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Introduction

1. The Regulation of Investigatory Powers Act 2000 ("**RIPA**") establishes the Investigatory Powers Tribunal ("**IPT**"),[1] which hears complaints relating to surveillance activities by public authorities. The Supreme Court case of *R (Privacy International) v Investigatory Powers Tribunal* ("***Privacy International***") concerned the Secretary of State's power under section 5 of the Intelligence Services Act 1994 to issue a warrant authorising MI5, MI6, or GCHQ to enter or interfere with property "specified" in the warrant. The IPT had to make a preliminary decision as to whether it was lawful for the Secretary of State to issue a warrant in respect of a *class* of property (sometimes known as a 'thematic' warrant), as opposed to some *particular* property. The IPT concluded that 'thematic' warrants are lawful.[2]

2. The claimant, Privacy International, sought judicial review of the IPT's decision on the ground that the IPT had committed an error of law. But there was a preliminary stumbling block in the form of section 67(8) of RIPA:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

3. The High Court[3] and the Court of Appeal[4] had held that section 67(8) was a bar to judicial review. However, by a majority of 4 to 3, the Supreme Court held that section 67(8) did not oust the power of judicial review of the IPT's decisions on the ground of error of law.

[1] Regulation of Investigatory Powers Act 2000 s.65.
[2] *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKIP Trib 14_85-CH ("***Hacking Judgment***") at [45], noted at [2016] All ER (D) 127 (Feb).
[3] *R (Privacy International) v Investigatory Powers Tribunal* [2017] 3 All ER 1127.
[4] *R (Privacy International) v Investigatory Powers Tribunal* [2018] 1 WLR 2572.

This note makes two points. First, the majority's conclusion was right and the minority's was not. Second, the decision of one of the majority judges, Lord Carnwath (with whom Lady Hale and Lord Kerr agreed), made several revolutionary remarks about ouster clauses generally that have attenuated the principle of parliamentary sovereignty.

The effectiveness of section 67(8)

'Clear and explicit' words

4. Lord Carnwath's judgment began in an orthodox enough manner. The starting point is that Parliament can only oust judicial review by making its intention crystal-clear using the "most clear and explicit" words.[5] For example, in *Anisminic Ltd v Foreign Compensation Commission* ("***Anisminic***"),[6] a statute provided that a "determination" by the Foreign Compensation Commission "… shall not be called in question in any court of law". According to the House of Lords, this provision did not oust judicial review, because a "determination" made outside the Foreign Compensation Commission's "jurisdiction" was not truly a "determination".

5. Section 67(8), with its explicit reference to "jurisdiction", is evidently an attempt by Parliament to avoid the result in *Anisminic*. But the majority in *Privacy International* said that the wording of section 67(8) was still not "clear and explicit" enough. Lord Carnwath reached this conclusion by applying *Anisminic* by analogy, hence sidestepping the need to engage with the difficult word "jurisdiction". *Anisminic* said that a "determination" made outside jurisdiction is no determination at all. Similarly, said Lord Carnwath, "a decision which is vitiated by error of law… is no decision at all".[7] To reach this conclusion, Lord Carnwath did not need to address the issue of whether or not a decision vitiated by error of law is *ipso facto* a decision made outside jurisdiction. Therefore, unlike Lord Wilson (dissenting),[8] the majority was not bogged down by a discussion of whether a decision of the IPT which is tainted by an error of law is necessarily a decision made outside the IPT's "jurisdiction".

[5] *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 (CA) at 583; *R (Cart) v Upper Tribunal* [2012] AC 663 (SC) ("***Cart***") at [30].
[6] [1969] 2 AC 147.
[7] *Privacy International* at [109].
[8] *Privacy International* at [219]-[226].

Who has the final word on the law?

6. The most significant issue that divided the majority from the minority was not whether a decision of the IPT is subject to judicial review on the ground of error of law, but rather whether it could even be said that there had been an error of law. How may one tell whether an "error of law" has taken place? Who is to say whether a decision-maker got the law right? One might pithily answer: 'the High Court (subject to appeals to the Court of Appeal and/or the Supreme Court)'. But *why* the courts?

7. That question mattered because, according to the dissenting judgment of Lord Sumption (with whom Lord Reed agreed), the IPT was "performing, within its prescribed area of competence, the same functions as the High Court".[9] This being so, the IPT cannot commit an error of law any more than the courts can, for the IPT itself has the power to pronounce authoritatively on the law. Lord Sumption had two reasons for this conclusion. First, "the [IPT] exercises a power of judicial review which would otherwise be exercised by the High Court".[10] Second, members of the IPT "must either have held high judicial office or have had a relevant legal qualification for at least seven years"[11] – in other words, the IPT is as experienced and learned in the law as are the courts. Lord Wilson, in his dissent, made essentially the same points.[12]

8. The first point is a red herring. True, the IPT is bound, in cases involving alleged executive violations of the ECHR, to "apply the same principles… as would be applied by a court on an application for judicial review".[13] So Lord Sumption was right to point out that the IPT "exercises a power of judicial review which would otherwise be exercised by the High Court".[14] But all that means is that the IPT does the same thing as the High Court does, namely, to apply the law to determine the legality of executive action. It is a logical leap to conclude from the fact that the IPT's job is to *apply* the law that the IPT has the power to *authoritatively state* the law.

[9] *Privacy International* at [211].
[10] *Privacy International* at [197].
[11] *Privacy International* [197].
[12] *Privacy International* at [247]-[252].
[13] *Privacy International* at [197], referring to the Regulation of Investigatory Powers Act 2000, s.67(2).
[14] *Privacy International* at [197].

9. The second point is true, but misleading. Lord Sumption's assumption was that the legitimacy of the High Court's decisions on the law flows from the fact that its judges are eminently *qualified and experienced* – as are the members of the IPT. But there is another important determinant of the High Court's legitimacy: that its judges are *independent*. The IPT is certainly an independent institution from the executive, but that is not all there is to judicial independence. The independence of judges of the senior courts is secured by, among other things, security of tenure until retirement age[15] and a rule that their salaries may not be reduced.[16] By contrast, IPT members serve only five-year terms[17] and there is no safeguard against a reduction in salary.[18] In other words, a malicious executive could pressure the IPT into deciding cases in a certain manner by threatening to reduce its members' remuneration or to not renew its members' appointments. Prudence therefore demands that the IPT's pronouncements on the content of the law not be invested with the same status as statements by the courts.

10. Now, it is true that various members of the judiciary (such as recorders and fee-paid tribunal judges) also do not enjoy security of tenure. But, crucially, their decisions are subject to the supervision of and/or appeal to a court that *does* enjoy security of tenure. So even if one argues that they are not independent, they are overseen by judges who certainly are. If the minority is correct, the same cannot be said of the IPT.

11. Unlike Lord Sumption and Lord Wilson, Lord Carnwath insisted that only the courts and not the IPT can have the last word on the law. His reason was not that the courts have certain unique institutional features. Rather, his point was that if multiple institutions were entitled to state the law authoritatively, they may come into conflict; the IPT might thus end up developing a "local law" which conflicts with the "general law of the land" laid down by the courts.[19] For him, it was no answer to say that judges in courts are as learned in the law as are members of the IPT, or that any differences in their views are merely debates about (as Lord Sumption put it) the "merits" of various possible decisions as to what the law is.[20]

[15] Senior Courts Act 1981, s.11(3). On the importance of security of tenure, see e.g. *Baka v Hungary* (2015) 60 EHRR 12, [2014] ECHR 528.
[16] Senior Courts Act 1981, s.12(3). On the importance of the protection of judicial salaries, see e.g. *Zubko v Ukraine* (2009) 48 EHRR 28, [2006] ECHR 479.
[17] Regulation of Investigatory Powers Act 2000, Sched 3, para 1(3).
[18] Regulation of Investigatory Powers Act 2000, Sched 3, para 4.
[19] *Privacy International* at [139].
[20] *Privacy International* at [211].

12. Lord Sumption sought to avoid this problem by stating that the IPT is only entitled to have the last word on the law "within its prescribed area of competence".[21] But he did not address the crucial question whether this area overlaps with the courts' area of competence. As Lord Carnwath rightly pointed out (with the aid of one example),[22] there is a risk of overlap between the sort of question of law answered by the IPT and by the courts.[23]

Lord Sumption's "permitted field" approach

13. There is a more fundamental problem with Lord Sumption's reasoning,[24] which arises from the metaphor of a "permitted field" (also known as a "prescribed area of competence") which he (but not Lord Carnwath) employed. According to this metaphor, administrative law is all about examining a decision-maker's decision to see whether or not it falls within the "field" or "area"; if the decision does, then it is lawful. But what exactly is the "decision" which the court is to examine?

14. In *Anisminic* (the case from which Lord Sumption borrowed the phrase "permitted field"), the majority proceeded on the basis that what the court must examine is the decision-maker's conclusion on the ultimate question it has to answer. According to the relevant statute in that case, the Foreign Compensation Commission's job was to hear and determine applications for compensation made pursuant to the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order. Hence, the question was whether the Foreign Compensation Commission's determination *that Anisminic was not entitled to compensation* fell within the permitted field.[25] It was this *particular* conclusion – that *this* claimant was not entitled to compensation in *these* circumstances – that stood to be tested for whether or not it fell within the field.

15. Similarly, the IPT's job was to determine whether GCHQ's alleged "Computer Network Exploitation" activities, *insofar as they affected the claimants* (which were Privacy

[21] *Privacy International* at [211].
[22] *AKJ v Commissioner of Police of the Metropolis* [2014] 1 WLR 285 (CA).
[23] *Privacy International* at [7].
[24] I am grateful to the anonymous reviewer, whose comments inspired this point.
[25] *Anisminic* at 211G-H.

International and seven Internet service providers), were lawful.[26] So the court's task should have been to ask: did the IPT's answer to *this* question fall within the permitted field?

16. But Lord Sumption asked a completely different question, namely, whether the decision *that thematic warrants are lawful* fell within the field.[27] This misses the point. The IPT's job is not to issue abstract advisory opinions on whether certain types of warrant are lawful. According to the RIPA, the IPT's job is to hear and determine proceedings by *particular* complainants in respect of *particular* activities.[28] So the IPT's judgment was merely a preliminary statement of the law as the IPT understood it and which the IPT would go on to apply in determining the complaint.[29] The court's focus must ultimately be on whether the IPT's conclusion *as to whether or not the complaint is made out* falls within the 'permitted field'. Lord Sumption wrongly asked whether the IPT's *preliminary statement of the law* fell within the 'permitted field'. But this presupposes that, in the first place, the IPT is in the business of deciding what the law is. As we have seen, there is simply no basis for this presupposition, and Lord Sumption said nothing to address its implication, pointed out by Lord Carnwath, that the IPT may end up applying a 'law' different from the "general law of the land".[30]

The effectiveness of ouster clauses generally

A constitutional revolution

17. So much for the majority's conclusion that section 67(8) did not oust judicial review of the IPT's decisions, which was based on an application of *Anisminic* coupled with an insistence that only the courts can authoritatively state the law. More intriguing is the second issue (as framed by the parties): "whether, and, if so, in accordance with what principles, Parliament

[26] *Hacking Judgment* at [2].
[27] *Privacy International* at [206].
[28] For example, a complaint that one has been a "victim" of an act by one of several authorities that is prohibited by section 6(1) of the Human Rights Act (RIPA s 65(2)(a) read with Human Rights Act 1998 s 7(1)), or a "complaint by a person who is aggrieved by [certain] conduct" by one of those authorities (RIPA s 65(2)(b) read with ss 65(4)-(5)).
[29] *Hacking Judgment* at [2].
[30] *Privacy International* at [139].

may by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction?"[31]

18. Lord Lloyd-Jones, though reaching the same conclusion as Lord Carnwath on the effect of section 67(8), deliberately said nothing about the controversial second issue.[32] The issue is controversial because if one accepts the classic model of parliamentary sovereignty, to ask such a question is heresy, for the answer is obviously: '(a) yes; (b) in accordance with any principles it likes, or none at all'. To answer to the contrary would be revolutionary. Lord Carnwath could, like Lord Lloyd-Jones, have ignored the matter altogether. Instead, Lord Carnwath said: "I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law".[33] Lord Carnwath began by stating that the "rule of law" is "a principle which is as fundamental to our constitution as the principle of Parliamentary sovereignty".[34] His conclusion was that the "rule of law" can lead to the result that "binding effect cannot be given" to some statutes,[35] though they be validly enacted. So the effect of Lord Carnwath's judgment is that Parliament is only sovereign *sometimes* – in other words, not sovereign.

19. A conservative reader might take Lord Carnwath's remark merely to be a prediction that the courts will be so reluctant to accept that Parliament intended to oust judicial review that, in practice, the courts will never conclude that Parliament so intended. Similarly, one might take Lord Carnwath's subsequent statement that "it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld"[36] to be merely a statement of the truism that the court's job is to interpret statutes; and one might take his remark that there would be no point in Parliament both "defining by statute the limit of a tribunal's powers" and passing a statute allowing "those limits [to] safely be passed"[37] as a statement of the canon that Parliament is taken not to intend to contradict itself. Such an interpretation of Lord Carnwath's judgment would be in line with parliamentary sovereignty as traditionally recognised, for it would explain the ineffectiveness of section 67(8) (and other ouster clauses)

[31] *Privacy International* at [21(ii)].
[32] *Privacy International* at [168].
[33] *Privacy International* at [144].
[34] *Privacy International* at [114].
[35] *Privacy International* at [144].
[36] *Privacy International* at [144].
[37] *Privacy International* at [122].

simply on the basis that, on a proper interpretation of the statute, Parliament did not *really* intend to oust judicial review.

20. But that is not what Lord Carnwath meant. To the contrary, he said that the court was not to deal with ouster clauses as an "exercise… of ordinary statutory interpretation, designed simply to discern 'the policy intention' of Parliament, so downgrading the critical importance of the common law presumption against ouster".[38] This is puzzling, because the use of "common law presumption[s]" *is* part of the exercise of "ordinary statutory interpretation". So, in effect, Lord Carnwath elevated the "presumption against ouster" from a principle of statutory interpretation to a principle *higher* than "ordinary statutory interpretation" (which is nothing but the exercise of giving effect to Parliamentary sovereignty as expressed in legislative intention). As a result, said Lord Carnwath, "there are certain fundamental requirements of the rule of law which no form of ouster clause (however 'clear and explicit') could exclude from the supervision of the courts".[39] Lord Carnwath did not say that such clauses do not really purport to oust judicial review as may appear at first glance; instead, he said that, *whether or not they do*, they will not be "upheld" by the courts.[40]

21. This attenuation of parliamentary sovereignty is striking, not least of all because it was not necessary to dispose of the case. Lord Carnwath could have stopped at saying that a decision tainted by an error of law is no decision at all – in other words, a "nullity" – and so section 67(8) does not oust review for error of law. That would have preserved Parliament's notional power to oust judicial review, even if the courts would never find that Parliament has actually done so. But Lord Carnwath now went on to say that "the 'nullity' analysis seems highly artificial",[41] and preferred an analysis based on an "appropriate balance" between "respect… for the particular statutory context and the inferred intention of the legislature" (does the word 'respect' mean something less than recognising sovereignty?) and the rule of law.[42] More striking still is his emphatic statement that "it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review".[43] Lord Steyn, in *R (Jackson) v Attorney-General*, famously said that the courts "may have to

[38] *Privacy International* at [107].
[39] *Privacy International* at [122].
[40] *Privacy International* at [144].
[41] *Privacy International* at [129].
[42] *Privacy International* at [130].
[43] *Privacy International* at [131].

consider" whether parliamentary sovereignty may be qualified in "exceptional circumstances".[44] Lord Carnwath's judgment, by contrast, is hardly as tentative.

'Proportionality' and the 'rule of law'

22. Putting aside the question of whether the displacement of parliamentary sovereignty by the "rule of law" has heralded a constitutional revolution, one is driven toward sympathy for Lord Wilson's point that Lord Carnwath had "fail[ed] to identify any robust criterion by reference to which the court's decision in any particular case could be foretold".[45] All that Lord Carnwath had said was that the 'rule of law' was to be given effect in a "sufficient and proportionate" manner,[46] such that the "scope of judicial review" was to be no less than that "required by the rule of law".[47] Hence, a "balanced assessment" explained the dissenting judgment of Geoffrey Lane LJ in *Pearlman v Keepers and Governors of Harrow School*[48] (which was approved by the House of Lords in *In re Racal Communications Ltd*).[49] In that case, a statute provided that the rateable value of property could be reduced if the tenant had made an improvement in the form of "works amounting to structural alteration, extension or addition"; Geoffrey Lane LJ held that one could not apply for judicial review on the ground that the decision-maker erred in considering that certain works involved a "structural alteration… or addition".

23. In truth, Geoffrey Lane LJ's decision in *Pearlman* has nothing to do with upholding the rule of law in a 'proportionate' manner. As Lord Carnwath rightly pointed out,[50] it is a question of fact whether something is a "structural alteration… or addition". The law is simply that tribunals' findings of fact may not be subject to review merely by reason that those findings are allegedly wrong. (According to *E v Secretary of State for the Home Department*,[51] review is only available if the findings of fact are wrong *and unfair*.) So the reason why *the rule of law* did not require that the decision of the County Court judge in *Pearlman* was reviewable

[44] *R (Jackson) v Attorney-General* [2006] 1 AC 262 (HL) at [102].
[45] *Privacy International* at [237].
[46] *Privacy International* at [133]. Note that "proportionate" here does not refer to proportionality as a *ground* of judicial review, in the sense discussed in cases such as *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 (SC).
[47] *Privacy International* at [132].
[48] *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 (CA).
[49] *In re Racal Communications Ltd* [1981] AC 374 (HL).
[50] *Privacy International* at [134].
[51] *E v Secretary of State for the Home Department* [2004] QB 1044 (CA).

for error of fact was simply that *the law* did not permit such review. It was *not* because this unreviewability was 'proportionate'. The 'proportionality' metaphor is misleading, because it would imply that the non-availability of review on the ground of error of fact is a *prima facie* (albeit justifiable) restriction of the rule of law – and it would not even tell us what the permissible grounds of restriction are.

24. One might seek to argue that 'proportionality' is nothing new because the Supreme Court, in *Cart*, has already introduced it into the law of judicial review.[52] But the operation of 'proportionality' was quite different in *Cart* than in *Privacy International*. *Cart* concerned the issue of the circumstances in which the court should grant permission to apply for judicial review of a decision of the Upper Tribunal – in other words, when the court should suspect that the Upper Tribunal has committed a legal error that requires correction through judicial review. By contrast, according to Lord Carnwath's analysis of *Pearlman*, 'proportionality' address the quite different, logically anterior, question of what counts as a legal error in the first place.

25. So Lord Carnwath's judgment would make the following radical change: the maintenance of the "rule of law" in a "proportionate" manner would be the new "organising principle of administrative law"[53] that explains not only the circumstances in which judicial review is available (in other words, when one may apply for judicial review), but also what grounds of review are possible (in other words, what judicial review is for, and what kind of errors it exists to correct). One would hope that a development of such magnitude had been accompanied by a definition of the "rule of law". After all, according to Lord Carnwath, it is for "the Supreme Court… to determine [the] content and limits" of this concept.[54] But the judgment provides no definition of the "rule of law", other than that "decisions are taken in accordance with the law".[55] What does "the law" say about how decisions may be taken? Lord Carnwath, in his treatment of *Pearlman*, answered that very question by reference to the "rule of law".[56] Given this circularity, Lord Carnwath's justifications for giving such pride of place to the principle of 'proportionality' in the 'rule of law', namely that the parties did not dispute

[52] H W R Wade and C F Forsyth, *Administrative Law* (11th ed: OUP, 2014) at 222-223, cited in *Privacy International* at [98].
[53] H W R Wade and C F Forsyth, *Administrative Law* (11th ed: OUP, 2014) at 222-223 (discussing *Cart*), cited in *Privacy International* at [98]. In *Privacy International*, Lord Carnwath acknowledged this point (at [98]), but explained it on the basis that "the law has evolved" (at [99]).
[54] *Privacy International* at [121].
[55] *Privacy International* at [88], citing *Cart* at [37].
[56] *Privacy International* at [134] read with [132].

the importance of the rule of law in principle,[57] and that section 1 of the Constitutional Reform Act 2005 refers to the "rule of law",[58] are rather unsatisfactory.

Legislation in vain?

26. One may argue that the remarks just made about parliamentary sovereignty are exaggerated because section 67(8) has not been stripped of all force. Lord Carnwath and Lord Lloyd-Jones, perhaps in an attempt to avoid the result that Parliament had passed section 67(8) in vain and/or that section 67(8) had been been judicially repealed, suggested that section 67(8) still did *something*: it ousted judicial review on grounds of error of precedent fact.[59] They considered that a decision by the IPT that a precedent fact requirement had been made out was a "decisio[n] as to whether they have jurisdiction". But the artificiality of this becomes apparent as soon as we ask: judicial review *of what*? Suppose the IPT commits an error of precedent fact. That is short for saying that the IPT wrongly thinks that it has the power to decide some question, when in truth it does not. According to Lord Carnwath, the court might not be able to review the IPT's conclusion that it has power to decide the question. But the fact remains that the IPT has no power to decide the question; so any purported answer to the question is a non-answer, and may accordingly be quashed by the court for being the product of an "unauthorised… exercise".[60] To use the 'permitted field' analogy: if the IPT's decision as to the complaint before it falls outside the permitted field, then it would make no difference whether the IPT thinks it has acted within the permitted field, and therefore it would make no difference whether or not the court can review whether the IPT was right in so thinking. Exactly what, then, did section 67(8) do?

27. At present, section 67(8) operates in tandem with the new section 67A (which was enacted a few weeks after the hearing of *Privacy International* in the Supreme Court). Section 67A provides a right of appeal against the IPT's decisions to the Court of Appeal or the Court of Session on, *inter alia*, "an important point of principle". The two provisions, on their surface, replace judicial review with this right of appeal. It is likely that Lord Carnwath would say that this is a "proportionate" means of maintaining the "rule of law", just as is the possibility (created by *Cart*) of an appeal on a point of law from the Upper Tribunal to the Court of Appeal.

[57] *Privacy International* at [119].
[58] *Privacy International* at [120].
[59] *Privacy International* at [110]-[111] and [166].
[60] *Privacy International* at [134].

In more orthodox terms, one might simply say that the appeal procedure is simply judicial review for error of law by another name.

28. But in the absence of section 67A (which did not exist at the time *Privacy International* came to court), taking the majority's judgment to its logical conclusion, section 67(8) ousted nothing at all. The practical effect of the majority's judgment may be the same as that of the majority decision in *Anisminic*. But the majority in *Anisminic* justified its conclusion by reference to legislative intent. That intent may have been a fiction. But that fiction prevented the conclusion that that the House of Lords had refused to obey a statute. Lord Lloyd-Jones took a similar approach.[61] By contrast, it appears that Lord Carnwath, Lady Hale, and Lord Kerr would, in effect, have struck down a statute for unconstitutionality. Whether or not this is desirable, it is truly revolutionary.

[61] *Privacy International* at [165].