Lord Chancellor's keynote speech on Judicial Review

Thank you to Policy Exchange for inviting me to speak here today.

I am very grateful for the work that Policy Exchange's Judicial Power Project has done over the past six years. That work seems to me to be crucial in two vital respects.

First of all, scholarly commentary has an important role in developing and refining the law. I am sure that all students of criminal law will recall how the House of Lords in the case of Anderton v Ryan – how shall I put this diplomatically – misconstrued s. 1 of the Criminal Attempts Act. Very soon after that decision Professor Glanville Williams wrote a scathing commentary of the ruling and a year later in R v Shivpuri their Lordships corrected course. When it comes to public law, there can be a tendency in sections of academia to want the courts to expand on their power. I think the Judicial Power Project and the academics associated with it provide an important counterweight to this tendency.

The second reason why I think your work is so important is that the debate about the proper balance of the Constitution is too crucial to be left to the pages of the Law Quarterly Review or of Public Law. It concerns us all whether we are lawyers or not and your work has really brought those issues into wider view.

So, I want to start by saying something about my underlying thinking when it comes to constitutional reform itself. I think it is fair to say that I am guided by three principles.

The very first, is a principle of method and I think it was Michael Oakeshott who put it best:

"To be conservative, then, is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss."

That means, in my book, that one should never seek to reinvent the wheel and that change where necessary should be incremental.

The second part of my principles is the Rule of Law. What I mean is that as a society we are governed by clear rules set in advance and not by the arbitrary choices of those in power. That is a fundamental principle of our Constitution and I would not want any reform to endanger it.

The third is the Sovereignty of Parliament. In order for life in common to be possible, the laws that govern us must be orientated towards the common good. But what the common good means is, of course, open to interpretation. As

Winston Churchill said, the least bad way of settling those disagreements is through democracy. It is our Constitution that gives the final say to the elected Parliament, not to the unelected branches of the state. I think that is a very sensible settlement which has served us all very well.

Now, in my lecture today I would like to take the opportunity to build on two speeches I made recently concerning our constitution – one at Queen Mary University of London and the other at University College London – and specifically to discuss the government's thinking behind our proposals for reform of Judicial Review.

As I said in both those speeches, our system and our constitution have evolved over centuries to serve the needs of the citizens in our country. It is inevitably the case that through all that change, the constitution will at times require some attention – some constitutional plumbing if you will – to ensure that it continues to strike the right and sensible balance between our institutions.

This afternoon the Government introduced the Judicial Review and Courts Bill, the Judicial Review elements of which I hope do exactly that.

It is clear to me, that the Executive and the Judiciary – as branches of the state – are servants of Parliament, which derives its power and authority through the democratic process from the people of our country. We each have a responsibility to respect what Parliament tells us and how it wants us to interact in the interests of just outcomes from the laws it creates and the powers that it grants to us.

The Judicial Review elements of the Bill grew out of the Independent Review of Administrative Law. In their report the IRAL Panel charted developments in Judicial Review over the past 50 years or so. The Panel wrote at length about the diminishing field of non-justiciable areas, highlighted the courts' inconsistent approach regarding nullity, and reflected on concerns expressed by others around ideas such as the 'principle of legality'.

The Panel also pointed out several instances where the courts have not had remedies at their disposal that provide the flexibility that they need, and that this prevents the courts from dealing with Judicial Review cases effectively. The Panel concluded that, in the main, Judicial Review is not in need of systemic reform, and the answer to any judicial overreach is judicial restraint, something which does not require legislation. These are views with which I strongly agree.

For me, this has been a process of reviewing the changes to Judicial Review over the past 40 years – both in individual cases and in the context of our constitutional balance – and asking this very sensible question: is Judicial Review in our country functioning as it should?

I will focus today on one half of the proposed reforms – removing Cart Judicial Reviews. You will see from the Judicial Review and Courts Bill that the ouster clause we are proposing primarily removes Cart reviews due to the resources they use. And I think Lord Brown's words in the Cart judgment are

relevant: “The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.”

But it also does something else. I hope it can provide a model for how such clauses should be used and draw a line under the legacy of Anisminic – that famous case, almost as old as me, which led to ouster clauses being rendered almost wholly ineffective.

I note that the debate happening around Judicial Review at the moment is a robust one. In a mature and healthy democracy like ours that is exactly as it should be. Unfortunately, those including the JPP who have expressed some concerns about certain developments on Judicial Review have had one of two positions attributed to them.

The first is that they want to abolish (or at very least severely weaken) Judicial Review in order to unleash Executive Power. The second is that critiques of developments have at best only identified a few cases where the courts have got it wrong and, so the argument goes, any system of law is bound to get some cases wrong – so essentially there is nothing to see here.

To my mind, both of those claims are wrong, but I do think we should be clear about the aims of the government in this exercise.

Judicial Review is a crucial tool to ensure that the Executive sticks within the bounds of the powers it has been granted. This is essential to the rule of law and we would not want to get rid of it. No-one is suggesting that we turn back the clock on Judicial Review. Certainly there is no desire – not from me, not from the wider government, and not from the vast majority of constitutional scholars and experts – to undermine the useful innovations and developments in Judicial Review in the past 40 years, of which there have been many.

But while some are clearly useful – for example that there are always limits to discretion – and undoubtedly enhance Judicial Review, there are other developments which could take Judicial Review in more worrying directions and so we must be cautious.

But it is not the case that these concerns are merely about the belief that a few hard cases should have been decided differently. In my UCL speech I focused on two cases, Evans v Attorney General and Privacy International v Investigatory Powers Tribunal . In response to that one commentator said that there was nothing more to it than a disagreement with the majority in two high profile Supreme Court cases. The argument seems to be, there are borderline cases and there will be disagreement about how these should be decided; that’s unexceptional.

However, with respect that misunderstands my point, which is that a case like Evans should not have been borderline in the first place. As Lord Hoffmann put it, “It is hard to see how Parliament could have made clearer its intention”. The fact that this clear intention was not given effect to “give[s] rise to a worrying impression of a tendency towards judicial

supremacism". Those latter words aren't mine, they are the words of Lord Brown of Eaton-under-Heywood – formerly of the House of Lords and the Supreme Court.

When we look at the evolution of Judicial Review over the past decades, we always have to ask ourselves whether developments serve its actual purpose. It can be seen to operate, in many ways, through an interpretation of what Parliament generally intends – as it would be impossible for legislation to cover every conceivable circumstance in which it may be applied. This is what should guide us in any analysis and proposals for change.

Because Parliament does not specify in exact detail all the necessary requirements and ways a power it grants should be used, the courts must fall back on certain assumptions about how Parliament generally expects decision makers to act. Due to the necessary breadth of these assumptions – for instance that a decision maker should not act unreasonably – it is easy to see how they can become victim to conceptual creep and over complication.

In general, I firmly believe that the courts take a practically minded approach to Judicial Review and, in the majority of cases, there is no cause for concern. But we shouldn't be lulled by this into a false sense of security, and we must be watchful for those cases which might demonstrate a change in conceptual growth, or indeed overgrowth.

Now, I think there are broadly three areas, where to a greater or lesser extent there is a risk. In all these areas we must ask: firstly what is the justification for assuming that Parliament generally intends its legislation to be interpreted or read in this way?

The first is the possibility of the misuse of Wednesbury , due to the potential difficulty in finding an objective way of measuring it, and the varying levels of intensity it is said to have. On the latter point Lord Justice Haddon-Cave's recent Gresham lecture is most helpful:

"the constant refinement and Enigma variations on Wednesbury and the spawning of a myriad of different public law tests in an attempt to achieve 'perfection' in every scenario has led to a great deal of obscurity and entanglement. Bright lines are no bad thing in the good administration of justice and good government. Not everything can be nuanced. In the slightly Alice-in-wonderland world of close or anxious or intense or quite intense scrutiny in public law, you will forgive me for asking: Is today Wednesbury or Thursbury and Fribury?"

Second are the calls for proportionality – the idea that the court does not just look at whether the decision maker has properly used the powers given to it by Parliament, but also whether the decision or action is a proportionate way of achieving a policy aim to become a general ground of Judicial Review. This would fundamentally change the role of the courts and risk a kind of adjudication which draws the judiciary into political questions or ones that are based around values. Indeed, the courts have pointed out such dangers themselves. For example, Lord Neuberger in Keyu v FCO summed up the risk in this way:

“The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest”

In the absence of explicit Parliamentary authorisation – as was provided in the Human Rights Act – proportionality should not be seen or become a standard ground of review.

The third concern is around the principle of legality. The IRAL Report discussed one element of this – the lack of certainty about the triggers for the principle of legality. Another is the concernthat Professor Varuhas has raised about what he terms the “augmented” and “proactive” variants of this principle which “make significant inroads into executive discretion, and Parliament’s capacity to reshape the common law, even where it manifests its intent by clear words.”

While we can view these developments as the courts striving to balance the very practical matters inherent in Judicial Review with complex legal principles, we must also be alive to the risk that the principles can start to take on a life of their own, and lead to the courts overreaching.

The IRAL in their report concluded that, “solutions to any potential problems of judicial overreach and uncertainty created by the current state of the law on the grounds of Judicial Review must come from the courts, and the courts should be encouraged to do what they can to address these problems. ” I agree and I am encouraged by recent decisions of the Supreme Court.

One of the concepts over which there has been much Judicial and academic comment is the requirements for the effectiveness of ouster clauses. I think this is a perfect example of where something has become more and more complicated, resulting in problems far beyond the real nature of the issue – a problem which arose out of the Anisminic judgment, and which we are determined to resolve.

Anisminic, as Lord Wilson put it in his dissent in Privacy International “set up 50 years of linguistic confusion for all of us who have been heirs to its decision” . This confusion was over the nature of different kinds of errors and whether all errors were in fact so called ‘jurisdictional errors’ – that is one where a decision maker acts without the power to do so, and have always been considered as making the action null and void.

Professor Feldman’s commentary on the context of Anisminic highlights several points that can I think help us to understand how this confusion arose and why it is less the case itself, rather its legacy, which has led to the confusion.

The case revolved around a decision of the Foreign Compensation Commission, which had been set up following the Suez crisis and the seizure of assets by

the Egyptian Government. The Commission's role was to determine compensation claims by affected British citizens and companies whose property had been seized. Anisminic (or in its other name Sinai Mining) was one such company, but the FCC refused them compensation because they believed it had a 'successor in title' – or someone to whom ownership of company property had passed – who was not a British National.

Anisminic argued that the Foreign Compensation Commission had made a mistake of law by making its determination about Anisminic's claim for compensation. Anisminic maintained that the FCC had gone beyond its jurisdiction in making such determination based on whether a 'successor in title' in fact existed. This relied upon interpretation of the FCC's power to make determinations, which was set out in statute. The relevant clause specified that the FCC must take three conditions into account, and only three. The FCC by adding a fourth – whether Anisminic had a successor in title, and basing its decision on that, had made a determination it had no power to make.

In the rationale, Lord Reid set out that the decision of the FCC was not protected by the ouster clause because there was no authority for the tribunal to construe its own powers in deciding what kind of determinations it could make. Only a superior court could decide the true extent of the powers of an inferior court.

It was not the fact of the FCC making an error of law which was decisive but that the kind of error it made led to it basing its decision on a matter it had no right to deal with, that is the issue about whether Anisminic had a successor in title who was not a British National. The House of Lords held that the statute did not allow the FCC to make that a further requirement of giving compensation, and that the FCC had no authority to deem that it could.

So, the judgment therefore did not attempt to rewrite the rules on ouster clauses or nullity, but it found that the specific kind of error the FCC made, in its particular context, did render its determination null, because the ouster clause did not give the FCC the power to alter or to re-interpret the terms on which its determinations must be based.

Here the court was exercising its powers in accordance with the purpose of Judicial Review, having regard to the statute, to Parliament's intent and to its context. It is after Anisminic that problems began to arise – both because of conceptual leaps by the courts and by legal thinkers, and attempts by various Governments let's be frank to make their ouster clauses 'Anisminic-proof'.

Professor Feldman points to the opinions expressed obiter dicta by Lords Reid and Pearce as the foundation of much of the confusion. Lord Reid explored the various scenarios in which a decision maker might deprive themselves of jurisdiction, theorising that there may well be many kinds of error in those categories – from acting in bad faith, to ignoring a mandatory requirement to take something into account. Lord Reid did not attempt to formulate a general rule about errors of law and jurisdiction, or make comments on the limits of ouster clauses, but as Feldman argues, this passage has been taken to do exactly that.

That interpretation of Anisminic was confirmed in the case of O'Reilly v Mackman where the House of Lords found that any error must change the nature of the decision being made – making it outside the decision maker's jurisdiction. The categories – the categorisation – set out by Lord Reid, had completely collapsed.

In response Parliament attempted to overcome the now seemingly restricted boundaries of ouster clauses. For an ouster to be effective in this post-Anisminic world, review over every error had to be ousted, as any error could – or perhaps by necessity would – be a jurisdictional error and therefore a nullity. And so, Parliament passed and attempted to pass extremely wide ouster clauses, wider than perhaps anyone would really consider necessary to achieve the policy intent. The Immigration Bill 2004 ouster is a very good example for an exhaustive ouster as it went through every conceivable kind of error, while the Regulation of Investigatory Powers Act ouster for the Investigatory Powers Tribunal is an example of a more conceptual one as it made provision for the body being able to decide its jurisdiction.

Professor Ekins tells us that legislation is, in part, an act of communication by Parliament to the courts . The communication between them thus begun to break down, because the principles surrounding ouster clauses and nullity and jurisdictional vs non-jurisdictional errors had distracted from what was really at stake – and it's this: what Parliament intended the jurisdiction of a certain body in particular circumstances to be. And that, remember, is how Anisminic was decided!

This came to a head in Privacy International where the wide scope of the ouster I just mentioned fell foul of the judgment's determination of the requirements of the rule of law. In attempting to 'Anisminic-proof' the ouster clause, the legislation had strayed into even more contentious territory. The drafters attempted to evade the post-Anisminic argument that every error was a jurisdictional one, by ousting review over the Tribunal decisions about its own jurisdiction.

That fell down on two counts, first that on a strict interpretation, the error made by the IPT was not about their jurisdiction in any case, so that the clause was redundant. The court chose not to interpret the decisions about jurisdiction might be implicit in the determination of the IPT – that is that they must have decided they had jurisdiction to make the determination they were making.

Second, that regardless of any wording, the court found it should apply such a stringent type of interpretation of ouster clauses, with a particular focus on the requirements of the rule of law, that it would seem impossible for the ouster to work.

But we must then ask ourselves – did Parliament pass a clause into legislation it intended not to have any effect? And hopefully I think we can agree that such an interpretation would be quite a stretch. We have reached a point where the growth of various concepts after Anisminic have meant Parliament enacting and proposing ouster clauses of seemingly extreme scope, and the courts then declining to judge clauses passed by Parliament of any

effect.

Complexity has led to confusion.

But Privacy International also I think showed us a way out of this conceptual quandary – Lord Carnwath emphasised the artificiality of nullity and also did not preclude Parliament passing effective ouster clauses, so long as, in the words of the Cart judgment, those clauses are clear and explicit. And that's the challenge I think for legislators.

The dissenting judgments also point to different thinking on ouster clauses, looking at concepts such as a 'permitted field' of activity, having more regard to statutory context and Parliamentary intent and the classes of error which the court should have supervision over from a rule of law perspective.

Furthermore, all judgments accepted that there is a distinction between true jurisdictional errors, instances where the decision maker seriously breached their duties to act fairly, and all other errors. These are the distinctions that the post-Anisminic case-law I think had collapsed. And I believe those distinctions hold the key to passing effective ousters that are respectful of the rule of law.

So, I hope the ouster that I am proposing points a way out of the marshes and onto firmer ground with the proper use and effectiveness of ouster clauses.

The clause in the Bill makes very clear what kind of decisions by the Upper Tribunal are not to be subject to review. And it also makes clear the kind of error which could be a ground of review. This preserves the jurisdiction of the supervisory courts for specific reasons.

Of course, for this to work, the courts would have to faithfully respect the distinctions drawn and I am confident that they will do that.

It is very much my hope that this clause will banish the ghost of Anisminic, draw a line under it, and provide a proportionate, targeted and just ouster clause.

Thank you.

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3. [1986] 2 All ER 334
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5. IRAL Report, 2.11-2.36, 2.94-95
6. IRAL Report, 3.29
7. IRAL Report 2.96, pp129-130
8. IRAL Report 3.19-3.22
9. R (on the application of Cart) (Appellant) v The Upper Tribunal [2011] UKSC 28 at [100]
10. Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

11. R (Evans) v Attorney General [2015] UKSC 21
12. R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22
13. judging-the-public-interest.pdf (policyexchange.org.uk) – last page
14. judging-the-public-interest.pdf (policyexchange.org.uk) – last page
15. Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223
16. See Lord Carnwath's discussion in Lord Carnwath's ALBA Annual Lecture (supremecourt.uk) page 18. See also Mark Elliott: Where next for the Wednesbury principle? A brief response to Lord Carnwath – UK Constitutional Law Association.
17. 2021-06-17-1800_HADDON-CAVE_ComplexityLaw-T.pdf – page 10.
18. Keyu v Sectetary of State for Foreign and Commonwealth Affairs [2015] UKSC 69 [133]
19. IRAL at 3.31-34
20. Varuhas, 'Principle of Legality', The Cambridge Law Journal, (December 2020)
21. IRAL at 3.18
22. R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22 at [214]
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24. Feldman, D (2014) 'Chapter 4: Anisminic Ltd v Foreign Compensation Commission [1968]: In Perspective', Landmark Cases in Public Law (2014) (eds Juss and Sunkin), pp. 92-95
25. R Ekins, The Nature of Legislative Intent, (OUP, 2012), p. 126
26. More detail from Feldman: See particularly Pearlman v Keepers and Governors of Harrow School [1979] QB 56 , CA, a case concerned with rights of appeal rather than review, in which Lord Denning MR and Eveleigh LJ formed the majority. The dissenting judgment of Geoffrey Lane was later approved by a majority of the Appellate Committee of the House of Lords in In re Racal [1981] AC 374 , HL, and by the Judicial Committee of the Privy Council in South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union [1981] AC 363, PC . For discussion of Pearlman see H. Rawlings , ' Jurisdictional review after Pearlman ' [1979] P .L. 404–419 . See also B oddington v British Transport Police [1999] 2 AC 143 , HL , at 144 per Lord Irvine of Lairg LC, and R (Lumba) v Secretary of State for the Home Department (JUSTICE and others intervening) [2011] UKSC 12 , 2012 1 AC 245, SC, at para. [66] per Lord Dyson
27. O'Reilly v Mackman [1983] UKHL 1
28. Ekins, R (2008) 'What is legislative intent? Its content and structure', Statute Law Society Conference, Belfast, p.2
29. Privacy International [30]
30. Privacy International [206], [211]