p Page* [1993] AC 682.

may be universally applied to judicial decisions. Finally, the courts more recently will be shown to reject the notion of jurisdiction as delineating the boundaries of judicial review and move towards a more holistic analysis of ouster clauses in their context. The approaches undertaken in both *Cart*[23] and *Privacy International*[24] will be analysed in order to identify the changes in the approaches of the courts since the *Anisminic* decision. This will serve as a basis for the subsequent criticisms of the traditional approaches and defence of the more recent approach to the circumvention of ouster clauses to take place in the following chapters.

Ousting Administrative Decisions

Many of the approaches taken by the courts to circumvent statutory ouster clauses have been premised on the notion of 'jurisdiction'. In order to properly understand how this notion has been adopted and evolved over time, it will be necessary to understand what 'jurisdiction' means and how the courts have relied on it to circumvent ouster clauses. The 'jurisdiction' of a decision-maker describes the field within which that body is permitted to make decisions. If such a body makes a decision outside of their permitted field, they will have made a non-jurisdictional decision, i.e., one which they were not entitled to make. The question remains why the courts have felt justified in circumventing ouster clauses where a decision is found to be non-jurisdictional. The answer to this question lies within the 'ultra vires theory'. The ultra vires theory suggests that JR is legitimated on the grounds that the 'courts are applying the intent of the legislature' and that the courts' function is to 'police the boundaries stipulated by Parliament.'[25] As such, if the intent of Parliament is that a body should have a defined set of powers, to exceed those boundaries would be to usurp Parliament's intention and act ultra vires. The courts have therefore legitimated their circumventions of ouster clauses where they have found decisions to be non-

[23] *Cart* (n 12).

[24] *Privacy International* (n 13).

[25] Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1988) 57 CLJ 63, 65.

jurisdictional, as it may be reasonably assumed that Parliament, in setting boundaries in statute, did not intend for decision-makers to exceed those boundaries, even in the face of an ouster clause.

The 'Pure' Theory of Jurisdiction

It will be useful to establish the original approach of the courts towards circumventing ouster clauses, in order to identify the change which occurred in the seminal decision of *Anisminic*. Prior to *Anisminic*, the courts took a 'narrow' approach to discerning whether a decision was within or outside the jurisdiction of the decision-making body. It was understood that in order to retain jurisdiction, the decision-maker was required to correctly enter the general field of inquiry relevant to the case.[26] The decision-maker would need to identify the area of law relevant to the case and ensure that they were legally permitted to entertain the case at hand. If an ouster clause was in place, and this threshold had been crossed, the decision they made would be within their jurisdiction, notwithstanding errors of law or fact appearing within their judgment. As such, errors *going* to jurisdiction were those which pertained to the decision-maker's entry into the relevant field of inquiry, while those *within* jurisdiction were ones made after this threshold had been passed. A distinction is therefore evident prior to *Anisminic* between errors *within* jurisdiction, and errors *outside* of jurisdiction (or 'non-jurisdictional' errors), with only the errors outside of jurisdiction warranting judicial intervention in light of ouster clauses. Such an approach by the courts therefore did not impose strict boundaries on the exercise of administrative decision-making and can be considered a rather deferential approach towards the oversight of administrative decisions.

It should be noted that while this distinction appears simple to apply in theory, it was notoriously difficult to apply in practice. MacLauchlan has recognised that administrative decisions cannot always be broken down into questions which arise strictly at the outset and questions which arise in the course

[26] JK MacRae, 'Jurisdictional Error: A Post-*Anisminic* Analysis' (1977) 3 AUR 111, 113.

of the inquiry.[27] This made it difficult for the courts to draw the line between jurisdictional and non-jurisdictional administrative actions. This critique reflects a significant flaw in the application of the 'pure' theory of jurisdiction. Difficulty in practical application is not limited to the 'pure' theory, however. It will be shown that such difficulties extend to other approaches to jurisdictional error, including the post-*Anisminic* approach. Evolving away from the 'pure' theory of jurisdiction, *Anisminic* will be shown to set the stage for a shift in judicial reasoning, leading to a more restrictive attitude towards decisions encumbered by errors of law.

Post-Anisminic Jurisdictional Error

The *Anisminic* judgment, while entailing uncertainty with regard to the specific test for jurisdictional error, heralded the end of the distinction between errors of law within and those going to jurisdiction.[28] This section will explore the post-*Anisminic* approach to jurisdictional error and clarify the specific approaches outlined by the courts *Anisminic* and *Page* towards circumventing ouster clauses of administrative decisions.

The case of *Anisminic v Foreign Compensation Commission* involved an appellant who owned property in Egypt which was sequestrated by the Egyptian authorities. In 1957, the appellant sold the property to an Egyptian government-owned organisation. The appellant subsequently claimed that a piece of subordinate legislation, passed under the Foreign Compensation Act 1950, entitled them to compensation. The Foreign Compensation Commission disagreed with the appellant, stating that because their 'successors in title' did not have the British nationality as required under one of the provisions of the subordinate legislation, they would not be entitled to compensation. Section 4(4) of the Foreign Compensation Act 1950 stated that 'the determination by the commission of any application made to them under this Act shall not be called into question in any court of law'. The first hurdle for

[27] H Wade MacLauchlan, 'Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?' (1986) 36 UTLJ 343.
[28] Scott (n 21) 357.

Anisminic was the question of how to have a court review the decision of the FCC. At the time of this case, decisions of lower courts and tribunals were predominantly reviewed by means of prerogative writ of certiorari, where the claimant would have to show an error of law on the face of the record for the more senior court to intervene.[29] Due to the fact that Anisminic was unable to point to any evidence that the Commission had erred in law, it pursued a declaration which would compel the Commission to plead its defence, providing the opportunity for the error of law perpetrated to be discovered. When the case was remitted for review, the questions before of the House of Lords were whether the FCC had committed an error of law in considering the 'successors in title', and whether this error warranted review in the face of the ouster clause.

The court found that the FCC had made an error in requiring the appellant to prove anything about successors in title,[30] taking them outside of their jurisdiction in a wide sense,[31] as opposed to the narrow sense which was relevant under the 'pure' jurisdictional theory. Lord Reid stated that ouster clauses must be construed strictly, [32] making clear that jurisdictional errors could occur even if the administrative body correctly entered into the inquiry.[33] He reasoned that the tribunal might have misconstrued the provisions giving it power to act, meaning that it failed to deal with the question remitted to it, or decided the case on a question which was not remitted to it (as was relevant in this case).[34] In this way, Lord Reid established that where an error of law results in the administrative body basing their decision on a matter which, 'on a true construction of their powers', they had no right to deal with,[35] such an error will go to their jurisdiction. Lord Wilberforce reinforced Lord Reid's examination of administrative power by stating that where such bodies have asked the wrong question,

[29] David Feldman, '*Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective', in Satvinder Jussand and Maurice Sunkin (eds), *Landmark Cases in Public Law* (Oxford 2017: Hart Publishing), 70.

[30] *Anisminic* (n 8*)* 174 (Lord Reid).

[31] ibid 174 (Lord Reid).

[32] ibid 170 (Lord Reid).

[33] ibid 171 (Lord Reid).

[34] ibid.

[35] ibid 174 (Lord Reid).

or applied the wrong test,[36] that body will have exceeded the limit of power defined by statute, taking them outside of their jurisdiction.[37] The conclusion of the court that the error of law committed by the FCC went to their jurisdiction opened the avenue for the s4(4) ouster clause to be circumvented. This ouster clause only related to decisions given within the field of operation entrusted to the tribunal,[38] or in other words, *real* as opposed to *purported* determinations by the FCC. The court justified its actions through emphasising that it was not initiating a struggle between the courts and executive,[39] but rather carrying out the intention of the legislature in policing the boundaries of administrative power set out in statute.[40] In this way, the courts recourse to the notion of jurisdiction was informed by the ultra vires theory and utilised as a means to justify the circumvention of ouster clauses. This case displays the central importance of 'jurisdiction' as delineating the boundaries of judicial review.[41] Two main discussion points will be raised with relation to *Anisminic*, the first being the shift away from the previous 'pure' theory of jurisdiction, and the second concerning the particular test of jurisdictional error which was formulated within the *Anisminic* judgment.

A clear shift can be identified away from the 'pure' theory of jurisdiction, where the tribunal's jurisdiction rested on the narrow question of whether it had entered into the area of inquiry correctly.[42] Lord Reid was clear that the courts would focus on jurisdiction in a wider sense, considering both the entrance of an administrative body into the area of law, and its interpretation and application of the law in that area. Lord Wilberforce appears to provide a reason for this shift in judicial attitude. He stated that questions relating to the limits of administrative power are 'reserved for decision by the courts.'[43] This suggests that the courts viewed themselves as the arbiters of executive power and would not allow

[36] ibid 210 (Lord Wilberforce).

[37] ibid 208 (Lord Wilberforce).

[38] ibid 207 (Lord Wilberforce).

[39] ibid 208 (Lord Wilberforce).

[40] ibid.

[41] Forsyth (n 9) [28].

[42] MacRae (n 26) 139.

[43] *Anisminic* (n 8) 209 (Lord Wilberforce).

the administrative tribunals to escape judicial scrutiny simply for entering correctly into their area of inquiry. Similarly, Lord Reid justified this shift on the basis that even after correctly identifying the area of inquiry in the narrow sense, the tribunals have a responsibility to act within the boundaries set by statute,[44] in order to give effect to the intention of Parliament in setting those boundaries,[45] and it is the courts' role to police this. Accordingly, Robert Craig has rightly identified this shift away from the pure jurisdictional theory as based on respect for the separation of powers.[46] While this shift can be readily identified, the extent of the shift is somewhat more convoluted and open to question. It has been suggested that *Anisminic* abolished the distinction between errors inside and errors outside of jurisdiction,[47] leading to the simple conclusion that any error of law perpetrated by an administrative tribunal places its decision beyond the scope of an ouster.[48] While such an approach would prove simple and convenient in its application, it is questionable whether this change was implemented in *Anisminic*, or if it was conceptualised and developed later in the case of *Page*. In assessing the dicta in *Anisminic*, it will be shown that the approach adopted was more nuanced and complex than the simple understanding would suggest. The court will be shown to leave ambiguous the position of non-jurisdictional errors of law, and not have adopted the more straightforward mindset developed in later cases that every error of law is one going to jurisdiction.

There appears to be some confusion surrounding whether the court in *Anisminic* abolished the distinction between errors of law within and those outside of jurisdiction,[49] placing all errors firmly

[44] ibid 171 (Lord Reid).

[45] Boughey (n 15) 594.

[46] R Craig (n 18) 572.

[47] *Racal* (n 11) 383 (Lord Diplock).

[48] Scott (n 21) 357.

[49] This sentiment has been noted on multiple occasions. For example, Scott (n 21) 357 notes that '*Anisminic* heralded (if it did not in fact itself bring about) the end of [this] distinction.' Furthermore, Joanna Bell, in 'Rethinking the Story of *Cart v Upper Tribunal* and its Implications for Administrative Law' (2019) 39 OJLS 74 (at 87) recognises that, according to the 'conventional theory, [*Anisminic*] eradicated the distinction between jurisdictional and non-jurisdictional errors.' Finally, Lord Diplock in *Racal (n 11)* at 383 goes as far as to state

outside the boundaries of administrative power. Bell has criticised the narrow judicial practice of grafting onto the *Anisminic* judgment as the starting point, and declaring any error of law as going to the jurisdiction of the body without further analysis of the case at hand.[50] It is true that the *Anisminic* judgment displays a deeper level of analysis than one of such conclusionary decision-making, and that the court recognised the possibility of errors of law occurring within their jurisdiction.[51] Far removed from applying the label of 'jurisdictional error' onto any error of law perpetrated by a tribunal, Lord Wilberforce made clear the need for nuanced analysis tailored to each case. He stated that 'argument may be possible whether this or that question of construction has been left to the tribunal, that is, within the tribunal's field.'[52] While in most cases, he expected that questions of construction were 'reserved for decision by the courts',[53] his intention was clearly not to definitively implement a structure whereby the jurisdiction of the administrative decision would be decided by the mere *existence* of an error of law. Lord Wilberforce also commented on the fine line between a tribunal doing something outside its area, and doing something wrong within the area it has been prescribed.[54] Lord Wilberforce's comments reflect a more evaluative approach than has traditionally been ascribed to the *Anisminic* decision, which promotes the process of navigating the detail of the statutory framework in order to shape the approach to judicial review employed by the court.[55] It must also be noted that the court did not suggest that every error of law in itself would lead to a tribunal stepping outside its jurisdiction, but only those errors which lead to the tribunal basing their decision on questions they have no right to take into account.[56] This subtle yet important distinction emphasised by Lord Reid would suggest that excess of jurisdiction does not *necessarily* follow an error of law, even if in many cases it does. Therefore, the *Anisminic*

---

that *Anisminic*, 'for practical purposes abolished' this distinction, begging the question of whether it was *Anisminic*, or subsequent interpretations of the case which heralded the end of this distinction.

[50] Joanna Bell, 'Rethinking the Story of *Cart v Upper Tribunal* and its Implications for Administrative Law' (2019) 39 OJLS 74, 90.

[51] B Jagat Narain, 'Jurisdictional Error in Administrative Law' (1983) 34 NIRLQ 315, 326.

[52] *Anisminic* (n 8) 209 (Lord Wilberforce).

[53] ibid.

[54] ibid 210 (Lord Wilberforce).

[55] Bell (n 50) 90.

[56] *Anisminic* (n 8) 174 (Lord Reid).

judgment appears to leave room for errors of law to be made within jurisdiction, with an emphasis on carefully navigating the statute to identify the deference intended to be left to the administrative tribunal by Parliament. The question remains of the significance of this retained area where errors of law might not open up the administrative tribunal to review. Despite the recognition of this retained notion of non-jurisdictional errors, it would appear as if the scope for such non-jurisdictional errors to be identified in practice is relatively slim. In order for this situation to occur, it would be necessary for the error of law perpetrated by the tribunal to be such that it did not impact or guide its decision. The error would need to be one not relating to the manner in which the tribunal reached their decision and would need to be ephemeral in its impact on the approach taken by the tribunal to deciding the case. Such a situation would appear unlikely, as it is likely that the interpretations of the relevant statutes by the tribunals would in most cases guide the decision-making process. Consequently, the retention of non-jurisdictional error cannot be seen to be particularly significant, as it merely occupies a residual area,[57] and as such would unlikely particularly impact the court's ability to circumvent ouster clauses where an error of law appears in the judgment of a tribunal.

A number of conclusions may be drawn from this understanding of the *Anisminic* decision. Firstly, there has been a significant shift away from the previous 'pure' theory of jurisdiction. Despite the residual retention of non-jurisdictional error, the scope for the court to find an error non-jurisdictional previously was much wider, displaying a significant divergence from the approach of the courts pre-*Anisminic*. Secondly, the fact that *Anisminic* has been hailed as 'eviscerating' the distinction between jurisdictional and non-jurisdictional errors,[58] while not entirely accurate, may be seen for practical purposes to hold truth. In order to fully expound the post-*Anisminic* approach towards the circumvention of ouster clauses, it will be necessary to consider *R (Page) v Lord President of the Privy Council*, which has been regarded as expressing the accepted interpretation of the approach laid out in *Anisminic*.[59]

[57] MacRae (n 26) 112.

[58] R Craig (n 18) 572.

[59] Rebecca Williams, 'When is an Error Not an Error? Reform of Jurisdictional Review of Error of Law and Fact' (2007) PL 793, 793.

In order to fully understand the post-*Anisminic* approach to the circumvention of ouster clauses as it has been implemented by the courts, it will be necessary to explore the *Page* judgment. This case concerned a lecturer whose employment was terminated with three months' notice on the grounds of redundancy. His employment was subject to the conditions of his employment letter and the university statutes, which stated under section 34(3) that no member of the teaching staff could be removed 'save for good cause.' The lecturer petitioned the visitor of the university for a declaration that such purported dismissal was contrary to section 34 so as to be ultra vires the university's powers and accordingly invalid. When the Lord President of the Privy Council, acting on behalf of the visitor, rejected the petition, the applicant sought JR of that decision. While this case did not concern an ouster clause, the court discussed the various approaches which would be taken in different circumstances, including administrative and visitor decisions. Two strands of reasoning may be identified within the *Page* judgment, one relating to the jurisdiction of visitors applying a form of domestic law, and the other relating to the jurisdiction of administrative tribunals to whom the general law of the land applies. It will be shown that the jurisdiction of visitors appears to emulate the narrow theory of jurisdiction apparent in the pre-*Anisminic* approach. Furthermore, it will be shown that the 'death knell' for the distinction between errors within and errors outside of jurisdiction was sounded by the court in this case.[60]

Firstly, the court discussed the position of visitors, who apply a form of domestic law which is separate from the common law applicable across the country, granting them an exclusive jurisdiction. Lord Griffiths recognised the long-standing line of authority stating that visitorial jurisdiction, being swift cheap and final, is exclusive,[61] making the visitor's decision final in all matters.[62] Lord Brown-Wilkinson expanded on this reasoning, stating that unlike administrative tribunals, the law to be applied by a visitor is a peculiar species of domestic law of which he is the sole arbiter, and of which the courts

[60] P Craig (n 25) 66/67.

[61] *Page* (n 22) 694 (Lord Griffiths).

[62] ibid 693 (Lord Griffiths).

have no cognisance.[63] The conclusion reached by the court was that no JR would lie where the visitor was within his jurisdiction in the narrow sense, in other words, where they had correctly entered into the area of inquiry.[64] This judgment appears to emulate the approach taken towards administrative tribunals prior to the decision in *Anisminic*, where review would only lie in the face of an ouster where the court exceeded its jurisdiction in the narrow sense, and the distinction between errors within and outside of jurisdiction could be readily identified. The rationale for retaining the distinction between errors within and outside of jurisdiction rested on the understanding that Parliament did not intend for the peculiar domestic law applicable to visitors to be interpreted consistently with the general law of the land. Rather, it intended for a small sub-category of cases to be created,[65] where the local visitorial law could develop asynchronously from the general law, justifying a more restrictive approach to judicial intervention than the one introduced in *Anisminic*.

It is interesting to compare the court's discussion of the visitor jurisdiction to the subsequent discussion of administrative tribunal jurisdiction. Lord Brown-Wilkinson stated that Parliament only conferred decision-making power to administrative bodies on the basis that it was exercised on the correct legal basis, and that any misdirection of law would render the decision ultra vires.[66] This statement appears to have narrowed the scope of the *Anisminic* judgment, removing the distinction between errors inside and those outside of jurisdiction for administrative bodies. Every error of law was viewed by Lord Brown-Wilkinson as going to jurisdiction. Quite contrary to the law applied by visitors, the law applied by administrative bodies *is* part of the general law of the land, where it is the courts that have the institutional competence to decide definitively the meaning of any given statute. It might be questioned why the court in *Page* decided to conclusively remove the distinction between errors of law within and those outside of jurisdiction for administrative bodies. Perhaps the residual area for errors within jurisdiction left by *Anisminic* was so small as to be negligible to the court in *Page*. If viewed in this

[63] ibid 702 (Lord Brown-Wilkinson).

[64] ibid 704 (Lord Brown-Wilkinson).

[65] R Craig (n 18) 577.

[66] ibid 701 (Lord Brown-Wilkinson)

way, the law has merely been clarified as opposed to undergoing any substantive change between *Anisminic* and *Page*. However, there is another way to view this shift. It is possible that the court in *Page* focused on the underlying understanding of the *Anisminic* judgment, that it is the constitutional role of the courts to provide the final interpretation of the law applicable to administrative tribunals, and simply applied this understanding in practice. Such an approach may be inferred from Lord Griffiths' judgment. The courts' role, he argued, is to ensure that public bodies carried out their duties in 'the way it was intended they should',[67] suggesting a level of finality in the interpretation of the statute favoured by the court. In this way, the court can be seen to forego the more subtle approach to each case which would include discovering the conferral of interpretative power in statute, as was Lord Wilberforce's approach in *Anisminic*.[68] Instead, the post-*Anisminic* approach towards circumventing ouster clauses became an exercise in identifying errors of law, recognising the excess of jurisdiction, and subsequently justifying the circumvention of an ouster clause on the basis of ultra vires. Therefore, while the post-*Anisminic* approach began as a nuanced and complex question of interpretative competence, this approach in its final form draws upon a much simpler standard. What became clear after the *Page* judgment's proverbial rubble had settled was that the post-*Anisminic* approach to circumventing ouster clauses had been clarified, and that the distinction between errors of law inside and outside of jurisdiction had been abolished.

Therefore, the *Anisminic* judgment, while forming the foundation of the post-*Anisminic* approach to circumventing ouster clauses, only provided the first step away from the 'pure' theory of jurisdiction. In opening the reasoning process of the courts from jurisdiction in a narrow sense to a wide sense, *Anisminic* certainly heralded a significant change. It shifted the interpretative role away from the administrative tribunals and firmly into the hands of the judiciary, reaffirming the separation of powers principle that an administrative body should not be able to set the limits of its own power. Directly after the *Anisminic* decision, most errors of law, perpetrated both in entering into the field of inquiry and

[67] ibid 693 (Lord Griffiths)

[68] *Anisminic* (n 8) 209 (Lord Wilberforce).

inside the field of inquiry, would go to the jurisdiction of the administrative tribunal. The courts would then be justified in proceeding with JR even in the face of an ouster clause, because such ouster clauses were only meant to be applicable to tribunal acting within their jurisdiction. However, the latest version of the post-*Anisminic* approach was not created until the decision in *Page*. The court in *Page* clarified the convoluted elements of *Anisminic*, for example which errors would remain inside the tribunal's jurisdiction, through formally abolishing the distinction between errors of law inside and outside of jurisdiction. Therefore, the post-*Anisminic* approach in its final form equates all errors of law to an excess of jurisdiction, providing grounds for the court to circumvent ouster clauses.

Ousting Judicial Decisions

Parliament's attempts to oust the jurisdiction of the courts are not restricted to the decisions of administrative bodies. Parliament has also enacted ouster clauses with relation to judicial bodies. The courts have sought to develop a separate approach from that taken following *Anisminic* in recognition of the different constitutional roles of administrative and judicial decision makers. There have been two distinct approaches adopted by the courts in respect of judicial decisions protected by ouster clauses, both of which focused on the notion of jurisdiction as delineating the boundaries of JR. The centrality of jurisdictional boundaries to the reasoning process of the courts displays the fact that all of the approaches are based on the same theoretical underpinning: ultra vires. Firstly, Lord Denning's approach in *Pearlman v Keepers and Governors of Harrow School*,[69] alongside the dissent by Geoffrey Lane LJ, will be considered. Lord Denning will be shown to adopt a similar approach to that adopted in *Page*, despite judicial bodies having the competency to conclusively interpret Parliamentary legislation whereas administrative bodies do not. Subsequently, this section will discuss the *Racal* approach, and the dismissal of Lord Denning's comments in *Pearlman*. While the *Racal* approach will be shown to clearly retain the traditional distinction between errors inside and those outside of jurisdiction, some inconsistency in the subsequent dicta of the courts will be highlighted.

[69] [1979] QB 56.

The *Pearlman* Approach

The *Pearlman* judgment set the stage for the first approach taken by the courts to ouster clauses affecting judicial decisions which will be discussed in this thesis. This case concerned section 1(4A) of the Leasehold Reform Act 1967, which stated that the decisions of the county court on a particular matter would be 'final and conclusive'.[70] A tenant held a long lease of a London house, where he installed a modern heating system. The tenant claimed that the rateable value of the house should have been adjusted under s1(4A), applying to the county court for such a determination. The county court judge found that the installation was not 'work of structural alteration', as was required by the statute for a determination to be made, and subsequently refused to make the declaration sought. Lord Denning, as part of the majority decision in the Court of Appeal, stated that JR will be available in the face of an ouster clause where the trial judge 'goes outside his jurisdiction'.[71] This would suggest a continued reliance on the notion of jurisdiction as fundamental to delineating the boundaries of JR. With this in mind, the question left for the court was what the boundaries of a judicial body's jurisdiction were. Lord Denning recognised that the distinction between an error of law within and outside of jurisdiction was 'very fine',[72] so fine in fact that a court had a choice whether to interfere as opposed to making a decision on any principled basis.[73] For Lord Denning, the understanding that the law should be 'decided in the same way' was sufficient to justify the disregarding of the distinction between errors in and outside of jurisdiction.[74] The idea that the law should be 'decided in the same way' suggests that there should be consistency in the interpretations of the law between the different levels of courts. In this way, an appellate court would be justified in imposing its legal interpretation on the decision of the lower court, in order to ensure conformity in the way the law is decided. Therefore, while Lord Denning did

[70] Leasehold Reform Act 1967, s1(4A) paragraph 2(2).

[71] *Pearlman* (n 69) 69 (Lord Denning).

[72] ibid.

[73] ibid 70 (Lord Denning).

[74] ibid.

recognise the merit in the claim that the trial judge, in inquiring into the meaning of the words 'structural alteration… or addition', made an inquiry within his jurisdiction, the understanding that the law should be applied consistently, and consequently that all errors of law should be open to review, usurped this claim.[75] As such, in finding that the trial judge erred in law when interpreting the term 'structural alteration', the majority found such an error to be outside the jurisdiction of the judge, justifying the circumvention of the ouster clause. While the main focus of Lord Denning's discussion of jurisdiction surrounds the idea of consistent application of law, this notion may be related back to the ultra vires theory. Lord Denning's dicta suggests that in enacting laws, Parliament intends for those laws to be interpreted correctly and consistently. As such, the courts will reach outside of its jurisdiction in making an error of law, rendering their decision ultra vires and opening it up to JR. Craig has argued that despite the test in *Pearlman* being the same as the test for administrative decisions post-*Anisminic*, where every error of law is equated to an excess of jurisdiction, the rationale for these approaches are distinct.[76] He argues that the administrative approach is firmly based on the separation of powers doctrine,[77] placing the final interpretation of law outside the hands of the administrative bodies. He reasons that Lord Denning's rationale, that the law must be decided in a consistent manner, is inherently distinct from the separation of powers rationale utilised post-*Anisminic*. However, it may be argued that Craig's position rests on too shallow a comparison between these approaches. It is possible to see that these rationales rest on a similar basis. The foundation of the post-*Anisminic* approach is Parliament's intention to not allow administrative decision makers to interpret the limits of their own power. The foundation of the *Pearlman* approach is arguably also based on Parliamentary intention. Lord Denning states that, 'when faced with the same point of law [the courts] should decide it in the same way',[78] suggesting that in enacting legislation, Parliament would expect that legislation to be applied consistently. From this, it is possible to infer that Lord Denning's understanding of the jurisdictional boundaries of the courts, and the need to interpret the law consistently, stems from an understanding of Parliament's will. As such,

[75] ibid.

[76] R Craig (n 18) 573.

[77] ibid.

[78] *Pearlman* (n 69) 70 (Lord Denning).

both the post-*Anisminic* approach and the *Pearlman* approach ultimately rest on the foundation of ultra vires and Parliamentary intention. Therefore, the *Pearlman* approach towards ouster clauses concerning judicial decisions mirrors the post-*Anisminic* approach. While it is true that the former's rationale is based on a consistent application of the law, and the latter's rationale is based on the separation of powers, both rationales are united in drawing from the foundation of Parliamentary intention. It must be noted that the majority in *Pearlman* was met with a powerful dissent from Geoffrey Lane LJ, which was later accepted in the House of Lords case of *Racal* and will be discussed in more detail in the subsequent section. Lane LJ strongly disagreed with the majority, stating that the constitutional position of the courts distinguished them from administrative tribunals, as the courts are responsible for interpreting the law. As they were given the capacity to interpret the law, they have the competence to inquire and decide matters of law without taking themselves outside of their jurisdiction.[79] In order to understand Lane's dicta in practice, it will be necessary to consider the second approach taken by the courts to circumvent ouster clauses relating to judicial decisions: the *Racal* approach.

The *Racal* Approach

The *Racal* approach will be shown to diverge from Lord Denning's conception of jurisdiction, through retaining the distinction between errors inside and outside of jurisdiction, in a similar manner to the 'pure' theory of jurisdiction. The *Racal* case concerned the Director of Public Prosecutions, who applied under section 441 of the Companies Act 1948 for an order authorising a police officer to inspect documents belonging to a company suspected of fraud. The order was not made, with the High Court judge interpreting the section as not applying to the instant case. Within section 441 of this Act, a clause stated that 'the decision of a judge of the High Court… on an application under this section shall not be appealable.' The question for the House of Lords was whether it had jurisdiction to reverse the High Court's decision in light of the ouster clause. Two main issues were discussed in this case, the first being the jurisdiction of the High Court and the second being the jurisdiction of inferior courts. The

[79] *Pearlman* (n 69) 75 (Geoffrey Lane LJ).

High Court was found to be a court of unlimited jurisdiction.[80] Where an ouster clause was present, there was no room to assume that Parliament did not intend for the high Court to be entitled to construe the words of the statute for itself.[81] The effect of this is that where the possibility of appeal has been ousted, there will be no room for JR even if the High Court perpetrate an error of law. In this way, the High Court has jurisdiction to make errors of law without the possibility of review where there is no provision for appeal. Following this understanding, the court found that the ouster clause present in *Racal* was effective in ousting the Court of Appeal and House of Lord's review jurisdiction of the High Court. While the jurisdiction of inferior courts was found to be more limited than that of the High Court, a shift in reasoning can be readily identified away from Lord Denning's approach in *Pearlman*. Lord Diplock, confirming Geoffrey Lane LJ's dissent in *Pearlman*, recognised that where ouster clauses existed, the 'subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not' has survived.[82] Lord Diplock reasoned that Parliament likely intended inferior courts to have jurisdiction to decide the meaning of the words used in the statute, and to define the question it has to decide with relation to interrelated questions of law, fact and degree.[83] This suggests a similar approach to that taken pre-*Anisminic*. So long as the court enters correctly into the relevant area of inquiry, securing its jurisdiction in the narrow sense, it will retain its jurisdiction even if it commits an error of law.

While Lord Diplock appeared to establish with certainty the distinction between the approach towards administrative and judicial decisions protected by ouster clauses, there appears to be some uncertainty in this approach.[84] In *O'Reilly*,[85] a House of Lords case decided two years after *Racal*, Lord Diplock commented on the approach to be taken towards ouster clauses of judicial decisions. He stated English public law had been 'liberated… from the fetters' of the distinction between errors inside and outside

[80] *Racal* (n 11) 384 (Lord Diplock).

[81] ibid.

[82] ibid 383 (Lord Diplock).

[83] ibid 383 (Lord Diplock).

[84] R Craig (n 18) 576.

[85] *O'Reilly and Others v Mackman and Others* [1983] 2 AC 237.

of jurisdiction so far as 'determinations of inferior courts and statutory tribunals were concerned.'[86] Interestingly, despite distinguishing judicial bodies from administrative ones in *Racal*, and establishing that the distinction between errors of law inside and outside of jurisdiction remained relevant for judicial decisions, Lord Diplock conflated these two different approaches in *O'Reilly*. He appears to suggest that, like the post-*Anisminic* approach, every error of law perpetrated by a judicial body will go to its jurisdiction and open it up to review. To state that there is a shared approach for both judicial and administrative bodies, despite a clear divide being drawn following the *Racal* judgment serves to mire the courts' reasoning processes in confusion. Lord Diplock's judgment appears to lack consistency with the previous ruling in *Racal*, with the consequence of obscuring the approach to be taken towards ouster clauses. Despite this hurdle, the decision in *Racal*, that judicial bodies may perpetrate errors of law within their jurisdiction, is regarded as authoritative.

The *Racal* judgment moves away from Lord Denning's understanding that every error of law will go to the jurisdiction of the court, and instead revives the distinction which was thought to be abolished in *Anisminic*. It is apparent that the court in *Racal* viewed the constitutional capacity of the courts to interpret legislation, whereas in *Pearlman*, this constitutional capacity was overshadowed by the perceived need for the law to be applied consistently. Both courts appear to rely on ultra vires and parliamentary intention as the basis for their understanding of the jurisdictional boundaries of the courts. This understanding, alongside the understanding that the post-*Anisminic* approach to ouster clauses rests on the ultra vires theory, identifies the ultra vires theory as the ultimate foundation of the courts' approach towards ouster clauses up until this stage in time. The ultra vires theory is utilised to inform the limits of a body's jurisdiction, which in turn delineates the boundaries of JR.

The courts' approach to circumventing ouster clauses pertaining to judicial decisions has varied and ultimately remained mired in uncertainty. Despite both appearing to subscribe to the ultra vires theory as the foundation of JR and the method of establishing the boundaries of a court's jurisdiction, the court

[86] ibid 278 (Lord Diplock).

in *Pearlman* adopted a significantly different approach to the question of jurisdiction than the court in *Racal*. Lord Diplock established that, so long as they retained their jurisdiction in the narrow sense, they had the competence to make errors of law within their jurisdiction. As such, when faced with ouster clauses, judicial decisions which exhibited an error of law would likely be immune from review. It is unfortunate that the clarity of this approach was undermined by Lord Diplock in *O'Reilly,* however the *Racal* judgment is to be taken as determinative of the jurisdictional approach towards ouster clauses relating to judicial decisions, due to the Lord Diplock's clarity in addressing jurisdictional boundaries in *Racal*.

The Diminishing Importance of 'Jurisdiction'

It has been established that the judgments up to *Racal* focused on developing an approach to ouster clauses which focused on 'jurisdiction' as the central feature of the reasoning process, for both administrative and judicial decisions. This section will consider the shift away from 'jurisdiction' as JR's defining feature, and the development of a more contextual, holistic approach towards adjudication within *Cart*[87] and *Privacy International*,[88] applicable to both judicial and administrative decisions. The courts will be shown to focus on an analysis of the competences of the relevant institutions, a consideration of Parliament's intention as exhibited in statute, and an evaluation of the requirements of the Rule of Law (RoL) in each particular case. An evaluation of the efficacy of this newly developed approach will be undertaken within the third chapter of this thesis.

The Progress Made in *Cart*

The *Cart* case significantly adjusted the way the courts approached JR, which until this point had been strongly focused on the notion of 'jurisdiction'. *Cart* concerned a claimant who was erroneously not

[87] *Cart* (n 12).

[88] *Privacy International* (n 13).

informed about his former wife's application for a variation of a maintenance assessment to the Child Support Agency. He was refused permission to appeal by the Upper Tribunal (UT) in respect of his complaint that the Secretary of State had failed to give notice of the variation application. The claimant subsequently sought review of this refusal, against which no appeal lay. The preliminary issue was whether the designation of the UT as a 'superior court of record' by s3(5) of the Tribunals, Courts and Enforcement Act 2007 meant that its decisions were not amenable to the supervisory jurisdiction of the High Court, and whether the decision which the claimant sought to challenge was amenable to JR. It will be useful to review both the Divisional Court and Court of Appeal's judgments, which favoured a continuation of the *Racal* line of reasoning, albeit with a heavier focus on the RoL before clarifying the alterations made to the approach by the Supreme Court.

Laws LJ led the majority in the Divisional Court,[89] emphasising the need for an impartial, authoritative judicial source of statutory interpretation in the form of the High Court or its alter ego.[90] In finding that the UT fulfilled this RoL requirement, the Divisional Court ruled that there was no right to JR for errors perpetrated within the UT's jurisdiction in the broad sense.[91] In other words, the fact that the UT was an impartial and authoritative judicial body meant that there would be no constitutional objection to their conferral of conclusive interpretative power. The conferral of such power to the UT does not undermine the efficacy of Parliament's statutes, as such a conferral on a purely administrative body, such as the FCC in *Anisminic*, would. This conclusion led the Division Court to group the UT within the 'judicial body' category, and subsequently apply the test for jurisdiction confirmed in *Racal*. So long as the UT entered correctly into the field of inquiry, it would not renounce its jurisdiction if it perpetrated an error of law.

Sedley LJ in the Court of Appeal came to much the same conclusion as Laws LJ in the Divisional Court. Sedley LJ stated that there is a 'true jurisprudential difference between an error of law made in the

[89] *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012.

[90] ibid [77] (Laws LJ).

[91] ibid [94] (Laws LJ).

course of an adjudication which a tribunal is authorised to conduct and the conducting of an adjudication without lawful authority'.[92] This recognition of the distinction between errors of law within and outside of jurisdiction confirms Laws LJ's dicta and affirms the *Racal* approach towards judicial decisions. Interestingly, both Sedley LJ in the Court of Appeal and Laws LJ in the Divisional Court framed their decisions from a RoL perspective, where the courts previously had framed the decision through the perspective of parliamentary intention. For example, in *Racal*, Lord Diplock referenced parliament's intention for lower courts to decide for themselves the interpretation of the relevant provisions.[93] This shift away from a direct focus on parliamentary intention and towards the broader focus on the RoL evidences the narrow nature of the traditional approach to ouster clauses. It would appear that Sedley LJ and Laws LJ did not view recourse to Parliamentary intention as sufficient in order to rest their decision as to whether JR should lie. Instead, recourse to the requirements of the RoL was necessary in order to obtain a broader analysis of the UT's role within the constitutional settlement. Despite this shift, the courts did not go so far as to reject the traditional jurisdiction-based approach towards JR, and ultimately found that under the *Racal* approach, the UT was able to make unreviewable errors of law within its jurisdiction.

Lord Dyson, in the Supreme Court, began by rejecting the notion that only jurisdictional errors should be reviewable in any case,[94] considering the narrowness of this approach and the failure to respond to the wider constitutional concerns which exist in each case.[95] The main problem identified with the *Racal* line of argument was that errors of law committed within the jurisdiction of the UT could be of general public importance but would not be open to review because of the 'non-jurisdictional' label. The court decided that, as opposed to simply viewing the jurisdictional/non-jurisdictional divide as conclusive, it would be necessary to interrogate the requirements of the RoL.[96] The relevant factors in the case would

[92] *R (Cart) v Upper Tribunal* [2011] QB 120, [36].

[93] *Racal* (n 11) 383 (Lord Diplock).

[94] *Cart* (n 12) [110] (Lord Dyson).

[95] ibid [122] (Lord Dyson).

[96] ibid [37] (Baroness Hale).

then be weighed to discern whether the RoL would be disproportionately affected if the decision were to escape review.[97] In *Cart*, it was found that it would be proportionate to allow only errors of law that were of general public importance to be judicially reviewable, leading to the adoption of the second-tier appeal criteria which allowed for a further check outside the tribunal system.[98] Robert Craig noted the move away from the traditional judicial review structure, stating that 'the binary question of whether the tribunal system was intended to comply with the general law is a question of Parliamentary intention, not judicial discretion.'[99] Where Craig frames the question of JR as a 'binary' choice between review and no review, he appears to place much emphasis on the apparent intention of Parliament in enacting a statute. Rather, the court recognised the wider concerns which arise when considering non-reviewable decisions, such as the fossilisation of bad law running contrary to the principles of the RoL.[100] Through understanding that the statute cannot be considered in isolation from the other factors pertaining to the case such as the significance of the error of law and the competence of the decision-maker, the court saw fit to adopt the more flexible approach which rejects a binary choice between options. This desire for flexibility coincides with the rejection of 'jurisdiction' as the basis for JR, in that this concept narrowed the inquiry of the courts down simply to the category of error perpetrated. The court's focus on the efficiency of the tribunal system as a reason to restrict review has led to commentators arguing that the courts have abandoned principle for 'raw pragmatism',[101] and that the courts focus is on balancing efficiency with RoL considerations.[102] However, the argument that, because the courts considered the efficiency and resource argument in *Cart*, their reasoning process rests on practicality as opposed to principle, may be quickly dismissed. The court did not simply shift its focus onto practical

[97] ibid [122] (Lord Dyson).

[98] ibid [56] (Baroness Hale).

[99] R Craig (n 18) 580.

[100] Joanna Bell, 'The Relationship Between Judicial Review and the Upper Tribunal: What Have the Courts Made of *Cart*?' (2018) PL 394, 398.

[101] Philip Murray, 'Process, Substance and History of Error of Law Review' in John Bell, Mark Elliot, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016), 108

[102] Boughey (n 15) 603.

arguments, but more broadly sought to give effect to the underlying legislative policies of the relevant statute.[103] The court, far from taking it upon itself to invent a new principle of efficiency by which to measure the availability of review, focused on unpacking the specific statutory framework,[104] taking a holistic view of the relevant factors to weigh alongside the requirements of the RoL. As such, in moving away from jurisdiction as the 'organising principle of administrative law',[105] the courts have opened themselves up to a more flexible and holistic approach to discerning the boundaries of JR.

However, the importance of *Cart* should not be overstated. While it certainly undermined the notion of jurisdiction as central to JR, and in doing so, altering the way such cases are to be perceived and addressed by the courts, that is not to say that it revolutionised the manner in which JR cases were approached by the courts on a practical level. Bell has noted that the courts have always viewed their primary task as unpacking the statutory framework and background of the case,[106] both prior to and post-*Cart.* This suggests that the significance of *Cart* lies not in its practical effect on the adjudication of day-to-day cases, but rather on the symbolic level, with the overarching judicial attitude towards the central features of JR shifting away from the notion of jurisdiction and towards a more holistic approach.[107] This progression established in *Cart* can be seen to survive in the seminal case of *Privacy International*, ultimately confirming this approach as applicable to ouster clauses.

Privacy International

The Supreme Court decision in *Privacy International* concerned the construction of s67(8) of the Regulation of Investigatory Powers Act 2000, which pertained to the powers of the Investigatory

[103] Bell (n 50) 88.

[104] ibid 98.

[105] Forsyth (n 9) [28].

[106] Bell (n 50) 98.

[107] While it is true that the government have proposed to remove the *Cart* reviews in the Judicial Review and Courts Bill 2021, this does not undermine the shift in judicial mindset towards a more holistic approach than was traditionally taken.

Powers Tribunal (IPT). This section provides that 'determinations, awards 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 by any court'. The appellants sought JR for a decision of the IPT, but both the High Court and Court of Appeal decided that s67(8) of the RIPA prohibited JR of that decision. The Supreme Court had to decide two questions: (i) whether s67(8) ousted the supervisory jurisdiction of the High Court to quash a judgment of the IPT for error of law, and (ii) in accordance with what principles Parliament might oust the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction.

Lord Carnwath, leading the majority, answered the first question in the negative. In recognising the IPT's overlap with legal issues which may be considered by ordinary courts, he considered the need to prevent what Leggatt J in the Divisional Court termed, 'legal islands',[108] from forming without scope for further review.[109] A legal island suggests an area of law outside the jurisdictional boundaries of the general courts such as the High Court. The issue with the IPT forming legal islands was that legal questions of general importance could not be considered by the higher courts, despite such questions residing within the framework of the general law of the land.[110] Consequently, Lord Carnwath stated that the exclusion present in s67(8) would only apply to decisions of jurisdiction involving issues of fact as opposed to issues of law.[111] In this way, the exclusion would not invoke the presumption against ousters, and would escape issues surrounding the formation of legal islands. It was recognised that Parliament's intention as to the interpretation of the statute was not conclusive as to the outcome of the case, and the failure of Parliament to make its intention sufficiently clear left it for the court to interpret the boundaries of review.[112]

[108] *R (on the Application of Privacy International) v Investigatory Powers Tribunal and Others* [2017] EWHC 114 (Admin) [49] (Leggatt J).

[109] *Privacy International* (n 13) [112] (Lord Carnwath).

[110] *Privacy International* (n 108) [49] (Leggatt J).

[111] *Privacy International* (n 13) [110] (Lord Carnwath).

[112] ibid [111] (Lord Carnwath).

The court's answer to the second question is useful in expounding its reasoning process behind its answer to the first and clarifying the approach to be taken towards ouster clauses. Lord Carnwath establishes that the scope of JR is not uniform, but is flexible and adapts to the context of each individual case.[113] The courts should consider the special status of the decision-making body,[114] the statutory context and inferred intention of the legislature,[115] the nature and importance of the legal issue and finally, the requirements of the RoL.[116] It would then be for the court to balance these factors, in order to establish what scope of JR is required to maintain the RoL[117], in line with the approach adopted in *Cart*. Therefore, the availability of review in the face of ouster clauses would vary according to the relevant factors existing in each case. Applying this understanding to the Supreme Court's answer to the first question, it is clear why it circumvented the ouster clause in the manner it did. They understood the RoL to require that legal islands, such as the one identified by Leggatt J in the Divisional Court,[118] did not form. In weighing this requirement of the RoL against the special status of the IPT, and accounting for the fact that the legal issue decided by the IPT was one of general public importance, the court found that, on balance, the RoL would be disproportionately affected if review was to be excluded completely. Interestingly, Lord Sumption's dissent rested on his diverging understanding of the requirements of the RoL. To Sumption, the RoL would be sufficiently vindicated by the judicial character of the tribunal,[119] and it did not matter that such a decision would open the possibility of local islands of law.[120]

[113] ibid [130] (Lord Carnwath).

[114] ibid [130] (Lord Carnwath).

[115] ibid.

[116] ibid [145] (Lord Carnwath).

[117] ibid [133] (Lord Carnwath).

[118] *Privacy International* (n 108) [49] (Leggatt J).

[119] *Privacy International* (n 13) [172] (Lord Sumption).

[120] Mark Elliott and Alison Young, '*Privacy International* in the Supreme Court: Jurisdiction, The Rule of Law and Parliamentary Sovereignty' [2019] CLJ 490, 494.

Both the majority and Sumption's dissent focus on the importance at framing the ouster clause from the perspective of the RoL.[121] Even though their understandings of the RoL diverged, this similar focus is important in evidencing the rejection of 'jurisdiction' as delineating the boundaries of JR. *Privacy International* appears to conclusively display the adoption of a new approach to considering ouster clauses, which does not rely on distinguishing between different types of errors of law, but rather takes a holistic understanding of the relevant factors of the case.[122] It might be argued that the approach taken by Carnwath emulates the decision in *Pearlman*, where all errors of law were reviewable despite the existence of an ouster clause, however an important difference should be noted. The jurisdictional approach taken in *Pearlman* meant that every error of law perpetrated by a judicial body was outside jurisdiction and as such open to JR, whatever the context. The approach in *Privacy International* is much more nuanced, only allowing JR in the instant case as a result of the particular factual context. Therefore, the difference lies in the reasoning process and level of analysis of the relevant factors in each case. The *Pearlman* approach simply labels every error of law as 'jurisdictional', whereas the *Privacy International* approach promotes a more holistic and in-depth analysis of the case. The *Privacy International* approach recognises and incorporates Parliamentary intention into the reasoning process, while also carefully considering the concerns relating to the RoL. The courts have gravitated towards discovering a proportionate compromise between the competing factors in each case,[123] developing a more holistic framework for JR than had previously existed. As such, the progressive approach taken by the majority in *Privacy International* rests on a careful proportionality analysis of the RoL, encouraging courts to move past the binary divide between errors within and outside of jurisdiction, and reach a conclusion based on a holistic analysis of the factors relevant to the case.

[121] ibid 493.

[122] Joanna Bell, 'Privacy International Symposium – Framing Questions About Ouster Clauses' (2018) https://adminlawblog.org/2018/11/30/joanna-bell-privacy-international-symposium-framing-questions-about-ouster-clauses/ (Accessed 07/12/2020).

[123] Mark Elliott and Robert Thomas, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 72 CLJ 297, 314.

A clear shift can be viewed in both the *Cart* and *Privacy International* cases away from the traditional forms of JR analysis, and towards a focus on the RoL as the central feature of JR discussions. In this way, the court has rejected the binary divide between judicial and administrative bodies, between errors inside and outside of jurisdiction, and has developed an all-encompassing approach which seeks to ensure the most complete analysis of the factors determining the availability of review.

Preliminary Conclusion

This chapter has sought to identify the various approaches taken by the courts when giving effect to the presumption against ouster clauses. The approaches may be broadly split into two distinct categories. The first category relies on the notion of 'jurisdiction' as the relevant focal point for delineating the boundaries of JR. The court in *Anisminic* found that an administrative tribunal acting outside of their 'jurisdiction' was committing an action contrary to the will of Parliament, consequently justifying JR despite the existence of an ouster clause. While the particular parameters of this approach were not entirely clear following the judgment in *Anisminic*, it was later confirmed in *Page* that any error of law perpetrated by an administrative tribunal would lead to an excess of jurisdiction. Therefore, the notion of jurisdiction was utilised in relation to administrative bodies by justifying review following any error of law. Furthermore, the approach towards circumventing judicial ouster clauses following *Pearlman* falls under this first category, in its reliance on the notion of 'jurisdiction'. Initially, the court in *Pearlman* adopted an approach almost identical to that favoured in *Anisminic*. Every error of law perpetrated by a court was to be regarded as an excess of jurisdiction, in light of the supposed need for the law to be applied consistently. The *Pearlman* approach was soon altered, in recognition of the court's constitutional capacity as interpreters of legislation. While some errors of law would render the decision ultra vires, there would be scope to make errors of law within their jurisdiction. In this way, different approaches were adopted for administrative and judicial bodies under this first category. The second category of approaches focuses not on jurisdiction as the central feature in circumventing ouster clauses, but rather on the RoL as a lens through which legislation may be interpreted. The court in both

Cart and *Privacy International* regarded the notion of jurisdiction as too restrictive a feature of review. Instead, they opted to view each element of the case through the lens of the RoL, to consider whether the strength of wording of the ouster clause was strong enough as to overcome the RoL concerns. Therefore, this chapter has clarified and categorised the approaches towards ouster clauses adopted by the courts since the seminal decision in *Anisminic*.

Chapter 2: Ultra Vires and Jurisdiction

Having explored and clarified the historical development of the courts' approach to statutory ouster clauses in Chapter 1, the next stage is to consider the appropriateness of each of these approaches with regard to their theoretical underpinnings and their practical application. All approaches discussed within this Chapter will be shown to be founded on the ultra vires theory and focus on the notion of 'jurisdiction' as circumscribing the boundaries of JR in the face of ouster clauses. The ultra vires theory suggests that JR is legitimated on the grounds that the 'courts are applying the intent of the legislature' and that the courts' function is to 'police the boundaries stipulated by Parliament.'[124] The courts have used the ultra vires theory to inform the scope of the 'jurisdiction' of administrative and judicial bodies,[125] and stated that any action which is outside of jurisdiction must be contrary to the will of Parliament.[126] Where action has been found to be outside of jurisdiction, the courts have considered themselves justified in circumventing ouster clauses. This Chapter will consider the post-*Anisminic* approach to ouster clauses regarding administrative decisions,[127] followed by the *Pearlman*[128] and *Racal*[129] approach to ouster

[124] P Craig (n 25) 65.

[125] *Anisminic* (n 8).

[126] ibid.

[127] ibid.

[128] *Pearlman* (n 69).

[129] *Racal* (n 11).

clauses regarding judicial decisions. Ultimately, each of these will be rejected as inappropriate due to theoretical and practical deficiencies, and a solution will be sought in the final Chapter.

Ouster Clauses and Administrative Decisions

Where ouster clauses have purported to oust the ability for the courts to judicially review administrative decisions, the courts have traditionally relied on the post-*Anisminic* approach to circumventing such clauses. Under this approach, the courts have found every error of law to be one 'going to jurisdiction' and as a result outside the scope of ouster clauses. The traditional ultra vires theory basis for this approach will be criticised for its indeterminacy, and the practical application of this approach will be criticised for its unduly formalistic and inflexible character. As such, the post-*Anisminic* approach towards circumventing ouster clauses will be rejected, and a number of solutions will be discussed.

As discussed in the first chapter, the post-*Anisminic* approach to ouster clauses for administrative decisions is as follows. Every error of law made within the decision-making process leads to an excess of jurisdiction.[130] The result of a decision-maker going outside of their jurisdiction is that they have acted outside of the field of operation entrusted to them by Parliament,[131] justifying the court's review of that decision as one that falls outside the scope of the ouster clause. While this approach is easily identifiable, it is important to consider the conceptual basis on which it rests in order to assess the appropriateness of this approach towards ouster clauses. Wade suggests that the ultra vires constitutes the 'essential underpinning for judicial review of administrative action'.[132] This statement would appear to correlate with the judicial attitude towards the post-*Anisminic* approach. Lord Wilberforce in the judgment of *Anisminic* stated that a tribunal's power is 'marked out and limited',[133] and that where a

[130] Williams (n 59) 793.

[131] *Anisminic* (n 8) 207 (Lord Wilberforce).

[132] MacLauchlan (n 27) 366.

[133] *Anisminic* (n 8) 207 (Lord Wilberforce).

court judicially reviews a decision vitiated by error of law to which an ouster clause applies, the court is simply 'carrying out the intention of the legislature.'[134] These statements imply that the Parliament's intentions are to be discerned from statute and define the boundaries of administrative power. Due to the fact that administrative decision makers are not in a position to interpret the boundaries of their own power, it is for the courts to do so by applying Parliament's intention. This focus on applying Parliament's intention fits squarely within the brackets of the ultra vires theory. Furthermore, in *Page*,[135] which discusses the application of the post-*Anisminic* approach, Lord Brown-Wilkinson states that a misdirection in law in making a decision renders that decision 'ultra vires',[136] evidencing the reliance on the ultra vires theory as the basis for this approach. Therefore, within this approach, the ultra vires theory informs the boundaries of 'jurisdiction', and whether a decision is made within or outside a body's 'jurisdiction' discerns whether JR will be available in the face of ouster clauses. While it has been shown how the notion of 'jurisdiction' has been invoked and how this notion is informed by ultra vires, it will be necessary to critically assess the validity of both the ultra vires theory as the foundation for this approach, as well as the practical application of this approach. In this way, it will be shown that the post-*Anisminic* approach towards circumventing ouster clauses is not appropriate and should be rejected by the courts.

It is possible to question traditional ultra vires' appropriateness as a theoretical basis for the post-*Anisminic* approach adopted by the courts. The main criticism levelled against the traditional ultra vires theory is its indeterminacy.[137] The traditional ultra vires theory can be used to justify a number of different theories of jurisdictional error, and as such fails to provide a meaningful basis for the courts' approach to JR.[138] Prior to the *Anisminic* case, the courts utilised ultra vires as the basis for a different model of JR, whereby only *some* as opposed to *all* errors of law made by administrative tribunals would

[134] ibid 208 (Lord Wilberforce).

[135] *Page* (n 22).

[136] ibid 701 (Lord Brown-Wilkinson).

[137] Allan (n 14) 430.

[138] P Craig (n 25) 67.

be considered a 'jurisdictional error'.[139] Previously, the courts suggested that it was Parliament's intention that administrative tribunals had some scope to make errors of law, however subsequent to *Anisminic*, the courts invoked Parliament's intention that administrative tribunals only make legally valid decisions. The indeterminacy of the traditional ultra vires theory is evident in that it has been used to justify two different standards of review, through the invocation of different intentions of Parliament. Where the courts under the ultra vires theory purport to defer authority to the higher power of Parliament, and as such take the exercise of setting the limits for JR out of the hands of the judiciary, they do so on what appears to be an illusory basis. While Brown-Wilkinson in *Page* attempts to justify this development in judicial reasoning by suggesting that *Anisminic* merely extended the doctrine of ultra vires, a more substantial change can be seen to have occurred. It would appear that the courts have *altered* their understanding of Parliamentary intention in order to accord with the decision reached in *Anisminic*, and no longer recognise the intention on the part of Parliament to allow administrative tribunals scope to make errors of law. Whether the previous or subsequent interpretation of Parliamentary intention was the more realistic one is unimportant. Rather, such alteration displays the indeterminacy of the ultra vires theory, suggesting that founding an approach to ouster clauses on this theory would be inappropriate. As stated by Laws LJ, the principles of the ultra vires theory are built on 'too much sand',[140] in that they are indeterminate and fail to provide proper direction to the courts, and as such must not form the basis of the courts' approach to ouster clauses. While this foundation itself is inappropriate, the post-*Anisminic* approach also presents practical issues where it leads the courts to applying standards of jurisdiction. Such issues include the overly formalistic character of this approach, as well as the failure to provide adequate justifications for the decision reached by the courts.

It is possible to find fault with the approach which equates every error of law to an error going to jurisdiction for administrative tribunals. It will be argued that such an approach is unduly formalistic[141]

[139] MacRae (n 26) 113.

[140] Sir John Laws, 'The Ghost in the Machine: Principle in Public Law' [1989] PL 27.

[141] MacLauchlan (n 27) 344.

and obscures important reasoning behind the label of 'jurisdiction'.[142] The courts have justified this approach with reference to Parliament's intention for the courts to have the ultimate interpretative jurisdiction, meaning that they are justified in imposing strict measures to guard against administrative errors of law in every context. Lord Wilberforce in *Anisminic*, for example, argued that the courts 'must ensure that the limits of that area which have been laid down are observed'.[143] Through observing their proper constitutional role as interpreters of legislation, MacRae recognises that there may be 'grey areas',[144] although ultimately suggests that the courts are justified in imposing jurisdictional boundaries informed by Parliamentary intention to guide their approach to the circumvention of ouster clauses. Contrary to MacRae's belief, these grey areas undermine the efficacy of the post-*Anisminic* approach to administrative decisions. Even though it is for the courts to police the boundaries set out by Parliament, an approach which focuses on jurisdictional boundaries, informed by the ultra vires theory, must ultimately be rejected due to the opaque nature of the reasoning process it prompts. The post-*Anisminic* approach purports to implement the boundaries delineated by Parliamentary intention. However, as Griffiths notes, the notion that the courts may divine parliament's intent from statutory language alone is a 'convenient fiction'.[145] Indeed, it is rather unlikely that the boundaries between those errors which render administrative decisions a nullity could be so easily discerned from statutory language. What the court appears to be doing instead is relying on their position as the ultimate interpreters of the law and attaching the conclusionary label of 'jurisdictional error' onto any decision which contains within it an error of law.[146] The difficulty in accepting the use of labels such as 'jurisdictional error' is that the true reasoning process is concealed. Where the courts should openly discuss the variety of contextual factors which relate to the matter at hand, and balance them to reach a conclusion as to the possibility for review, the courts simply refer to the 'jurisdictional error' as justification for their decision. This overly formalistic reliance on labels obscures the true reasoning

[142] John Griffiths, 'Jurisdictional Review of Errors of Law' (1980) 39 CLJ 232, 235.

[143] *Anisminic* (n 8) 208 (Lord Wilberforce).

[144] MacRae (n 26) 126.

[145] Griffiths (n 142) 235.

[146] MacLauchlan (n 27) 369/370.

process and undermines the ability for the individual factors of each case to be considered.[147] The test is so simple as to undermine the ability for conceptual clarification of the jurisdictional position of the tribunals.[148] Therefore, the inflexibility of the post-*Anisminic* approach prevents recourse to more evaluative decisions by the courts, and the obscurity of the reasoning process suggests that this approach is an inappropriate one.

A further criticism of the post-*Anisminic* approach is the difficulty of discerning whether a legal error has in fact compromised the decision of the administrative tribunal. In cases such as *Anisminic* and *Page*, the categorisation of an error made by the tribunal as one of law as opposed to fact would change the possibility of review.[149] Where the error is found to be one of law, review will be available, even in light of a ouster clause, however where the error is one of fact, this will be seen to be within the jurisdiction of the administrative body, and not open to review.[150] The difficulty which arises following the recognition of this distinction, is that there is no purely analytical method of distinguishing in practice between errors in interpreting the requirements of the law, and mere instances of applying the law incorrectly to the facts.[151] This presents a difficulty in applying the post-*Anisminic* approach, as the court might struggle to find a principled basis on which to discern which errors are purely legal and which errors relate to an intersection between fact and law, or pure fact.[152] The picture of this approach which we are left with is that, in cases where there is no principled or objective standard for discerning the type of error, the issue will be left to be resolved on the basis of emphasis of the reviewing court or judge entirely.[153] While an element of judicial discretion is certainly not novel within the application of law, the failure of an approach based on 'jurisdictional error' to provide a principled and clear basis from which decisions may be made is evidence for its lack of appropriateness as an approach to ouster

[147] Narain (n 51) 329.

[148] Allan (n 14) 442.

[149] Williams (n 59) 793.

[150] ibid 793.

[151] Allan (n 14) 444.

[152] Narain (n 51) 318.

[153] MacLauchlan (n 27) 371.

clauses. This approach, instead of providing a clear basis for determining the boundaries of review, reduces the basis of judicial review to the obscure and binary divide between which errors fit within the 'law' category, and which fall underneath the 'fact' category.

A collateral issue which arises is that the more pragmatic and contextual reasons for the decision to allow JR are supplanted with the shorthand of 'error of law', where in fact, a finding that the error was one of fact, or one that did not occur during the course of statutory interpretation, would be more accurate. While this issue has been discussed above, its reiteration in this instance is necessary to illustrate the inappropriateness of the post-*Anisminic* approach to circumventing ouster clauses in the administrative setting. Consequently, the post-*Anisminic* approach should be squarely rejected by the courts as failing to provide a transparent reasoning process or principled approach to determining which errors open up a tribunal to judicial review, even in the face of ouster clauses. Boughey has suggested an alternative to the post-*Anisminic* approach. She has argued for the implementation of the Australian system of administrative review into the UK. While her approach will be seen to achieve a higher level of transparency in reasoning than the post-*Anisminic* approach, it will ultimately be rejected for its reliance on the notion of 'jurisdiction' as guiding the ambit of JR.

The Australian Approach

The UK approach to judicial regulation of administrative decision-making has been shown to stem from the understanding that Parliament did not intend for such decision makers to have the capacity to make errors of law. The Australian approach does not involve such conclusionary judgments, but rather invokes the jurisdictional/non-jurisdictional divide in order to delineate the boundaries of review in the face of ouster clauses. Boughey explains that under the Australian approach, the reviewing court must examine the text of the empowering legislation in light of its context and the self-evident purposes of the empowering statute, and more specific rules of statutory construction.[154] The Australian court deems

[154] Boughey (n 15) 599.

Parliament to have intended whatever result the application of the established rules of construction produces.[155] In other words, the court uses statutory interpretation to discover Parliament's intention. Where it is found that Parliament's intention is for tribunals to be capable of making certain errors of law, those errors will be within their jurisdiction, and as such not open to review in the face of an ouster clause. Already, the Australian approach can be seen to lie on more stable foundations than the post-*Anisminic* approach. Where the Australian courts specifically focus on the boundaries, context and requirements of the relevant statue, the courts in post-*Anisminic* cases such as *Page* have been shown to approach Parliamentary intention in a narrower manner. For example, the court in *Page* stated that every error of law made by an administrative court could be quashed by the courts.[156] Parliamentary intention is not to be discerned from the specific circumstances of each case, but remains a broad concept in favour of continued judicial oversight over administrative decisions. Therefore, the context-driven approach of the Australian courts produces results based on the specific factors of each case. This differs from the post-*Anisminic* approach, which instead focuses simply on the existence of errors of law, lacking the more rigorous context-based analysis of Australian courts.

Allan is in favour of a more contextual approach than the one exhibited post-*Anisminic*.[157] He states that an approach which relies on formalism and rigid conclusionary labels, as the UK approach does, fails to properly distinguish different kinds of errors.[158] Only those, such as the Australian approach, which offer more detailed arguments relating to the context of the case, may provide a doctrinal distinction between jurisdictional and non-jurisdictional errors of law. If Allan and Boughey are correct, the Australian approach would be a much more attractive approach than the UK one, in that it provides the solution to the insufficient analytical framework surrounding the UK's formalistic approach towards errors of law. Supposedly, the boundaries for delineating JR could now be mapped out in a consistent manner through recourse to the principles of statutory interpretation. The question must therefore be

[155] *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at 591.

[156] *Page* (n 22) 702 (Lord Brown Wilkinson)

[157] Allan (n 14) 442.

[158] ibid 439.

posed: is the Australian approach towards the circumvention of ouster clauses an adequate and principled one? While Boughey might answer in the affirmative, the issues with this approach and the continued reliance on the notion of jurisdiction will be argued to undermine the effectiveness of the Australian model. The continued reliance on 'jurisdictional' boundaries under the Australian approach can be seen to be overly restrictive, failing to account for the possibility of more nuanced approaches towards the circumvention of ouster clauses. In setting a clear boundary between jurisdictional and non-jurisdictional errors, the Court restricts itself to two categories of error which determine the possibility of review. By labelling an error non-jurisdictional, the Court is essentially eliminating the possibility of JR where an ouster clause is in place. This will even be true where the legal error, though technically non-jurisdictional, is significant and could potentially become entrenched. The courts should not limit themselves to a set of labels which prevents the possibility of correcting serious errors of law, yet allows for the correcting of a largely insignificant error which has been deemed 'jurisdictional'. Therefore, the retention of this distinction restricts possibility for a more flexible and contextual approach to JR, leading to the capacity for significant errors of law to become entrenched within the judicial system.

Despite the limitations of the jurisdictional/non-jurisdictional divide, Boughey maintains that this distinction is necessary to uphold the of the constitutional settlement.[159] This distinction is said to be important in reiterating and confirming Parliament's power to set the limits of judicial and administrative decision-making. The distinction's importance is therefore said to lie in its confirmation of Parliamentary sovereignty. In this way, such a distinction serves the constitutional purpose of respecting the intention of Parliament and recognising Parliament's constitutional position as superior to that of the court.[160] It should be noted that the constitutional settlements of the UK and Australia do diverge somewhat. For example, Australia has a written constitution and a clear delineation between judicial functions and other governmental functions, and the Australian courts have the power to invalidate legislation that contravenes the constitution.[161] However, the common link between the two

[159] Boughey (n 15) 608.

[160] ibid.

[161] Kathleen Foley, 'Australian Judicial Review' (2007) 6 WUGSLR 281, 304.

settlements is the courts' subordinate position to Parliament. It is this facet of the constitution that Boughey suggests the distinction between jurisdictional and non-jurisdictional errors protects and reaffirms. Therefore, despite the differences between the settlements, Boughey's argument regarding the importance of this distinction is readily applicable for the purposes of this debate to the UK's constitution. Supposedly, removing these jurisdictional labels would rob the courts of the ability to display their adherence to the constitutional settlement, and undermine the sovereign nature of Parliament. It seems somewhat of a fallacious proposition to state that what stands between constitutional legitimacy and constitutional usurpation is a set of labels denoting the limits of judicial and administrative power. The approach as Boughey has explained it suggests that the label of 'jurisdictional' or 'non-jurisdictional' error is affixed *after* the process of statutory interpretation and decision whether to conduct review. Such a label therefore appears to be an ephemeral addition to the decision and does not guide or determine the ambit of review. If this is truly the case, then such labels are entirely unnecessary to confirm Parliament's power, as they add no substance to the actual reasoning undertaken by the court to reach its conclusion. Furthermore, the courts base their understanding of Parliamentary intention on the construction of the statute. So long as the court properly construes the statute along the accepted lines of statutory interpretation, it will have adhered to Parliament's intention, and the additional label of 'jurisdictional' or 'non-jurisdictional' error will be entirely unnecessary. As such, the Australian approach must also be rejected for incorporating the restrictive and unnecessary notion of 'jurisdiction'.

Having discussed the particular problems which encumber these approaches towards administrative ouster clauses, it will be useful to provide the foundational principles of an approach which is to be preferred. The main issue which is to be avoided is treating process of adjudication as a simple 'separation or demarcation of issues between administrators and the courts.'[162] Such an attitude leads to an approach with overly formalistic properties, where the complex and contextual nature of a decision is reduced to an arguably arbitrary categorisation of an error to determine the level of review. What will

[162] MacLauchlan (n 27) 382.

be argued for in Chapter 3 is a functional analysis,[163] similar to that of the Australian approach argued for by Boughey, but which rejects the 'jurisdictional' model, and instead openly considers and articulates the relevant factors behind judicial review.[164] Through such an approach, the issues such as transparency of decision-making, and the unprincipled basis for distinguishing between different kinds of errors will be mitigated, leading the courts to adopt an appropriate approach towards circumventing ouster clauses.

Ouster Clauses and Judicial Decisions

The *Pearlman* Approach

Lord Denning established an approach to circumventing ouster clauses of judicial decisions in the case of *Pearlman v Keepers and Governors of Harrow School.*[165] According to Lord Denning, 'no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends'.[166] This finding suggested that Parliament had not conferred the power to the courts to make errors of law, justifying the circumvention of ouster clauses in such a circumstance. Therefore, insofar as the post-*Anisminic* approach to administrative decision-making rested on the ultra vires theory and making all errors of law 'jurisdictional errors', Lord Denning supplanted that same test into the judicial context.

Lord Denning's approach to the circumvention of ouster clauses leaves much room for criticism and may quickly be rejected in favour of an alternative approach. Lord Denning's justification for this approach was that there should be continuity within the legal system.[167] Where an error of law is made, the danger is that this error will be replicated if not corrected. Therefore, an approach which widens the

[163] ibid 345.

[164] Williams (n 59) 799.

[165] *Pearlman* (n 69).

[166] ibid 70 (Lord Denning).

[167] ibid.

scope of JR to encompass all errors of law would ensure continuity within the legal system. However, the issue which this approach presents is that it excessively opens the ambit of JR,[168] to the point where the distinction between appeal and review is obscured. When considering the Court's review jurisdiction, it is important to note the constitutional responsibility of the court as ultimate arbiter of the law.[169] It is well recognised that courts have the institutional competence to interpret the law, meaning that so long as the judge does not inquire into questions or decided matters which they have no right to decide, even if they reach the wrong decision, they will have jurisdiction. In other words, simply making an error in law is not sufficient to take a judge outside of their legitimate role as an interpreter of statute. Herein lies the issue regarding the breakdown of the distinction between appeal and review when faced with the *Pearlman* approach. Appeals are strictly for considering the merits of the case, while reviews consider the legality of a decision.[170] Where appeals have been ousted by the courts but making errors of law is legally within the boundaries of judicial power, as ultimate interpreters of the law, there is no scope for JR to take place. Where Lord Denning suggested that JR is justified in these instances, it can be seen that the *Pearlman* approach would affect the integrity of the judicial review procedure by implementing a de facto appeal procedure, despite appeals being ousted, and despite there being no issues of legality on which a review could bite. Therefore, where the appellate function of the courts has been ousted, they should refrain from reviewing a decision in a way that deals with the merits of the particular decision and should instead accept the legality of judicial bodies making errors of law. The *Pearlman* approach is open to significant criticisms for its wide and seemingly boundless allowances for JR in the face of the institutional competences of the court. The rejection of this approach by the Court of Appeal in *Racal* is to be commended, however the *Racal* approach must also be opened to scrutiny.

[168] ibid 75 (Geoffrey Lane LJ).

[169] R Craig (n 18) 576.

[170] Griffiths (136) 233.

The *Racal* Approach

As with the *Pearlman* and post-*Anisminic* approaches to circumventing ouster clauses, the *Racal* approach focuses on the notion of 'jurisdiction' as delineating the boundaries of JR. Lord Diplock in *Racal* established that not all errors of law will lead to JR in the face of ouster clauses, as those errors may be made within the jurisdiction of the court. The court in *Racal* stated that where a judge considers the words that they ought to consider, and not embark on some unauthorised activity, they will have acted within their jurisdiction, even if they make an error of law.[171] The influence of the ultra vires theory is apparent in this approach, with Lord Diplock referencing Parliament's intention for inferior tribunals to have jurisdiction to decide for itself the meaning of ordinary words used in the statute.[172] While the *Racal* approach certainly provides a more understandable approach to ouster clauses than the *Pearlman* approach, in that it recognises the constitutional role of the courts as interpreters of legislation, it will nonetheless be found to be inadequate. It will be shown that the *Racal* approach suffers from the same theoretical flaws as the post-*Anisminic* approach with its reliance on the ultra vires theory. Furthermore, it will be shown that the formalistic concept of errors 'within' and 'outside' of jurisdiction must be replaced with a more functional approach if it is to be applied transparently and consistently across cases.

As with the post-*Anisminic* approach, the *Racal* approach is founded on weak theoretical underpinnings. It has been shown that the ultra vires theory was used to justify both the *Pearlman* and the *Racal* approach to ouster clauses. The problem which becomes clear is that this theory has been utilised to justify two disparate approaches, displaying the indeterminacy of the ultra vires theory as a basis for any approach taken by the courts. Where Lord Denning in *Pearlman* suggested that no court had been granted jurisdiction to make errors of law,[173] Lord Diplock finds, quite to the contrary, that the judicial interpretative role by its nature grants jurisdiction to make errors of law. While it does appear that

[171] *Pearlman (n 69)* 76 (Geoffrey Lane LJ).

[172] *Racal* (n 11) 383 (Lord Diplock).

[173] *Pearlman (n 69)* 70 (Lord Denning).

Denning's promotion of the *Pearlman* approach rested on a misconception of the interpretative role of the courts, as pointed out by Geoffrey Lane in his dissent,[174] the ultra vires theory has nonetheless been utilised to justify two opposing approaches. In this way, the conclusion reached above and argued by Paul Craig, that the ultra vires theory is too indeterminate and unclear to form the basis for any approach towards ouster clauses by the courts, is reinforced.[175] The fact that the *Racal* approach is founded on a weak and indeterminate theoretical basis already signals its inadequacy as the accepted approach towards ouster clauses. However, further criticism may be levelled against this approach's failure to provide transparency and consistency within its reasoning process. The continued reliance on the notion of 'jurisdiction' as the basis for determining the levels of JR which are justified will therefore be rejected.

Having criticised the ultra vires theory as the theoretical foundation for the *Racal* approach, the focus on the notion of 'jurisdiction' as the driving feature behind this approach will be shown to be inadequate and in need of replacement by a more contextual approach. Despite these mounting criticisms, there are those who support recourse to the notion of 'jurisdiction', and suggest that it can function as a principled method of delineating the boundaries of JR. For example, Robert Craig argues that in invoking the language of 'jurisdictional' and 'non-jurisdictional' errors, clear boundaries are mapped out as to the scope for JR.[176] Craig suggests that without such clear boundaries, the basis for JR would be obscured, and the ability for the courts to properly identify the limits of review would suffer. However, Craig's confidence in the efficacy and clarity of the terms 'jurisdictional' and 'non-jurisdictional' in circumscribing the limits of judicial power will be argued to be unfounded, with these terms leaving space for more confusion than they cure. The fatal flaw of this approach is the formalistic nature of the distinction between the terms 'jurisdictional' and 'non-jurisdictional'.[177] In many cases, the decision as to whether an error goes to the jurisdiction of the judge will not be made on an objective basis,[178] as the

[174] *Pearlman (n 69)* 75 (Geoffrey Lane LJ).

[175] P Craig (n 25) 66.

[176] R Craig (n 18) 579.

[177] Allan (n 14) 440/441.

[178] MacLauchlan (n 27) 370.

courts have given only vague suggestions as to how to distinguish a jurisdictional error from a non-jurisdictional one. The difficulty lies in identifying a workable test, 'preferably along strict analytic lines',[179] as to which errors of law are within a judge's jurisdiction and which ones are not. Were such a test available, providing a principled manner in which to make this crucial distinction, then the courts would be able to apply these distinctions on a consistent basis.

However, under the *Racal* approach, the courts are only given the direction that where a judge '[inquired] into and [decided] a matter which he had no right to consider',[180] or embarked on 'some unauthorised or extraneous or irrelevant exercise',[181] will their decision be outside of their jurisdiction. This test essentially establishes that judges are not permitted to venture outside of the corners of their power and must decide only those questions which they have power to decide. While such a test seems simple at first glance, an unfortunate level of circularity is involved when interrogating this approach further. A judge is only allowed to inquire into matters which they have the right to consider. Which matters does a judge have the right to consider? According to Lord Diplock in *Racal*, the interpretative ambit of a judge's power extends to the ability to 'define the question which it has to decide'.[182] Therefore, a level of circularity is introduced, where the limits of judicial power appear to be circumscribed by the very judges to whom the limits apply. Clearly there is an inconsistency in suggesting that judges can define the question which they have to decide, yet they will be acting outside of their jurisdiction if they ask the wrong question. Griffiths has also noted this inconsistency, recognising that the whole issue of how to determine which questions the decision-maker has jurisdiction to inquire into is woefully neglected within the case law.[183] While there might be cases where a decision-maker is clearly acting without jurisdiction and inquiring into questions wholly removed from their area of inquiry, the failure of the *Racal* approach lies in the dearth of principled

[179] ibid 368.

[180] *Pearlman* (n 69) 75 (Geoffrey Lane LJ).

[181] ibid 76 (Geoffrey Lane LJ).

[182] *Racal* (n 11) 383 (Lord Diplock).

[183] Griffiths (n 142) 235.

guidance as to how to resolve borderline cases. The fact that the distinction between jurisdictional and non-jurisdictional errors is so difficult to apply in practice robs it of its efficacy and calls for a more principled approach to allow consistent application by the courts.[184]

Not only is this distinction esoteric and 'based on foundations of sand',[185] but it also fails to take account of the practical effects of such a decision. Both non-jurisdictional and jurisdictional errors alike affect the victim of the error equally.[186] If the courts insist on relying on jurisdiction as the foundational feature of JR, then they should develop a clear and analytically precise test in order to ensure that the victim of an error of law is only affected in a defined set of circumstances. Otherwise, the courts may fail to properly evaluate whether the error is 'jurisdictional', and subsequently subject the victim of the error to unnecessary and unwarranted hardship. Where the categorisation of the issue can have such a profound effect on the outcome of the decision, and it has been shown that the categorisation of an error is no simple or principled task, it would appear illogical to rely on this distinction as circumscribing the limits of JR. Therefore, it is the difficulty in evaluating a principled and clear test for the distinction between jurisdictional and non-jurisdictional errors, and the subsequent profound effect that this distinction has on the outcomes of cases which leads to the rejection of the *Racal* approach as appropriate for delineating the boundaries of JR. This analysis suggests that neither a focus on the ultra vires theory, nor the reliance on the formal divide between jurisdictional and non-jurisdictional errors provides an adequate foundation for the courts' approach to the circumvention of ouster clauses. In every instance, such approaches have been undermined by their weak theoretical underpinnings, and their failure to develop tests along clear analytical lines which delineate the boundaries of JR.

This chapter has so far considered the approaches based on 'jurisdiction' for both administrative and judicial bodies. In every case, the approaches have been found to lack transparency and clarity in their reasoning process. The reliance on the notion of 'jurisdiction' as delineating the boundaries of JR has

[184] ibid.

[185] *Privacy International* (n 13) [84] (Lord Carnwath).

[186] *Cart* (n 12) [110] (Lord Dyson).

been argued to be formalistic and restrictive, and moving forward, it is clear that a model which is not based on the ultra vires theory and does not rely on the distinction between jurisdictional and non-jurisdictional errors must prevail. Before discussing the application of this novel approach in the subsequent chapter, one further issue will be discussed which will help illustrate the fallacy of applying different approaches to the circumvention of ouster clauses based on whether the body is administrative or judicial in nature.

Special Tribunals

Having criticised the reliance on the ultra vires theory and the notion of jurisdiction as the foundation of JR, a further criticism of the courts' approach is the distinction made between judicial and administrative bodies. While it is clear that different constitutional considerations apply to each type of body, the fact that one test applies to administrative bodies, and another to judicial bodies gives rise to an important issue. Where a tribunal contains both administrative and judicial elements, such as the Upper Tribunal, the courts under the *Racal* and post-*Anisminic* approach would have to identify which test to apply. With no middle ground, and no ability to tailor the test to the particular tribunal, courts are left with an ill-fitting test which fails to properly account for the individual characteristics of the tribunal. An example of the confusion caused by these binary and restrictive tests may be seen in *Cart*.

In *Cart*, the Divisional Court and Court of Appeal suggested that the Upper Tribunal was capable of making errors of law inside their jurisdiction, but in some cases would make errors that took them outside of their jurisdiction. Lady Hale criticised this decision, stating that this 'would lead us back to the distinction between jurisdictional and other errors which was effectively abandoned after the *Anisminic* case'.[187] However, it appears that Lady Hale is conflating the approaches taken towards administrative and judicial decisions. If the jurisdictional boundaries of the Upper Tribunal were to be tested under the 'administrative', post-*Anisminic* test, where every error of law is equated to an excess

[187] *Cart* (n 12) [39] (Lady Hale).

of jurisdiction, then Lady Hale's criticism would hold weight. This is because the Divisional Court and Court of Appeal would have left scope for errors to occur within the jurisdiction of the Upper Tribunal, despite the post-*Anisminic* approach requiring every error to go to the jurisdiction of the court. However, simply because the Upper Tribunal embodies administrative elements does not justify the testing of its limits under the post-*Anisminic* administrative approach. Special tribunals may embody judicial characteristics, such as being conferred the ability to define statutory provisions for themselves in the same way as inferior courts.[188] Where these tribunals exercise judicial functions, then it is apparent that similar standards should apply to them as inferior courts.[189] Therefore, the Divisional Court and Court of Appeal in *Cart* were not bringing back the distinction between jurisdictional and non-jurisdictional errors as Lady Hale suggested, but were rather applying the *Racal* test to the Upper Tribunal, in recognition of its judicial function. Therefore, Lady Hale appeared to assume that the Upper Tribunal, with its administrative elements, was being tested against the post-*Anisminic* test, whereas the previous courts thought it prudent to test it under the *Racal* approach. The question of whether the Upper Tribunal had more of a judicial or administrative capacity is beside the point. Instead of attempting to fit special tribunals into a pre-defined test, when to do so would be to ignore its unique characteristics, the courts should dispense with the rigid and inflexible tests as they apply to administrative and judicial bodies separately. Instead, it will be necessary to expand on an approach which may be applied to both administrative and judicial bodies alike. In this way, all of the characteristics and contexts surrounding special tribunals and different bodies may be accounted for, instead of arbitrarily applying one test over another.

Preliminary Conclusion

Cart has seen the move away from the formalistic and analytically deficient approaches to the circumvention of ouster clauses, and thankfully so. Previously, the courts adopted different tests for administrative tribunals

[188] Griffiths (n 142) 236.

[189] Narain (n 51) 316.

and judicial bodies, even if this obscured the basis for review of special tribunals containing both administrative and judicial characteristics. For administrative tribunals under the post-*Anisminic* approach, the conclusionary labels and overly simplified process of discerning the boundaries of a tribunal's jurisdiction required a move towards a more transparent and contextual approach to determining the boundaries of review. While the Australian approach proved to be more effective in having a more transparent and analytically sound process of determining the boundaries of review, the reliance on the jurisdictional, non-jurisdictional distinction was restrictive and unnecessary. The subsequent chapter will elaborate on an approach which dispenses with the notion of 'jurisdiction' and in its place supplants a contextual analysis of the statute and surrounding constitutional context. Furthermore, having rejected both the *Pearlman* and *Racal* approaches, again criticising the reliance on the notion of jurisdiction as delineating the boundaries of review, an all-encompassing model will be considered in the following chapter.

Chapter 3: The Modified Ultra Vires Theory

Introduction

This thesis has thus far established the chronology of the courts' methods of circumventing ouster clauses, identifying the traditional approaches based on the ultra vires theory and the subsequent approaches which embody a more contextual and holistic analysis of each case. The preceding chapter considered the traditional approaches, definitively arguing for the rejection of the ultra vires theory as a theoretical foundation of ouster clause circumvention and for the unsuitability of the notion of jurisdiction as delineating the boundaries of JR.

This chapter will argue for two distinct propositions. The first proposition is that the modified ultra vires theory, as distinct from the ultra vires theory, is the appropriate theoretical basis from which to approach questions of ouster clauses and the limits of JR. The modified ultra vires theory relies on the

notion that the wording of the statute is not the only relevant source of legislative intent,[190] and recognises the presumed intention of the legislature to legislate in accordance with the RoL.[191] This theory will be argued to justify the courts' recourse to the RoL as the lens through which to identify Parliamentary will and the boundaries of JR. The modified ultra vires theory will be defended against the criticisms of the common law theorists, and placed within the context of ouster clauses, in order to evidence its efficacy and appropriateness as a foundational basis for the courts' approach to circumventing ouster clauses. It should be noted that there is some debate as to how 'legislative intention' should be conceptualised and defined.[192] While this thesis will not seek to comment in any substantial detail on this debate, it will be useful to briefly outline the stance to be taken in the subsequent chapter. As Ekins has suggested, legislative intent can be conceived in 'multiple different ways.'[193] The legislature will be shown to have both a 'primary or particular' intention, as evinced in statute, and a 'secondary' intention, which includes the intention to act reasonably along constitutionally appropriate boundaries.[194] The recognition of both forms of intention will be necessary for the functioning of the modified ultra vires theory.

The second proposition to be argued for is that the decisions in *Cart* and *Privacy International* are justifiable when read through the lens of the modified ultra vires theory. The defence of these cases will respond to criticisms that the decisions were made on an unconstitutional and unprincipled basis.[195] Through identifying the modified ultra vires theory as underlying the more recent approaches of the courts towards circumventing ouster clauses, and displaying why such an approach is justifiable, it will

[190] Mark Elliott, 'The Ultra Views Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 CLJ 129, 130/131.

[191] Forsyth (n 16) 135.

[192] See Vera Sacks, 'Towards Discovering Parliamentary Intent' (1982) LR 143, Richard Ekins, 'The Intention of Parliament' (2010) PL 709, Jeffrey Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33 OJLS 821, and Richard Ekins, 'Intentions and Reflections: *The Nature of Legislative Intent* Revisited' (2019) 64 AJJ 139.

[193] Richard Ekins, 'Intentions and Reflections: *The Nature of Legislative Intent* Revisited' (2019) 64 AJJ 139.

[194] Richard Ekins, *The Nature of Legislative Intent* (OUP 2012), 58.

[195] Murray (n 101) 108.

be shown that the courts have finally reached a constitutionally appropriate approach towards ouster clauses.

Modified Ultra Vires and Ouster Clauses

The following section will introduce the modified ultra vires theory as a basis for interpreting ouster clauses through the lens of the RoL. It will explore the criticisms raised by common law theorists towards the modified ultra vires theory, such as the supposed 'divination' of Parliamentary intention,[196] and the apparent fallacy of presumed Parliamentary intention.[197] Such criticisms will be rebutted in order to promote the modified ultra vires theory as a constitutionally appropriate basis for the courts' approach to the circumvention of ouster clauses.

The ultra vires theory states that it is the courts' role to discern Parliament's intention as to the limits of administrative power and to enforce those limits.[198] This theory embodies a narrow understanding of the role of the courts, relegating their responsibility to the interpretation and implementation of Parliament's will, leaving little room for independent or creative decision-making. The modified ultra vires theory on the other hand suggests that the reality of JR proceedings involves both the influence of legislative intention as well as judicial input, in a co-operative endeavour.[199] The modified ultra vires theory suggests that, because Parliament is presumed to intend its conferrals of power to be exercised consistently with the RoL,[200] Parliament has essentially given an 'imprimatur' to the judges to interpret

[196] Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000), 338.

[197] Sir John Laws, 'Illegality: The Problem of Jurisdiction' in M. Supperstone and J Goudie (eds), *Judicial Review* (London: Butterworths 1997, 2nd edn), 4.17.

[198] P Craig (n 25) 65.

[199] Elliott (n 189) 130/131.

[200] See Thomas Adams, 'Ultra Vires Revisited' [2018] PL 31, 33 and *Privacy International (n 13)* [123].

the law through the lens of the RoL.[201] Under this theory, the courts are not deferring their decision to the supposed intention of Parliament. Rather, they are recognising Parliament's specific intention in any particular case and weighing it against the understanding that Parliament also intends for the RoL to be upheld in the decision-making process. This may also be described as the courts recognising and balancing the competing intentions of Parliament, specific and general, in any given case. While Allan suggests that the constitutional principles such as the RoL 'transcend, and therefore qualify' more transient legislative purposes within individual cases,[202] the modified ultra vires theory may instead be seen more neutrally as recognising the different forms of Parliamentary intention present in each case. This understanding of the RoL therefore recognises and incorporates both forms of intention, general and specific, into the judicial reasoning process, acting as a counterpart to any explicit legislative intention which is displayed. It must be made clear that presumed Parliamentary intention is not to be favoured arbitrarily over the specific intention displayed by Parliament. Rather, the courts are in a position to impartially consider whether the threat posed to the RoL in any particular case is severe enough to proportionally outweigh the intention expressed by Parliament. In other words, they must consider whether the specific intentions of Parliament are expressed clearly enough to dismiss the general intention to legislate in accordance with the RoL. What emerges from the modified ultra vires theory is a process whereby the courts respect and balance the apparent intentions of Parliament, while taking on an active role in determining the limits required by the RoL.

The common law theory provides an alternative to, and a critique of, the modified ultra vires theory. The common law theory suggests that administrative law embodies a series of principles which are 'founded in common law'.[203] Within this theory, parliamentary intention occupies only a residual role in determining the action of the courts. Common law theorists would suggest that recourse to parliamentary intention is not required in order to justify the actions of the courts in JR proceedings, and that a focus on intention would not reflect the reality of the decision-making process. Quite apart

[201] Forsyth (n 16) 135.

[202] Allan (n 14) 124.

[203] Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] PL 543.

from the modified ultra vires theory's focus on balancing the express and implied intentions of Parliament, the common law theory states that the controls which the courts choose to impose in JR proceedings are purely judicial creations and are normatively justified due to the constitutional importance of principles such as the RoL.[204]

The first criticism levelled by common law theorists against the modified ultra vires theory regards the assertion that Parliament intends administrative power to be conferred within the boundaries of the RoL. Forsyth, expounding his interpretation of the modified ultra vires theory, states that 'what an all-powerful Parliament does not prohibit, it must authorise either expressly or impliedly… there is no grey area'.[205] Forsyth argues that Parliament, when conferring power to administrative bodies, must be taken to either permit that body to act outside its powers and the RoL, or intend for that power to be exercised within the boundaries of the RoL. Forsyth suggests that there is no middle ground. On this interpretation, Parliament could not reasonably be taken to permit administrative bodies to act contrary to the RoL, and as such must impliedly intend for them to act within its boundaries. The modified ultra vires theory operates based on this assumed intention. However, Laws LJ suggested a flaw in this reasoning, and promoted the common law theory as the appropriate theoretical foundation of JR. He stated that 'the absence of legislative prohibition does not entail the existence of a legislative permission', and that there is in fact an 'undistributed middle' where Parliament may have no intention as to how the powers conferred should be carried out.[206] Contrary to Forsyth, who suggests that Parliament *must* either prohibit or authorise bodies to breach the RoL, Laws suggests that all authorities and prohibitions need not originate from Parliament.[207] Rather, under Laws' conception, Parliament is taken to legislate without intending the RoL to be upheld, leaving the role of deciding which constitutionally required boundaries are to be implemented entirely in the gift of the courts. If this position is accepted, then the

[204] P Craig (n 17) 429.

[205] Forsyth (n 16) 133.

[206] Laws (n 197) 4.17.

[207] Sir John Laws, 'An Extract From: Illegality: The Problem of Jurisdiction' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000), 78.

recourse to Parliamentary intention as a justification for JR under the modified ultra vires theory would simply be a fiction employed by the courts to implicitly legitimate the decision they have made.[208] The reference to Parliament's intention in this situation would be inappropriate and misleading. It would be the courts that had developed the administrative principles independently of Parliament, and yet 'intention' would be used as a 'fig leaf' to cover the true origins of these principles.[209]

However, it is suggested that to accept Laws' argument with regard to an undistributed middle would be 'manifestly absurd'.[210] In order to accept Laws' proposition, one would have to accept that Parliament is entirely ambivalent as to whether the RoL is upheld when creating and conferring governmental power. As Lord Steyn remarked in *ex parte Pierson*, 'Parliament does not legislate in a vacuum'.[211] It would be incongruous for Parliament to confer powers which it did not impliedly intend to be exercised within the boundaries of the RoL. For this reason, it is appropriate to reject Laws' claim regarding the existence of an undistributed middle. The notion that Parliament is unconcerned about the use of government power does not accord with the reality of the legislative process, and as such cannot form a convincing criticism of the modified ultra vires theory's recourse to implied Parliamentary intention. Therefore, legislative intention is not merely a fig leaf with which to cover the true judicial decision-making process. Legislative intention does not serve as a convenient façade of legitimacy as Laws and Craig have suggested, and is not 'manufactured'.[212] Rather, the existence of Parliamentary intention supporting the RoL is a relevant and justified consideration in JR proceedings. The modified ultra vires theory therefore provides a more realistic picture of the relationship between

[208] P Craig (n 25) 79.

[209] Sir John Laws, 'Law and Democracy' [1995] PL 72, 79.

[210] Mark Elliott, 'Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-Operative Endeavour' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000), 355.

[211] *R v Home Secretary, ex p Pierson* [1997] 3 WLR 492, 587.

[212] Paul Craig, 'Competing Models of Judicial Review' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000), 384.

Parliament and the courts in JR proceedings than the common law theory, respecting both the independent contributions of the court as well as recognising the realistic intentions of Parliament.

A further criticism of the modified ultra vires theory, which appears to be based on a misunderstanding, is promoted by Jowell. He suggests that where the courts decide questions based on an assessment of how the legislature would have decided the matter, this is an act of 'divination' and an 'abdication of judicial responsibility.'[213] Jowell appears to believe that in recognising implied legislative intent, the courts are undertaking the impossible task of divining Parliament's specific intention as it pertains to individual cases. If this were the way the courts approached JR cases under the modified ultra vires theory, then it would be justified to suggest they were obscuring the true reasoning process under the guise of Parliamentary intention. However, to suppose that the court attempts to 'divine' how Parliament would decide each case is to promote a misunderstanding of the modified ultra vires theory. The purpose of intention under this theory simply serves to direct the courts' attention. For example, the implied intention of Parliament for governmental power to be carried out consistently with the RoL does not determine the court's decision in any case, but rather directs the court towards a point of inquiry. The court's role is to independently determine the boundaries of governmental power, but to do so consistently with parliamentary intention. Therefore, while the implied intention to legislate in conformity with the RoL guides the court to consider the RoL implications of use of governmental power, it is the court itself that independently analyses and assesses the requirements of constitutional principle. It would be a misunderstanding of the courts' role under the modified ultra vires theory to label this process as legislative divination. For this reason, Jowell's criticism that the court abdicates its duty when acting under the principles of the modified ultra vires theory is unfounded, in misunderstanding the effect of Parliamentary intention on the decision-making process of the courts.

Paul Craig raises a final point of contention with regard to the modified ultra vires theory as the theoretical foundation for JR. He accuses this theory of being somewhat deceptive in its reference to

[213] Jowell (n 196) 338.

Parliamentary intention. He states that reference to such intention appears to legitimate the decisions as being in line with the will of Parliament. Yet, he argues, even though Parliament could choose to intervene and overturn a development with which it disapproved, it is not realistic to imagine that it would actually do so.[214] Craig argues that, because Parliament is unlikely to actually act or respond directly to the decisions of the courts, the reference to intention is empty and 'self-referential',[215] and as such an inappropriate basis for JR. Two responses may be made to this criticism. The first regards an inconsistency in Craig's own reasoning, and the second addresses the issue of intention being empty. Firstly, Craig's reasoning in his 1988 piece, from which the above criticism is made, appears to be inconsistent with his later work and his defence of the common law theory. In 2000, Craig argued that the common law theory is legitimate because if, in the course of making independent decisions on a normative basis, Parliament disagreed with the decision of the courts, then it would be free to simply enact a statute to the contrary.[216] His very argument for why the modified ultra vires theory is inadequate is used to justify and promote the common law theory in a later piece of work. While this incongruent account of Parliament's willingness to amend a court's decision would appear to undermine Craig's earlier criticism of the modified ultra vires theory, it must be questioned whether the reference to legislative intent is, in fact, empty. It is suggested that this theory is not empty, as it does not refer to a specific intention to which Parliament might object in any particular case. Rather, as discussed above, the relevant intention is a general one, relating to the granting of administrative power in conjunction with the principles of the RoL. This general Parliamentary intention points the courts towards the RoL as the standard which the factors of the case should be measured against. It is then in the purview of the courts to consider how the RoL should be interpreted, and how it should be applied to the factors of the case at hand. The intention is not used by the courts to implicitly legitimate their decisions, as Craig has suggested is a cause for concern.[217] It is the court's constitutional competence in evaluating the requirements of principles such as the RoL, and the general intention of Parliament for the RoL to be

[214] P Craig (n 25) 79.

[215] R Craig (n 18) 577.

[216] ibid 383.

[217] P Craig (n 25) 79.

complied with, which grant it legitimacy.[218] The courts do not purport to impute an intention on Parliament as to how a particular case should be decided, and as such they do not impute an intention to which Parliament would be likely to object. For this reason, reference to intention is not empty. As such, Craig's criticism of the modified ultra vires theory is based on a misconception of the type of intention invoked by the courts, and, as with Jowell's criticism, fails to find any true fault in the modified ultra vires theory as a theoretical basis for JR.

The criticisms levelled by Craig, Laws LJ and Jowell against the modified ultra vires theory have been refuted. In doing so, it has been shown that the modified ultra vires theory does not promote empty reliance on Parliamentary intention and does not attempt in vain to defer to the decision Parliament would make in any particular case. As such, it will be possible to move forward to consider both the common law theory and modified ultra vires theory in the context of ouster clauses, in order to show that the modified ultra vires theory is not only conceptually sound in the general context of JR, but also in the specific context of ouster clauses.

The Modified Ultra Vires Theory in Practice

Having defended the modified ultra vires theory on a conceptual level, this section will consider two questions. Firstly, it will be asked whether the common law theory or the modified ultra vires theory provide a more justified and appropriate foundation for the courts' judicial review functions in the specific context of ouster clauses. The common law theory will be criticised for its failure to respect parliamentary intention and the modified ultra vires theory will be revealed as the only theory which allows for ouster clause circumvention while upholding the supreme nature of Parliament. Secondly, this section will expound a general process for courts assessing the boundaries of ouster clauses, describing the essential components of the RoL, the factors relevant to the courts' discussion, and the shift away from the previous, formalist approach adopted under the previous 'jurisdictional' test.

[218] Forsyth (n 16) 135.

In order to conclusively reject the common law theory as an appropriate basis for the courts' approach to circumventing ouster clauses, Laws LJ's arguments will be addressed and rebutted. When enacting an ouster clause, Parliament is displaying the intention for the body in question to act without the threat of judicial intervention. Where the courts circumvent this apparent intention, they must do so without being seen to undermine the will of Parliament. It is necessary for a theoretical foundation of JR to provide this legitimate circumvention, and Laws argues that this is possible through the common law theory. Laws bases his common law theory argument on the principle of legality, which gained judicial recognition in *Simms,*[219] and states that 'fundamental rights cannot be overridden by general or ambiguous words.'[220] He took the fact that 'Parliament can only abrogate the Rule of Law by an express measure to that effect',[221] and argued that it will be open to the courts to find the language of the ouster clause too vague to allow for their review jurisdiction to be ousted. This line of argument circumvents any direct challenge to parliamentary sovereignty through interpreting away the natural reading of the ouster clause. In this way, the courts are able to protect their role as reviewers of administrative decisions while also maintaining the natural constitutional order. For example, it is possible to consider the *Privacy International* ouster clause wording in light of Laws' argument. In *Privacy International*, the ouster stated that the courts were not to review any decisions of the IPT, 'including decisions as to whether they have jurisdiction'.[222] A common law theorist would have to argue that this phrasing is not sufficiently clear to dislodge the presumption against ouster clauses arising from *Anisminic*, and that the ouster would not apply as a result. Such a theorist might argue that Parliament, in enacting this ouster clause, could have used the term 'purported decision', to address the particular language used in *Anisminic*, and anything short of this warrants a strictly narrow interpretation by the courts.

[219] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 11

[220] ibid 131 (Lord Hoffman).

[221] Laws (n 197) 4.26.

[222] Regulation of Investigatory Powers Act 2000, s67(8).

However, in this instance, it is suggested that the common law theorists are guilty of the very shortcomings on which they criticise advocates of the modified ultra vires theory. To follow the argument as explained above would be to disregard the reality of the situation and embrace a convenient fiction. While it might be true that Parliament in any case *could* be clearer about its intentions, it must be questioned whether this alone is sufficient to stand in the face of clear Parliamentary intention. Such a question must be answered in the negative. If a court were to interpret ouster clauses simply through relying on its normative position as arbiter of constitutional principle, without recourse to Parliament's intention, it would purport to place its common law authority above the authority of Parliament. In other words, the court would seek to uphold the RoL as an end in and of itself, without sufficient regard to the weight of Parliamentary intention in the matter. To do so would be to challenge the accepted constitutional order and threaten the notion that the courts work within a framework of parliamentary sovereignty. The common law theory does this because it refuses to recognise the possibility of presumed legislative intent and as a result deprives the court of 'any adequate interpretative machinery' which could be employed to legitimately circumvent an ouster clause.[223]

Interestingly, the common law theory appears to rely on the principle of legality as a normative force with which it may justify a strictly construed reading of legislation, through rejecting the notion that Parliamentary intention plays a role in the circumvention of ouster clauses. The idea that the principle of legality is underpinned by a normative force is not only accepted by common law theorists, but also appears to be hinted at by Lord Hoffmann in *Simms*. Lord Hoffmann states that, despite the lack of express limitations on the power of Parliament in the UK, the principles of constitutionality applied are 'little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.'[224] This suggests a normative force behind principles such as the principle of legality, which have a similar effect to an express limitation on the power of governments in other jurisdictions. However, it has been suggested that the constitutionally justifiable circumvention

[223] Elliott (n 210) 363.

[224] *Simms* (n 219) 131 (Lord Hoffmann).

of ouster clauses cannot rest on normative justifications alone, as this would fail to respect Parliamentary intention in any give case. As such, if the principle of legality and modified ultra vires theory are to be accepted, interpretative as opposed to normative justifications must be identified. Philip Sales has argued that the courts should view the principle of legality as a version of partnership with Parliament, with a view towards identifying legislative meaning.[225] The courts are not in a position to ignore the intentions of Parliament. Rather, it is the role of the courts interpret, with a 'level of principled constraint',[226] the legislation in light of the 'rights… [and] values… of the United Kingdom's constitutional tradition'.[227] This *interpretative* as opposed to *normative* restriction placed on Parliament by the principle of legality is therefore founded on the presumption that Parliament intends to legislate with respect to the aforementioned rights and values of the UK's constitution. As such, this principle is founded not on a normative basis but rather on the understanding of presumed Parliamentary intention. When considered in this light, the principle of legality works in much the same way as the modified ultra vires theory, which relies on presumed Parliamentary intention to interpret legislation in line with constitutional values such as the RoL. Therefore, the principle of legality cannot be relied upon by common law theorists as a normative force with which to justify the circumvention of ouster clauses. Both the principle of legality and the modified ultra vires theory can be seen to derive their legitimacy from recognising the Parliament's general intention to legislate consistently from the RoL.

It would not be prudent for the courts to simply ignore Parliamentary intention, so they must find a way to interpret legislative provisions from a starting point which does not seek to undermine Parliamentary sovereignty.[228] It is argued that, where the common law theory fails in this regard for its pitting of the common law against legislative intent, the modified ultra vires theory succeeds. The modified ultra vires theory allows the role of the courts to be placed within its proper constitutional setting in order to

[225] Philip Sales, 'Partnership and Challenge: The Courts' Role in Managing the Integration of Rights and Democracy' (2016) PL 456, 465.

[226] ibid 465.

[227] ibid 465.

[228] Elliott (n 210) 362.

accommodate both a respect for Parliamentary sovereignty as well as the responsibility of the courts to uphold the RoL. It has been shown previously that Parliament may be taken to have both a specific intention, in the form of an ouster clause, and the general intention for the powers conferred by that statute to be exercised within the limits of the RoL. As such, contrasting interpretations of Parliamentary intent are possible,[229] in what Adams has labelled a form of 'legislative schizophrenia'.[230] It is possible for the courts to utilise the presumed intention of parliament to confer power within the bounds of the RoL as the starting point for their analysis. In this way, where it interprets away the ouster clause through what may be considered a strained analysis, it has done so to respect Parliament's intention for the RoL to be upheld, and on an understanding of the principle of legality which is based on presumed Parliamentary intention as opposed to a merely normative foundation. This is in contrast to the common law theory, which upholds the RoL as an end in and of itself. It has been argued that this end (upholding the RoL) in itself does not provide a sufficiently convincing reason for usurping Parliamentary intention as evinced within the ouster clause. The difference with the modified ultra vires theory is that upholding the RoL is not framed as an end in and of itself, but rather a means to the end of respecting the presumed intention of Parliament. The focus on the RoL as a determining factor in whether to uphold an ouster clause is therefore legitimated by the fact that the courts are not challenging parliamentary sovereignty, but rather weighing the disparate intentions evinced by Parliament and reaching a balanced conclusion. The presumed intention of Parliament married with the normative force behind the RoL provides adequate and legitimate interpretative machinery with which the courts may challenge the efficacy of ouster clauses. It is this distinction which stands the modified ultra vires theory out as constitutionally appropriate where the common law theory fails to properly respect Parliamentary sovereignty.

Unless one were to challenge the constitutional order, arguing that foundational principles of the constitution such as the RoL could form a substantive limitation on the ability for Parliament to freely legislate, the recognition of some underlying presumption of legislative intent is 'inescapable' if the

[229] Nicholas Bamforth, 'Ultra Vires and Institutional Interdependence' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000), 118.

[230] Adams (n 200) 38.

courts are to legitimately circumvent ouster clauses.[231] While this underlying presumption does allow for ousters to be circumvented, this will not be the result in every case. The modified ultra vires theory does allow room for ouster clauses to operate as intended, and only provides grounds for circumvention where the factors of the case weigh proportionally on the side of the RoL as opposed to the intention to oust the courts' jurisdiction. Elliott has noted that where Parliament makes a sufficiently clear provision within the right set of circumstances, the operation of the principles of good administration can be excluded.[232] While it is impossible to say with certainty the exact conditions which would need to be met for these principles to be excluded, case law has shown that clear statements of legislative intent can override the RoL factors considered by the judges. For example, in *R (Evans) v Attorney General*,[233] Lord Hughes was convinced by the strength of the wording of s53(2) of the… He found that, because of the clarity of the wording, extra conditions should not be inferred into the provision, in spite of the RoL implications that accompanied that finding.[234] Despite the fact that Lord Hughes was in the minority in this case, his judgment is consistent with the modified ultra vires theory, showing that there is room for the RoL concerns to be overridden by sufficiently clear statutory language. There is no reason why, in the instance of unequivocal statutory language in future cases, the modified ultra vires theory would prevent such provisions from taking effect as intended by Parliament. In this way, there are no substantive restraints placed on Parliament's ability to legislate, only the procedural restraint of the need for clear language proportional to the level of threat to the RoL. The greater the challenge to the RoL, the clearer language necessary for an ouster clause to be enforced in full. The modified ultra vires theory is resultingly found to be the most legitimate and justified basis for the courts' approach to ouster clauses.

[231] TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61 CLJ 87, 105.

[232] Elliott (n 210) 349.

[233] [2015] AC 1787.

[234] ibid 1850 (Lord Hughes).

An important question to address is why the distinction between the common law theory and modified ultra vires theory is actually relevant. There is no substantive difference in the approaches taken by the courts under each of these theories, which might suggest that the debate about which should lie as the theoretical foundation of ouster clause litigation is redundant in its detachment from practical reality. However, the expounding of the modified ultra vires theory is vital in its ability to justify those decisions which appear on the surface to present an overt challenge to the sovereignty of Parliament. It is necessary to analyse a theory such as the common law theory in order to recognise how one might criticise the decisions and approach of the court. Having raised and addressed those concerns, a discussion of the modified ultra vires theory evidences the possibility of challenges to ouster clauses being made in a constitutionally appropriate manner. It is this theoretical understanding which is necessary in order to provide a basis for the actions of the courts in cases such as *Privacy International*, as will be discussed later in this chapter. Therefore, it is the recognition and addressing of the constitutional concerns raised when considering ouster clause litigation which renders the differences between the common law theory and modified ultra vires theory so important, even if such differences are not visible on the practical level.

Where the modified ultra vires theory has been defended, it will be useful to discuss the general approach to be taken by the courts under the modified ultra vires theory towards ouster clause litigation. This section will consider how the contextual approach differs from the formalist approach traditionally undertaken by the courts. It will also identify the relevant RoL definition as well as the factors to be taken into account by the courts when deciding the efficacy of an ouster clause. Firstly, the modified ultra vires theory relies on the presumed intention of Parliament to confer powers in accordance with the RoL.[235] It is through this presumption that the courts are justified in considering and weighing RoL

[235] This presumption has been identified in cases such as *Pierson* (n 204), where Lord Steyn recognised that 'Parliament does not legislate in a vacuum' (587), but rather with respect to constitutional principles such as the Rule of Law. It has also been identified by academics such as David Feldman, who has stated that 'Parliament is presumed not to intend to legislate inconsistently… with individuals' rights and freedoms', in his article 'Statutory Interpretation and Constitutional Legislation' (2014) LQR 2.

considerations against the explicit intention of Parliament evidenced in ouster clauses. However, it is necessary to define some boundaries around the notion of the RoL in order to establish the appropriate area within which the courts may adjudicate.

Critics such as Jowell have, contentiously argued that the RoL contains a substantive element which acts as a constraint on the content of the law itself.[236] While recognising a substantive component to the RoL would give the courts considerable power over their ability to circumvent ouster clauses, the existence of any substantive restraints on legislative powers are highly contestable. As such, it would not be prudent to suggest that the conception of the RoL under the modified ultra vires theory contained a substantive element, as doing so could give rise to questions of the constitutional legitimacy of the courts' decisions. Fortunately, it will be shown that to function properly, the modified ultra vires theory only requires the RoL to contain a formal element, which does not seek to pass judgment on the content of the law itself.[237] Raz has suggested a number of formal components to the RoL, with access to the courts and an independent judiciary being two components relevant to the discussion of ouster clauses.[238] For example, where an ouster clause threatens to leave adjudication in the hands of an administrative body, this would threaten access to justice through an independent judiciary, weighing in favour of a strict and narrow interpretation of the ouster clause. In this way, the courts only need rely on the formal element of the RoL under the modified ultra vires theory in order to satisfactorily approach ouster clause cases.

Having specified the defining features of the RoL under the modified ultra vires theory, it is necessary to briefly consider the factors relevant to a court under the modified ultra vires theory model. Previously, under the traditional approaches focused on 'jurisdiction', the courts would look for particular elements

[236] Jeffrey Jowell, 'The Rule of Law Today', in Jowell and Oliver (eds), *The Changing Constitution* (3rd ed, 1994), 71-77.

[237] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467, 467.

[238] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195 at 196.

in a case, for example an error of law by the body in question. The courts would isolate and determine the outcome of the case based on the existence of such elements, maintaining an arguably narrow and inflexible approach to ouster clause litigation. However, the approach under the modified ultra vires theory differs from the traditional approach in its greater flexibility and holistic analysis of the factors pertaining to each case. Under this approach, the court will apply what Jason Varuhas terms the 'augmented variant [of the principle of legality]',[239] whereby the courts introduce a proportionality dimension to the adjudication process. The courts will construe the ouster clauses with varying degrees of strictness based on the level of threat posed to the maintenance of the RoL. In order to consider the threat to the maintenance of the RoL, the courts are to consider factors such as the respective institutional competencies of the court and those of the body protected by the ouster clause, and the importance of the point of law in question. These factors will be weighed by the court against the strength and purpose of the ouster clause. Where the threat to the RoL is particularly acute, the court will be justified in a stricter reading of the statute, limiting the effectiveness of the ouster clause in order to protect the RoL, and by extension protect Parliament's implied intention for the RoL to be upheld. It is useful to consider the standard enunciated by Lord Dyson in *Cart.* Dyson stated that 'the scope of JR should be no more (as well as no less) than is proportionate and necessary for the maintaining of the RoL.'[240] This suggests that overly strict readings of statute are not warranted or justified where such strictness is unnecessary to protect the formal principles within the RoL. The modified ultra vires theory approach can therefore be seen as weighing the RoL considerations within a case against the statutory wording and purpose and interpreting the statute in a stricter sense proportionally to the level of threat posed to the RoL by the statute.

Interestingly, this approach can be analogised closely to the approach taken by the Canadian courts. The Canadian approach considers factors such as the expertise of the decision-maker, the presence of ouster clauses and the nature of the issue in question, whether it be one of fact or law.[241] The Canadian

[239] Jason Varuhas, 'The Principle of Legality' (2020) 79 CLJ 578.

[240] *Cart* (n 12) [122] (Lord Dyson).

[241] Boughey (n 15) 601.

approach, much like the modified ultra vires theory, considers the cases in a holistic and contextual fashion, rejecting the formalistic model embodied by the courts under *Anisminic* and *Racal*. In the subsequent section, this new approach will be identified in the context of *Cart* and *Privacy International* and shown to produce constitutionally appropriate decisions by the courts.

Case Law and the Modified Ultra Vires Theory

It will be useful to consider two cases in light of the modified ultra vires theory in order to show how their decisions are justifiable and within the constitutional remit of the courts. Firstly, *Cart* will be considered. It will be shown how the decision-making process aligns with the contextual and holistic nature of the modified ultra vires theory, and how the subsequent decisions can be justified in light of the RoL implications arising from the case. Similarly, the decision in *Privacy International* will be reconciled with the modified ultra vires theory, and the differences between judgments of the majority and minority will be shown to result not from a difference in opinion of the requirements of the RoL, but a difference in the balancing exercise undertaken. The conclusion will be reached that, in each case, the court arrived at a decision that they were entitled to make and did not act in a manner which threatened Parliament's sovereign position in the constitution.

Cart

While the court in *Cart* did not have to consider the functioning of an ouster clause, it was still necessary to consider whether the designation of the Upper Tribunal (UT) as a 'superior court of record' was sufficient to oust the jurisdiction of the courts. The court found that review was only justified if independent scrutiny outside the tribunal structure was required by the RoL,[242] moving away from the traditional approach embodied in *Racal*. A number of objections have been raised against both the

[242] *Cart* (n 12) [51] (Lady Hale).

approach taken by the court and the decision reached. It will be shown that the court's approach can be reconciled with the modified ultra vires theory and that all the considerations taken into account were legitimate. Finally, the resultant decision will be defended on the basis that it achieved balance between the requirements of the RoL and the context of the statutory scheme which introduced the UT.

It will be useful to clarify the approach of the court in *Cart*, before considering the criticisms and concerns raised with regard to this approach. Lord Philips framed the role of the court as a balancing exercise between the requirements of the RoL and the competency and efficiency considerations of the tribunal system.[243] Instead of focusing on the types of legal errors perpetrated, as had been the approach in previous cases, the court sought to identify and balance the factors in favour of JR and factors pointing towards ousting the court's jurisdiction. With regard to the former, the court focused on RoL considerations, placing value in ensuring 'scrutiny of decision making by an independent judicial body in order to ensure compliance with the law'.[244] With regard to the latter, the court considered the expertise and institutional competence of the UT, while also recognising the need to maintain the 'finality and speed' of the Administrative Court system.[245] This departure from the traditional approach to JR and acceptance of a more holistic approach has raised questions from Murray as to whether the court embraced 'raw pragmatism' in an unjustified eschewal of doctrine.[246] Furthermore, Boughey notes the 'significant shift' away from the way JR was previously conceptualised,[247] and suggests that the court prioritised a functional approach over the considerations of what Parliament provided within the relevant statute.[248] The sentiment is conveyed that the courts are unjustifiably focusing on the esoteric notion of efficiency, focusing on pragmatism, instead of fulfilling their constitutional responsibility to implement and respect the will of Parliament. Were such criticisms to bear truth, it would be possible to consider the decisions made by the court under such an approach as

[243] *Cart* (n 12) [89] (Lord Phillips).

[244] Bell (n 50) 83.

[245] ibid 83.

[246] Murray (n 101) 108.

[247] Boughey (n 15) 603.

[248] ibid 606.

constitutionally inappropriate, for subverting the important considerations of Parliamentary intention in order to promote the common law considerations of efficiency. However, such criticisms may be readily addressed when considering the court's approach through the lens of the modified ultra vires theory. The modified ultra vires theory approach requires the courts to consider the two facets of Parliamentary intent. This includes the presumed intention to confer power in line with the RoL, and the specific intentions evidenced in statute. The court in *Cart* did not simply embrace raw pragmatism, as Murray has suggested, but carefully unpacked the specific intention of Parliament to weigh against the RoL considerations. The considerations of administrative efficiency which the court found in favour of restricting review should not be viewed as judicial creations, but rather as the result of extracting the 'core legal policy underlying the Tribunals, Courts and Enforcement Act (TCEA)'.[249] The court found that Parliament introduced the UT and the tribunal system under it as a means of streamlining the administrative processes, intending for this new structure to increase administrative efficiency. Therefore, the focus on efficiency as a relevant consideration to the extent of JR is likely premised on the court's desire to respect Parliament's underlying intention behind enacting the TCEA. Resultingly, Lady Hale is justified in her assertion that the scope of JR is a 'matter of principle, not discretion',[250] as the court may be viewed as premising all of its considerations on the explicit or implied intentions of Parliament. When viewed in this light, it is difficult to fault the approach taken by the court in *Cart*. The Court's approach closely aligns with the requirements of the modified ultra vires theory, with the court's considerations identifying and weighing the requisite intentions displayed by Parliament. Interestingly, Elliott notes, with apparent approval, the court's recognition of proportionate dispute resolution in its invocation of efficiency and resource arguments.[251] This notion of proportionate dispute resolution neatly identifies the approach taken by the courts under the modified ultra vires theory, where the courts must consider the proportionality of restricting JR in the face of RoL concerns. Indeed, the court in *Cart* recognise this shift to a proportionality focus. Lord Dyson states that the scope of JR should be 'no more (as well as no less) than is proportionate and necessary for the maintaining of the

[249] Bell (n 50) 85.

[250] *Cart* (n 12) [33] (Lady Hale).

[251] Elliott (n 123) 314-315.

RoL.'[252] It is this consideration of relevant factors in order to find the proportionate outcome which lies at the centre of the modified ultra vires theory, respecting the competing forms of legislative intention at play. As such, the approach taken by the court in *Cart* is justifiable in its focus on balancing the relevant considerations to Parliamentary intention.

Having discussed the justifications behind the approach of the court in *Cart*, it will now be necessary to consider the decision to adopt the second-tier appeals criteria within the context of the modified ultra vires theory. It will be shown that the court did not unjustifiably overstep its decision-making remit, as Robert Craig has argued,[253] but rather fulfilled the proportionality exercise necessitated by the modified ultra vires theory, reaching a constitutionally appropriate decision. The court decided to utilise the second-appeal criteria, where permission is only granted if there is an element of general public interest.[254] The use of these criteria in the particular context of *Cart* appears to be a judicial creation, with no specific statutory guidance as to the process of JR of the UT. This approach also diverges significantly from the traditional approaches taken by the courts, where the court would make the binary decision whether JR was available or not without attaching conditions. Craig observes this divergence and criticises the court in *Cart* for its 'unwarranted judicial legislation'.[255] This criticism implies that the court stepped outside its adjudicative remit, purporting to usurp Parliament's legislative function by implementing its own standards of review, separate to those intended by Parliament. He states that the court failed to properly address the 'binary question' of whether or not the tribunal system was intended to comply with the general law. This question, he argues, is simply a matter of 'Parliamentary intention, not judicial discretion'.[256] If Craig's argument is to be accepted, the court's role in *Cart* was to decide whether the UT's decision was open to JR or not with no scope left to introduce judicially imposed conditions on the possibility of JR. Contrary to Craig's position, there is nothing to suggest that the

[252] *Cart* (n 12) [122] (Lord Dyson).

[253] R Craig (n 18) 580.

[254] *Cart* (n 12) [130] (Lord Dyson).

[255] R Craig (n 18) 580.

[256] ibid 580.

court was to perform a passive role, simply choosing between two possible outcomes. Instead, it is arguable that when considered through the modified ultra vires theory, the imposition of the second appeal criteria was perfectly within the remit of judicial power. Craig's argument appears to exist with the traditional, jurisdictional model of review in mind, which did not leave the courts much room to make a judgment outside whether an error of law perpetrated went to the body in question's jurisdiction. However, the court in *Cart* adopted a more 'evaluative approach',[257] considering the competing intentions of Parliament and reaching a proportionate compromise. As discussed previously, the court weighed the RoL considerations, including the possibility of the fossilisation of bad law and respective competencies of the court and the UT,[258] with the need to maintain administrative efficiency. In reaching the decision to adopt the second appeals criteria, the court struck a balance which would safeguard against embedding of significant errors of law within the system, while simultaneously 'ensuring that in most cases, the UT's decision would be final.'[259] It is apparent that the court reached a proportionate compromise, ensuring to set the scope of JR at no more, as well as no less than was necessary to maintain the RoL.[260] Considered through a modified ultra vires theory lens, the court had to properly balance the competing intentions of Parliament at play. It did so through respecting the implied intention of Parliament that the RoL was to be upheld, while also interrogating the statute in order to respect the purposes behind it. Not only does this evidence the constitutional appropriateness of the decision of the court, in adhering to Parliamentary intention, but also undermines Craig's argument that the decision captures the 'worst of both worlds.'[261] Craig suggested that the adoption of the second appeals criteria obscured the clear boundaries mapped within the jurisdictional approach to JR.[262] Firstly, it is arguable that the jurisdictional approach never set clear boundaries. As argued previously,[263] the jurisdictional approach failed to provide a clear test as to which errors fall inside and

[257] *Privacy International* (n 13) [84] (Lord Carnwath).

[258] Bell (n 100) 398.

[259] Bell (n 50) 83.

[260] *Cart* (n 12) [122] (Lord Dyson).

[261] R Craig (n 18) 579.

[262] ibid 579.

[263] Chapter 2, 'The *Racal* Approach'.

which fall outside of a court or tribunal's jurisdiction. Secondly, Craig's concern that the court in *Cart* obscured the scope of JR and captured the worst elements of the jurisdictional and full approaches to JR may be quickly dismissed. In addressing each relevant factor explicitly in its judgment, the court is able to clearly and transparently justify their decision by drawing on the explicit intention of Parliament and the requirements set by the RoL. It has been shown that the second appeals criteria work to balance the competing requirements of Parliamentary intention, reaching a proportionate compromise which promotes a flexible yet clear set of standards for the availability of JR.

Therefore, the evaluative approach undertaken by the court in *Cart* embodies legitimacy and constitutional appropriateness through its basis in the modified ultra vires theory. Furthermore, it breaks free from the formalistic and narrow tethers of the jurisdictional approach, reaching a pragmatic compromise, and ensuring the greatest respect for the competing intentions of Parliament.

Privacy International

Privacy International is an interesting example of the court strictly interpreting an ouster clause despite the arguably clear intention of Parliament to relegate the decision-making tasks entirely to the IPT. The court found that the ouster clause only applied to judgments in the IPT's jurisdiction with regards to factual, and not legal matters, leaving the courts room to judicially review any errors of law perpetrated by the IPT. This section will discuss the two main criticisms levelled towards the court's judgment in *Privacy International*; firstly, that the judicial character of the IPT vitiates any RoL concerns warranting review, and secondly, that the clear wording of Parliament left no room for circumvention of the ouster. It will be shown that the majority, much like in *Cart*, undertook an evaluative form of review of the case as opposed to compartmentalising the relevant factors into predefined categories. Furthermore, it will be argued that, in aligning closely with the modified ultra vires theory, a strict interpretation of an ouster clause is warranted where RoL concerns arise, justifying the decision to allow review of errors of law of the IPT.

The main criticism against the *Privacy International* decision rests on the judicial character of the IPT. It will be useful to discuss why the judicial character alone should not be a sufficient reason for the court to defer entirely to the natural meaning of the ouster clause. Rather, it will be shown that competing considerations are also relevant to the court's treatment of the ouster and the availability of review. Both Lord Sumption, giving a minority judgment in *Privacy International*, and Robert Craig object to the strict interpretation of the ouster clause on the grounds that the IPT was of a judicial nature. For example, Lord Sumption references the fact that the IPT's President must hold or have held judicial office in order to evidence the judicial character of this tribunal.[264] Sumption argues that any RoL concerns are vindicated by the judicial character of the tribunal, meaning that any form of appeal would be constitutionally unwarranted.[265] He views the fact that a judicial body must be treated differently to an administrative body as conclusive of the fact that the IPT's jurisdiction should not be brought into question by the courts,[266] and states that a view contrary to this would be promoting a 'putative turf war' between the IPT and other judicial bodies.[267] Similarly, Craig argues that the judicial character of the IPT satisfies the relevant RoL criteria,[268] leaving the court no valid reason to circumvent the ouster clause in place. Essentially, this argument falls back on the original binary distinction made between administrative and judicial bodies, whereby the judicial character of a tribunal would vindicate the RoL concerns, allowing for errors of law to be made without review. Both Craig and Sumption appear to reason that, once judicial characteristics have been identified, the scope of review is a foregone conclusion. In this way, judicial characteristics are equated automatically with the restriction of JR.

Despite this analysis, and despite the understanding that the IPT carries out a predominantly judicial function, the evaluative approach undertaken by the majority in *Privacy International* is favourable to

[264] *Privacy International* (n 13) [197] (Lord Sumption).

[265] ibid [172] (Lord Sumption).

[266] ibid [187] (Lord Sumption).

[267] ibid [199] (Lord Sumption).

[268] R Craig (n 18) 581.

the binary, categorical approach undertaken by Craig and Lord Sumption. A level of nuance is introduced when looking past the character of the tribunal, and towards the more subtle requirements of the RoL. While it is true that RoL concerns such as adjudication by an independent judiciary are vitiated by the judicial character of the IPT, relevant issues still remain. An issue raised in both the High Court and the Supreme Court was the possible creation of legal islands,[269] where the IPT might, if left unchecked, develop law asynchronously to the general courts.[270] Such a development might have legal implications beyond the scope of the IPT's remit, especially where the legal issue in question is one of general public importance.[271] Such a consideration, while not determinative of the level of review necessary, is certainly relevant, and should be weighed against the competing factors instead of simply accepting the binary distinction between a predominantly judicial or administrative character as conclusive. Lord Carnwath instead promotes an evaluative approach, which aligns closely with the principles of the modified ultra vires theory. He states that it is for the courts to determine the extent to which an ouster clause is upheld, 'having regard to its purpose and statutory context… and to determine the level of scrutiny required by the RoL'.'[272] In raising local islands of law as a relevant consideration, the majority does not simply undermine the competing factors in favour of limited review, but instead carefully balance these factors in order to reach a decision that is appropriate for the context of the case. For example, Carnwath recognises that review should be restricted because of the 'special status of the IPT',[273] and because of its 'equivalent status and powers to those of the High Court'.[274] In carefully weighing these factors to reach a conclusion based on a true evaluation of the context of the case, the court does not undermine the will of Parliament, or purport to fuel a 'putative turf war'.[275] Instead, the majority displays the nuanced analysis necessary to properly balance the competing intentions of Parliament, to restrict review while upholding the RoL. As such, the fact that the IPT is of a judicial

[269] *Privacy International* (n 13) [139] (Lord Carnwath).

[270] Anna Eliasson, Robert Chiarella & Shameem Ahmed, 'Ousting the Ouster?' (2019) 22 JR 263, 275.

[271] *Privacy International* (n 13) [139] (Lord Carnwath).

[272] Carnwath *Privacy* [145].

[273] ibid [126] (Lord Carnwath).

[274] ibid [99] (Lord Carnwath).

[275] ibid [199] (Lord Sumption).

character should not conclusively define the boundaries of review, especially where relevant factors, such as the creation of local islands of law, warrant judicial consideration.

Elliott has suggested that the divergence between Lord Sumption and Lord Carnwath's judgment is because Lord Sumption adopted a narrower understanding of the RoL.[276] However, it is suggested here that it is not Sumption and Carnwath's conception of the RoL which differed, but their approach to reviewing errors of law. Lord Carnwath has been shown to adopt a holistic and evaluative approach which considers and balances the relevant factors present. Lord Sumption on the other hand appears to view the scope of review as a categorical, binary question, in much the same way as Craig. Lord Sumption states that the RoL is 'sufficiently vindicated by the judicial character of the Tribunal'.[277] To Lord Sumption, the judicial character of the tribunal identifies the category of review which it fits into, negating the need to undertake a more thorough approach to the requirements of the RoL. In this way, Lord Sumption does not necessarily promote a differing or more restricted conception of the RoL than Lord Carnwath, as Elliott suggests, but rather views the task of the court as one of categorisation of different types of errors and resultingly undertaking a shallower form of review than the majority. The majority judgment can be viewed through a modified ultra vires theory lens, with its contextual and holistic evaluative model, whereas the minority judgments bear more resemblance to the categorical approaches to jurisdiction which were common prior to *Cart*. Therefore, it is not necessary to view the scope of review as premised on esoteric and indefinite judicial conceptions of the RoL, but rather on the much more tangible process that the courts undertake to reach their decisions. If the decision-making process adheres to the principles of the modified ultra vires theory, the judgment should arise as a result of careful consideration between relevant factors, giving rise to a proportionate and constitutionally appropriate judgment. It is argued that this is true of *Privacy International*. Therefore, the courts were justified in identifying more nuanced RoL considerations, such as the possibility of local islands of law.

[276] Elliott (n 120) 494.

[277] *Privacy International* (n 13) [172] (Lord Sumption).

This discussion can be used to inform a wider criticism of the modified ultra vires theory. The argument could be made that the modified ultra vires theory's focus on the RoL is unclear, as judges and authors might disagree on the definition of the RoL. However, as can be seen in *Privacy International*, it is not the differing conceptions of the RoL that cause disagreement, but rather the different approaches to reviewing errors of law. Furthermore, as has been discussed above,[278] the modified ultra vires theory does not require the RoL to contain any substantive restraints on legislative authority. The courts only need to look to the formal components of the RoL, such as access to the courts and an independent judiciary, to undertake the relevant proportionality analysis. While the substantive elements of the RoL are generally contested, these formal components are widely accepted. Indeed, Paul Craig notes that even those who espouse substantive conceptions of the RoL accept its formal attributes.[279] This demonstrates a consensus as to the contents of the RoL which are relevant to the modified ultra vires theory. Therefore, the modified ultra vires theory's focus on the RoL is not unclear, as it adheres to well-established principles which can be easily identified by the courts in their decision-making process.

Despite the justifications given above, critics such as Gordon have argued that the clear expression of the ouster clause by Parliament should conclusively exclude review despite any RoL considerations to the contrary.[280] It will be necessary to address such criticisms in order to fully defend the majority decision in *Privacy International*. Gordon has argued that 'we are well past the point where clear words are not enough to achieve the desired effect of statute',[281] suggesting that the court has disregarded the constitutional hierarchy in order to '[govern] by accepted principles of the RoL'.[282] This criticism suggests that the courts have overstepped their interpretative boundaries in order to utilise illegitimate methods of adjudication, such as placing RoL considerations above Parliamentary intention. The

[278] See n 237.
[279] P Craig (n 237) 467.
[280] Mike Gordon, '*Privacy International*, Parliamentary Sovereignty and the Synthetic Constitution' (2019), (https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/ (Accessed 03/07/20)).
[281] ibid.
[282] ibid.

minority in *Privacy International* appears to hold a similar view, with Lord Wilson stating that 'a strict construction of the subsection [has] to yield to what I consider to be the only reasonable meaning of its words'.[283] Lord Wilson's dicta implies that the clarity of the words of the statute overcomes any presumption or method of interpretation seeking to circumvent the ouster clause, leaving the court with no recourse but to accept the limitation to its jurisdiction. Similarly, Lord Sumption appears to view the clause addressing the *Anisminic* line of argument as a strong display of intention,[284] contributing to his decision in favour of restricting review. Interestingly, Elliott views the majority's strict interpretation of the ouster, not as evidence of the difficulty of excluding review, but of 'the limits of Parliament's power to do so'.[285] He has likened the strict interpretations favoured by the court to 'an iron fist of irreducible constitutional principle'.[286] Elliott appears to agree, in part, with the minority in this sense. He seems to agree that interpretation alone could not lead the majority to their judgment, as no legitimate methods of interpretation could dislodge the clear intention of Parliament in this sense. The sentiment which arises is that the majority's decision could not have been reached through the accepted interpretative methods of the courts, and as such, the courts must have been acting outside the boundaries of their power.

However, it is possible to show that, despite the clear wording, the judgment of the courts does not endorse an irreducible constitutional minimum or the placement of the RoL above Parliamentary sovereignty. Rather, when interpreting the ouster clause through the lens of the RoL, as legitimated by the modified ultra vires theory, the decision reached by the court may be readily defended. Firstly, it must be reiterated that the use of the RoL as an interpretative device is not justified solely on a normative basis but is premised on Parliament's presumed intention to legislate in accordance with the RoL. This addresses Gordon's concern that the courts are purporting to govern through the RoL. Secondly, the RoL concerns raised by Lord Carnwath warrant a stricter reading of the ouster clause. It is indeed

[283] *Privacy International (n 13)* [224] (Lord Wilson).

[284] *Privacy International (n 13)* [201] (Lord Sumption).

[285] Elliott (n 119) 494.

[286] ibid 494.

arguable that the potential for local islands of law to form around legal issues of general public interest poses a threat to the consistent application of the general law of the land. Consequently, it is important for the court to consider whether the wording of the statute is clear enough to overcome this RoL concern, and if it is not, then to construe the meaning of the ouster clause strictly. In this way, the court is justified in restricting the scope of the ouster clause where clearer wording could have been used by Parliament.[287] Lord Carnwath recognises that the majority's interpretation of the ouster clause, where only errors of fact were found to be outside the court's review jurisdiction, might not have been a likely interpretation of Parliament's intentions.[288] However, due to the fact that Parliament could have responded more directly to the *Anisminic* line of argument, for example through using wording such as 'purported determination', and consequently made its intentions clearer, the court is open to strictly construe the wording of the statute where the RoL concerns are evident.[289] In this way, the majority's decision was justifiable. The majority balanced the RoL concerns with the factors in favour of review, found considerable weight behind the RoL considerations, and found that Parliament had failed to express their intentions sufficiently clearly to overcome the strict, RoL based interpretation of the ouster clause. The approach of the majority was therefore not one of complete ambivalence towards the wording of the ouster clause in an attempt to maximally protect basic norms, as Jason Varuhas has suggested.[290] It was instead an approach which focused on whether the RoL considerations proportionately outweighed the reading of the ouster clause. The decision did not seek to usurp Parliamentary sovereignty or endow the courts with the power of judicial legislation, but rather was one made within the proper boundaries of the court's adjudicative powers in light of Parliament's general intention to legislate in accordance with the RoL.

[287] Carnwath *Privacy* [111].

[288] Carnwath *Privacy* [111].

[289] Parliament's use of such language can be observed in Section 3(b) of the Fixed-term Parliaments Act 2011 (Repeal) Bill. This appears to be an attempt by Parliament to circumvent the linguistic difficulty of ousting the court's jurisdiction, through responding directly to the wording used in *Anisminic*.

[290] Varuhas (n 239) 602.

This would be an appropriate time to reiterate that, under the modified ultra vires theory, the 'general' intention of Parliament to legislate in accordance with the RoL will never have the power to override the 'specific' intentions of Parliament to oust review. However, a proportionate balance must be struck to safeguard both the specific and general intentions of Parliament. The more pressing the RoL factors in a case, the more strictly Parliament's wording can be construed. The clearer the specific intentions of Parliament, the less influence the RoL factors will have over the outcome of the case. Therefore, the courts, under the modified ultra vires theory, are permitted to proportionately balance the two intentions, but never to override the specific intention of Parliament. When considering how specific an intention of Parliament is, it will be useful to consider not only the wording of the clause, but also the context of the statute it exists within. Therefore, an Act which focuses on a specific issue, and includes a strongly worded ouster clause relating directly to that issue would evidence specific intention on behalf of Parliament. An example of this strong specific intention is Clause 3 of the Dissolution and Calling of Parliament Bill (DCPB).[291] Firstly, this short Bill is focused entirely on the powers relating to the dissolution and calling of Parliament. Secondly, the wording of the ouster clause is strong, excluding both the exercise and the 'purported' exercise of powers from judicial review of any kind.[292] This level of focus on a single issue is evidence of Parliament's specific intention, and would leave little room for the courts to consider the proportionality of RoL issues. Such a specific focus on the ouster clause and issue is not apparent in the RIPA,[293] which is a larger act with a less specific ouster clause than the DCPB, justifying the more proportionate approach taken by the Court in *Privacy International.*

The courts in both *Privacy International* and *Cart* sought to overhaul the previous approaches taken towards ouster clauses, and in doing so, opened themselves up to critics questioning the legitimacy of their judgments. However, when considered through a RoL lens, the court's actions are seen to be premised on balancing the competing intentions of Parliament, as well as broadening the decision-making process to encompass an evaluative approach. It is argued that such a change is commendable

[291] Dissolution and Calling of Parliament Bill 2021, Clause 3.
[292] ibid.
[293] Regulation of Investigatory Powers Act 2000.

in its ability to more adequately respond to the nuances of each individual case, and its ability to remain inside a principled, yet proportionate, structure of decision-making. Therefore, the modified ultra vires theory provides a stable theoretical foundation for the courts' approach to ouster clauses.

Preliminary Conclusion

This chapter has sought to identify a justifiable method of circumventing ouster clauses which does not seek to undermine or usurp Parliament's sovereign position within the constitutional settlement. The modified ultra vires theory has been argued to achieve this, through firmly basing the actions of the courts on the presumed intention of Parliament to legislate in accordance with the RoL. Criticisms raised against the modified ultra vires theory by common law theorists such as Laws have been rebutted, and the very basis of the common law theory as an alternative basis of JR has been emphatically rejected. The common law theory fails to stand against the modified theory in its refusal to recognise presumed parliamentary intention as the basis for the interpretation of ouster clauses. The normative basis of the common law theory is insufficient to stand in the face of clear Parliamentary intention, for to do so would be to place the common law foundations of the court against the sovereign nature of Parliament. Applying the modified ultra vires theory to *Cart* and *Privacy International*, the actions of the courts have been justified. The RoL considerations in each case warranted a stricter response to Parliament's expressed intention, leading to the introduction of a holistic and proportionate standard of review. Such a standard has been shown to rest on constitutionally appropriate foundations and justify the actions of the court in the instance of ouster clause circumvention.

Conclusion

The purpose of this thesis was, in a broad sense, to defend the more recent approaches taken by the courts towards circumventing ouster clauses. In order to reach this point, a number of questions have been considered.

Firstly, it was necessary to identify and clarify the varying approaches adopted by the courts since the case of *Anisminic* towards judicial and administrative ouster clauses. The first approach to be adopted, the post-*Anisminic* approach towards administrative ouster clauses, was shown to give rise to some uncertainty in its application. While it was widely considered to remove the previous distinction between errors within and errors outside of jurisdiction, an analysis of the judgments in *Anisminic* revealed a more evaluative approach which left room for a tribunal, in a limited set of circumstances, to make errors of law inside of their jurisdiction, so as to render ouster clauses effective. This uncertainty was only clarified in the subsequent case of *Page*, where the distinction was formally abolished, meaning that all errors of law were outside the jurisdiction of administrative bodies. Therefore, the post-*Anisminic* approach equated all errors of law to an excess of jurisdiction, leading to a finding of ultra vires and a successful circumvention of the present ouster clause. While this approach was initially emulated by the court in *Pearlman* and applied to ousters concerning judicial bodies, it was soon altered in recognition of the courts' constitutional roles as interpreters of legislation. This led to the understanding in *Racal* that judicial bodies, in some cases, had the capacity to make errors of law within their jurisdiction, so long as they properly entered the relevant area of law. Therefore, both the *Racal* and post-*Anisminic* approaches to circumventing ouster clauses relied on discovering whether the decision was made within the tribunal or court's jurisdiction and justifying the circumvention of the ouster clause where it was not. The cases of *Cart* and *Privacy International* disrupted this traditional focus on jurisdiction and turned the attention of the courts onto the RoL as the focus of ouster clause litigation, while also introducing an approach applicable to both administrative and judicial bodies alike. This consisted of identifying the RoL considerations relevant to the instant case and questioning how

far the RoL would be undermined if the ouster clause were to be given effect to. The court would then discover the proportionate balance between restrictions on review and protecting the RoL, reaching a compromise based on a holistic analysis of the case at hand. Two main categories of approaches may therefore be identified in the period since *Anisminic*. The first category includes those approaches which focus on 'jurisdiction' as the central feature of JR, and the second category includes the approach focused on the RoL as a lens through which legislation may be interpreted.

The second question addressed was whether the approaches within the first category, those focused on jurisdiction, could be regarded as practically and theoretically appropriate as a basis for JR and the circumvention of ouster clauses. It has been argued that a focus on jurisdiction is both theoretically and practically inadequate. This category of approaches relies on the theory of ultra vires to discern whether a decision is within or outside a court or tribunal's jurisdiction, and ultra vires has been shown to be an inadequate theoretical foundation for the circumvention of ouster clauses due to its indeterminacy. This theory was used to justify diverging approaches pre- and post-*Anisminic* for administrative bodies, and the distinct approaches in *Pearlman* and *Racal* for judicial bodies. The fact it was utilised in such a way evidenced its lack of usefulness as a stable and justifiable theoretical basis for the circumvention of ouster clauses. This category of approaches also presented significant practical problems in the inflexibility and formalism. The reliance on the notion of 'jurisdiction' allowed the courts to apply the conclusionary label of 'jurisdictional error' to post-*Anisminic* cases where any error of law was discovered. Such labels would be used in the place of a thorough analysis of how much decision-making power was delegated by Parliament to the tribunal, restricting the level of analysis in a case to the mere existence of an error of law. Furthermore, it was shown that under the *Racal* approach, the resurrection of the distinction between jurisdictional and non-jurisdictional errors was so difficult to apply in practice due to the lack of clear guidance or test that the label of 'jurisdictional error' failed to be applied along strict analytical lines. The first category of approaches has therefore been rejected as an appropriate basis for the circumvention of ouster clauses, leading to the question of how effective and justifiable the second category of approaches are.

The final issue addressed was the exposition and defence of the second category of approach, based on the RoL as a lens through which legislation may be interpreted. This approach is founded on the modified ultra vires theory, which suggests that presumed Parliamentary intention should be considered in identifying legislative intent. This theory has been defended against criticisms from common law theorists who have suggested an element of unreality in presumed Parliamentary intention. It has been argued that presumed intention is a natural element in legislation and that Parliament must be taken to intend their enactments to comply with fundamental constitutional rights and the RoL. The common law model has been rejected for its failure to respect the sovereign position of Parliament within the constitution, and its attempts to rely on a purely normative, common-law basis for the circumvention of ouster clauses. The parallel has been drawn to the principle of legality, which can be seen to guide the decisions of the courts in this area and has been argued to rely on the same foundation of presumed parliamentary intention as the modified ultra vires theory. The modified ultra vires theory has been shown to be applicable to the judgments of both *Cart* and *Privacy International*, though not explicitly referred to, and has provided a justification for the decisions reached by the courts. For example, in *Cart*, the understanding that Parliament intended the RoL to be upheld when creating the new tribunals system with the Upper Tribunal at its head suggested to the court the need for the possibility of review in cases which touched on significant points of law. Similarly, the court in *Privacy International* was justified in their restrictive reading of the ouster clause as a result of the need to restrict the creations of legal islands. The court was able to utilise presumed Parliamentary intention in this respect to consider the strength of the wording of the ouster against the ouster's RoL implications in order to find the provision of review which would be a proportionate and justifiable measure in this particular case.

In concluding that the most recent approaches taken by the courts are justifiable and entail an identifiable theoretical basis (that being the modified ultra vires theory), this thesis, it is suggested, has completed the task of clarifying and critically analysing the varying approaches taken by the courts to circumventing ouster clauses since *Anisminic*. Those approaches focusing on 'jurisdiction' as the central feature of review have been shown to fail for reason of their inflexibility and narrowness. It is commendable that the courts have seen fit to dispense with this formalistic focus and instead turn their

attention to a more holistic model, which identifies the relevant factors and reaches conclusions on the basis of proportionality. Moving forward, the modified ultra vires theory should be accepted as the appropriate theoretical basis for the circumvention of ouster clauses and utilised in the same manner as has been done in the recent case of *Privacy International*. Such a theory has been shown to fit into the traditional model of Parliamentary sovereignty, where the courts recognise no substantive restrictions on Parliament's ability to legislate. In this way, this thesis has addressed the issue of ouster clause circumvention and justified the actions of the courts without purporting to usurp the traditional model of Parliamentary sovereignty.

Bibliography

Legislation

- Companies Act 1948

- Dissolution and Calling of Parliament Bill 2021

- Foreign Compensation Act 1950

- Leasehold Reform Act 1967

- Regulation of Investigatory Powers Act 2000

- Tribunals, Courts and Enforcement Act 2007

Textbooks

- Bell J, Elliott M, Varuhas J and Murray P (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

- Calliess C and Van Der Schyff G (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2020)

- Ekins R, *The Nature of Legislative Intent* (OUP 2012)

- Forsyth C (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- Jowell J and Oliver D (eds), *The Changing Constitution* (3rd ed, 1994)

- Jussand S and Sunkin M (eds), *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017)

Articles and Chapters

- Adams T, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 CLJ 289
  — 'Ultra Vires Revisited' [2018] PL 31

- Allan T, 'The Rule of Law as the Foundation of Judicial Review' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)
  — 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61 CLJ 87
  — 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' (2003) PL 429

- Bailey S, 'Judicial Review in a Modern Context' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- Baker J, 'Statutory Interpretation and Parliamentary Intention' (1993) 52 CLJ 353

- Bamforth N, 'Ultra Vires and Institutional Interdependence' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- Bell J, 'The Relationship Between Judicial Review & The Upper Tribunal: What Have the Courts Made of *Cart*?' (2018) PL 394
  - — 'Rethinking the Story of *Cart v Upper Tribunal* and its Implications for Administrative Law' (2019) 39 OJLS 74

- Boughey J & Burton-Crawford L, 'Reconsidering *R (Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error' [2017] PL 592

- Craig P, 'Ultra Vires and the Foundations of Judicial Review' (1988) 57 CLJ 63
  - — 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467
  - — 'Competing Models of Judicial Review' [1999] PL 428
  - — 'Competing models of Judicial Review' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)
  - — 'Constitutional Identity in the United Kingdom', in Christian Calliess and Gerhard Van Der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2020)

- Craig R, 'Ouster Clauses, Separation of Powers and the Intention of Parliament: From *Anisminic* to *Privacy International*' (2018) PL 570

- Edlin D, 'A Constitutional Right to JR: Access to Courts and Ouster Clauses in England and the United States' (2009) 57 AJCL 67

- Ekins R and Goldsworthy J, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 SLR 39

- Ekins R, 'The Intention of Parliament' (2010) PL 709
  — 'Putting Judicial Power in its Place' (2017) 36 UQLJ 375
  — 'Intentions and Reflections: *The Nature of Legislative Intent* Revisited' (2019) 64 AJJ 139

- Eliasson A, Chiarella R & Ahmed S, 'Ousting the Ouster?' (2019) 22 JR 263

- Elliott M and Thomas R, 'Tribunal Justice and Proportionate Dispute Resolution' (2012) 72 CLJ 297

- Elliott M and Young A, '*Privacy International* in the Supreme Court: Jurisdiction, The Rule of Law and Parliamentary Sovereignty' [2019] CLJ 490

- Elliott M, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 CLJ 129
  — 'Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-Operative Endeavour' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)
  — 'Holyrood, Westminster and Judicial Review of Legislation' (2012) 71 CLJ 9

- Feldman D, '*Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective', Satvinder Jussand Maurice Sunkin (eds), *Landmark Cases in Public Law* (Oxford: Hart Publishing 2017)

- Foley K, 'Australian Judicial Review' (2007) 6 WUGSLR 281, 304.

- Forsyth C, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122
  — 'The Rock, and the Sand: Jurisdiction and Remedial Discretion' (2013) 18 JR 360

- Goldsworthy J, 'Legislative Intention Vindicated?' (2013) 33 OJLS 821

- Griffiths J, 'Jurisdictional Review of Errors of Law' (1980) 39 CLJ 232

- Humphrey-Jenner M, 'Should Common Law Doctrines Dynamically Guide the Interpretation of Statutes?' (2009) 3 L 171

- Jagat-Narain B, 'Jurisdictional Error in Administrative Law' (1983) 34 NIRLQ 315

- Jowell J, 'The Rule of Law Today', in Jowell and Oliver (eds), *The Changing Constitution* (3rd ed, 1994)
  — 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- Laws J, 'The Ghost in the Machine: Principle in Public Law' [1989] PL 27
  — 'Law and Democracy' [1995] PL 72
  — 'An Extract From: Illegality: The Problem of Jurisdiction' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- MacRae J, 'Jurisdictional Error: A Post-*Anisminic* Analysis' (1977) 3 AUR 111

- McIntyre J and Neudorf L, 'Judicial Review Reform: Avoiding Effective Review Through Procedural Means' (2016) 16 OUCLJ 65

- Meagher D, 'The Common Law Principle of Legality' (2013) 38 ALJ 209

- Murray P, 'Process, Substance and History of Error of Law Review' in John Bell, Mark Elliot, Jason Varuhas and Philip Murray (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing 2016)

- Oliver D, 'Is the Ultra Vires Rule the Basis of Judicial Review?' (1987) PL 543

- Raz J, 'The Rule of Law and its Virtue' (1977) 93 LQR 195

- Sacks V, 'Towards Discovering Parliamentary Intent' (1982) LR 143

- Sales P, 'A Comparison of the Principle of Legality and Section 3 of the HRA 1998' (2009) 125 LQR 598
  - — 'Partnership and Challenge: The Courts' Role in Managing the Integration of Rights and Democracy' (2016) PL 456

- Scott P, 'Ouster Clauses and National Security: Judicial Review of the Investigatory Powers Tribunal' (2017) PL 355

- Varuhas J, 'The Principle of Legality' (2020) 79 CLJ 578

- Wade W, 'Constitutional Realities and Judicial Prudence' in Christopher Forsyth (eds), *Judicial Review and the Constitution* (Oxford: Hart Publishing 2000)

- Wade-MacLauchlan H, 'Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?' (1986) 36 UTLJ 343

- Williams R, ‘When is an Error Not an Error? Reform of Jurisdictional Review of Error of Law and Fact’ (2007) PL 793

Other Sources

- ‘Supreme Court: Parliament’s ‘Ouster’ of High Court Judicial Review Powers is Not Binding’ (2019) https://www.cms-lawnow.com/ealerts/2019/05/supreme-court-parliaments-ouster-of-high-court-judicial-review-powers-is-not-binding (Accessed 04/06/20)

- Bell J, ‘Privacy International Symposium – Framing Questions About Ouster Clauses’ (2018) https://adminlawblog.org/2018/11/30/joanna-bell-privacy-international-symposium-framing-questions-about-ouster-clauses/ (Accessed 07/12/2020)

- Craig P, ‘IRAL: The Panel Report and the Government’s Response’ (2021) UKCLA https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/ (Accessed on 29/05/21)

- Ekins R & Gee G, ‘Making the Case Against Expansive Judicial Power’ (2015) Judicial Power Project https://judicialpowerproject.org.uk/making-the-case-against-expansive-judicial-power/ (Accessed on 29/05/21)

- Elliott M, ‘Judicial Review Reform II: Ouster Clauses and the Rule of Law’ (2021) Public Law for Everyone’ https://publiclawforeveryone.com/2021/04/11/judicial-review-reform-ii-ouster-clauses-and-the-rule-of-law/ (Accessed on 29/05/21)

- Finnis J, ‘Judicial Power and the Balance of Our Constitution’ Policy Exchange

- Gordon M, '*Privacy International*, Parliamentary Sovereignty and the Synthetic Constitution' (2019) https://ukconstitutionallaw.org/2019/06/26/mike-gordon-privacy-international-parliamentary-sovereignty-and-the-synthetic-constitution/ (Accessed 03/07/20)

Table of Cases

- *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147

- *Conway v Rimmer* [1968] AC 910

- *In Re Racal Communications Ltd* [1981] AC 374

- *Lacey v Attorney General of Queensland* (2011) 242 CLR 573

- *O'Reilly and Others v Mackman and Others* [1983]

- *Padfield v Ministry of Agriculture* [1968] AC 997.

- *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56

- *R (Cart) v Upper Tribunal* [2011] QB 120
  — [2012] 1 AC 663

- *R (On the Application of Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin)
  — [2019] AC 491

- *R v Home Secretary, Ex parte Pierson* [1997] 3 WLR 492

- *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682

- *R v Secretary of State for the Home Department, Ex parte Simms* [1999] 3 WLR 328

- *Ridge v Baldwin* [1964] AC 40