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Justice, Jurisdiction, and R (on the application of Privacy International)

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I. Introduction

In the 2019 case of *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*,[1] the Supreme Court gave a landmark judgement in which it held that the authority of *Anisminic Ltd v Foreign Compensation Committee*[2] applied to the facts of the case as an "obvious parallel".[3] At face value, the decision has simplified the law on ouster clauses. Ouster clauses are provisions that remove the courts of their judicial supervision over the decisions of executive bodies. The legislature creates these by introducing a clause into legislation that prevents judicial review of specialist tribunals' adjudicatory decisions. By their nature, therefore, ouster clauses are a controversial subject. Writing shortly after Lord Denning MR held an ouster clause invalid in the case of *Pearlman v Keepers and Governors of Harrow School*,[4] Garner announced that the "wonderful octogenarian… the Lord Mansfield of our century—has done it again!".[5]

This support for judicial intervention in the ouster clause, however, has been far from ubiquitous. Underlying ouster clauses is a debate over what governmental behaviour is permissible by the courts and what court intervention is permissible by the government: a line that divides orthodox views on parliamentary sovereignty

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1 *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

2 *Anisminic Ltd v Foreign Compensation Committee* [1969] 2 WLR 163 (HL).

3 *Privacy International* (SC) (n 1) [2] (Lord Carnwath).

4 *Pearlman v Keepers and Governors of Harrow School* [1978] 3 WLR 736 (CA).

5 JF Garner, "Exclusion Clauses" (1979) 42 MLR 578, 578.

and the rule of law. If Parliament is sovereign, then it can do anything, including remove the authority of the courts to review. This may permit executive bodies to act without concern that the courts will intervene if they perceive that a decision is reviewable. However, judges—aware of their constitutional role underpinned by the rule of law—are apprehensive to fully exempt governmental bodies from judicial review. As Leyland and Anthony noted, this would be "tantamount to opening the door to potentially dictatorial power".[6] Therefore, these pieces of statutory aversion to review are often met with canny judicial intervention, which is used to prevent ouster clauses precluding the justiciability of tribunals and lower courts. The decision in *Privacy International* has brought to the fore questions about judicial intervention in political bodies and is an example of how the concept of what is justiciable has changed in recent years. This paper will demonstrate how such a change is indicative in the Supreme Court's decision and reveals an incremental creep towards jurisdiction of what previously would have been considered political matters. At a time when the justiciability of constitutional conventions is being examined, now is a good moment to explore ouster clauses, being a point at which judicial involvement in political matters comes to a crux.

Commentary on ouster clauses is divided. Constitutionalists such as Professor Griffith identified ouster clauses as indispensable methods of protecting the sovereignty of Parliament from a mutinous judiciary. This perspective holds that ouster clauses are useful tools for ensuring that specialist bodies may be the final word in adjudication which is relevant to their expertise.[7] Differing interpretations of ouster clauses are demonstrative of the 'red-light'-'green-light' premise of Harlow and Rawlings on how policy factors affect application of legal principles. Harlow and Rawlings provide two ideological approaches to the rule of law: the 'red-light' approach is characterised by a laissez-faire distrust in the advancing power of the state; the 'green-light' approach sees state involvement in the life of individuals as a necessary prerequisite for meeting social goals.

For the former, ouster clauses prevent the legal right and duty of the courts to review the decisions of a state encroaching upon civil liberties; for the latter, ouster clauses are efficient methods of protecting social advancement from a conservative judiciary.[8] Griffith's concern is one that academics have recognised as belonging to the 'green-light' school: ouster clauses provide "consistency and finality" in legislative decisions.[9] Discussion on the law of ouster clauses generally

6 P Leyland and G Anthony, "Express and implied limits on judicial review: ouster and time limit clauses, the prerogative power, public interest immunity" in *Textbook on Administrative Law* (Oxford University Press 2016), 392.

7 JAG Griffith, *The Politics of the Judiciary* (Fontana Press 1997), 123–4, 340.

8 C Harlow and R Rawlings, *Law and Administration* (Cambridge University Press 1984).

9 *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 393.

orbits around two main conclusions. First, that those favouring the ouster clause do so from a 'green-light' perspective. Second, that the traditional position—which held clauses would suffice to oust the power of the courts to review an executive body if it acted within its jurisdiction—is now defunct. Through the previous case law and the Supreme Court judgement in *Privacy International*, this paper will examine these two claims to consider whether the judiciary's attitude towards ouster clauses has become an indurate legal principle.

It will be argued that, from the decision in *Privacy International*, these must be revised. First, that the new favourable interpretations of ouster clauses come from what might be considered an 'amber-light' approach, respecting liberal social mores whilst expressing concern with an encroaching executive. Second, that although the majority decision of the Supreme Court undermined the traditional distinction between ouster clauses concerning errors within jurisdiction and without jurisdiction, in practice this is still present. In qualifying its judgement in *Privacy International* as such, the Supreme Court decision has overturned an agreement struck between Parliament and the judiciary on sovereignty and jurisdiction. This change, it will be argued, is representative of the argument advanced by Poole in 2009 of the "reformation" in administrative law from the language of unreasonableness in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[10] to rights-based judicial review. Where once generally ultra vires behaviour was the trigger for review of bodies behaving beyond their permitted jurisdictional bounds, now anthropomorphic rights-based arguments provide the foundation for judicial action.[11] It is in this conceptual matrix that the decision in *Privacy International* was decided against the traditional interpretation of the ouster clause. Although the judgement simplifies the law on ouster clauses, *Privacy International* has created the potential for greater confusion and constitutional ambiguity.

II. The concept of the ouster clause

It is useful to understand ouster clauses and judicial interpretations of them by cutting through their theoretical difficulties: what Beatson called an "intrinsic mosaic of conceptual formulae."[12] Ouster clauses are methods of precluding judicial review of determinations made by tribunals and lower courts. The logic behind them works thus: in a piece of legislation, Parliament bestows upon a Tribunal the jurisdiction to make decisions over hearings in a particular area.

[10] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[11] T Poole, "The Reformation of English Administrative Law" (2009) 68 CLJ 142, 142.
[12] J Beatson, "The Scope of Judicial Review for Error of Law" (1984) 4 OJLS 22, 31.

A section of the Act provides that the Tribunal has authority to determine in proceedings whether or not a third party meets statutory requirements.

Hypothetically, say Parliament deemed it appropriate to introduce a new oversight of the making and registration of cheese. The fictitious Dairy Products Act provides in section 1 that the Cheese Registration Tribunal has jurisdiction to determine whether or not a dairy product may be called a 'cheese'—depending on requirements such as ingredients and processes. The authority is given to the Tribunal because Parliament deems it to be an agency particularly qualified in the area of policy—the Investigatory Powers Tribunal, for example, consists of prominent judges and academics who are well-placed to make determinations on the security services. Due to this particular expertise, another section of the Act provides that any decision made by the Tribunal is not capable of judicial review. So, in the Dairy Products Act, section 2 states that 'the Cheese Registration Tribunal's determinations shall not be reviewable in any court': a total ouster clause.

Alternatively, section 2 of the theoretical Act might provide that legal action may be brought against a decision of the Tribunal, but only within six months of the determination being made. This is a time limit clause and, although the concept is slightly different to total ouster clauses, the courts generally consider the two together. Parliament relies on the Diceyan legal theory that it is the source of sovereignty which courts must respect.[13] Legislation must therefore be read in line with parliamentary intention. The courts, however, apply the fundamental principles of the rule of law in keeping governments in check. One aspect of this is that the courts have the right and duty to review an executive body if its actions exceed the legislative authority granted upon it by Parliament. Per Edin, as the courts interpret parliamentary intention, they will hold that Parliament would not have the intention to allow an executive body to violate legal principles without absolute clarity.[14] Therefore, if a Tribunal makes a decision which breaches the jurisdiction placed upon it by Parliament, the courts are considered competent to review it. To return to the cheese analogy: what would happen if the Tribunal decided that a coagulated dairy product, despite meeting the requirements and which is—for all intents and purposes—a cheese, should not be called a cheese? What about if, after this decision was made, it was revealed that members of the Tribunal had shares in a competitor's business? Or if it was held that the Tribunal's understanding of what could be considered a cheese was erroneous? Or if the applicants claimed that the Tribunal misapplied the statute to exclude them? Any

[13] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

[14] DE Edin, "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States" (2009) 57 AJCL 67, 68.

decision of the Tribunal that extended beyond its authority would undermine the effectiveness of the ouster clause in two ways.

First, the decision by the Tribunal may be erroneous as to undermine the words of the statute and remove legislative control, so that the courts may review it. Second, the decision by the Tribunal may be erroneous as to disrupt or threaten a key principle of English law, which the courts may review by right. The debate lies, however, in deciding what errors of law may amount to breaching the jurisdictional remit of a tribunal and therefore nullifying an ouster clause. In considering whether ousters are effective or not, the question is whether an error by the executive body invalidates its authority, and removes the statutory protection of the ouster clause.

III. The landmarks of the ouster clause

Before moving to the Supreme Court's judgement in *Privacy International*, it is prudent to first examine and understand the preceding case law. Much academic commentary has been written on these cases: the purpose of revisiting the judgements is not to question the decisions made, but to demonstrate the journey which has led to *Privacy International*. In 1980, after the decision in *Anisminic*, Professor Wade wrote that the judiciary "have almost given us a constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function."[15] Although this comment may seem overstated for the time, it is somewhat prescient of the decision in *Privacy International*, which has streamlined the jurisdiction of the courts to overturn ouster clauses in extending judicial authority to review errors. When reading the case law on ouster clauses, one must consider two distinct but related areas of discussion: first, the face-value legal jurisdiction of the court to review, and second, the political implications of the courts' review of executive decisions. Since the 1960s, there has been a slow progression towards judicial comfort in throwing out ouster clauses for any erroneous decision made by the executive body in question. Previously this would only stem from a legal error that went beyond the jurisdiction allotted to it by Parliament. With the authority of the Supreme Court judgement, and this distinction seemingly over, the road ahead may have fewer options for judges to take.

A. The old ouster clause

When ouster clauses were brought in front of the courts prior to the 1960s, there was a distinction drawn between two types of erroneous decisions that these

[15] HWR Wade, *Constitutional Fundamentals* (Stevens & Sons 1980) 68.

attempted to cover: non-jurisdictional (an executive body committing an error of law within the powers conferred upon it), and jurisdictional (an executive body committing an error of law outside the powers conferred upon it). Blackstone wrote that inferior courts were subject to supervision:

> [W]here they concern themselves with any matter not within their jurisdiction… or if in handling matters clearly within their cognizance they transgress the bounds prescribed to them by the laws of England… else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety which no wise government can or ought to endure, and which is, therefore, a ground of prohibition.[16]

Although courts were capable of reviewing jurisdictional errors of law by virtue of the public bodies in question behaving ultra vires, an ouster clause would be effective in preventing judicial review of a non-jurisdictional error of law. The rationality for this is simple: if an executive body acts beyond its jurisdictional limits then the courts have an intrinsic right and duty to review that potentially unlawful action. This reasoning goes to the heart of the grounds for judicial review that would later become instilled in *Wednesbury* principles and the doctrine of ultra vires. In *R v Cheltenham Commissioners*,[17] the court prevented the success of an ouster clause in a jurisdictional case, in which Lord Denman CJ stated that: "The statute cannot affect our right and duty to see justice executed."[18] In this case, a paving and lighting Act for the town of Cheltenham enabled commissioners to raise money through a tax. Those taxed could appeal to the quarter sessions if they felt the rate affecting them was unreasonable, but the Act ousted the jurisdiction of the courts to review the sessions' decisions. Section 134 held that "the determination of the said justices in their said general quarter sessions, or adjournment thereof, shall be final, binding, and conclusive to all intents and purposes whatsoever."[19] Section 136 further enacted "that no order, verdict, rate, assessment, judgement, conviction, or other proceeding… shall be quashed or vacated for want of form only, or be removed or removable by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster…"[20] Any certiorari of the quarter sessions' decision on the rates was ousted by these provisions.

However, in an appeal against a rate in which the respondents objected to an admission of evidence, it was found that three of the eleven magistrates who held the evidence admissible had interests in the property concerned. It was held that the attempted ouster clause was undermined by the jurisdictional error of the

16 W Blackstone, *Commentaries on the Laws of England, book III* (1768), 112.
17 *R v Cheltenham Commissioners* [1841] All ER Reprints 301 [1835–1842] (QB).
18 *ibid*, 303 (Lord Denman CJ).
19 1 & 2 Geo 4, c cxxi, section 134.
20 *ibid*, section 136.

quarter session: the interests of the three magistrates in question meant that the proceedings were "improperly constituted" and that, as a result, sections 134 and 136 of the Act did not function. Lord Denman CJ summarised how the behaviour of the quarter sessions warranted the court's interference, stating that the clause could in no way "preclude our exercising a superintendence over the proceedings, *so far as to see that what is done shall be done in pursuance of the statute* [emphasis added]."[21]

The court's ability to undermine this ouster clause stemmed from the jurisdictional error that had been committed. The reasoning for which, however, was that of legislative supremacy as opposed to purely preventing the unlawful behaviour. Parliamentary and statutory authority still took precedence over judicial intervention: the logic of the court was to refuse the ouster clause so that the legislation itself was not undermined. Seeing justice executed was predicated on reviewing the quarter session's judgement, not because of the nature of that decision, but because of the way in which that decision was made. The ouster clause failed to prevent review in this jurisdictional error because the court was, per Williams J, "badly constituted".[22] The effectiveness of the clause was undermined by the quarter session's administrative failures.

Here, however, lie the limits of the old jurisdictional/non-jurisdictional divide: ouster clauses were rendered ineffective only by practical errors made by the executive body that meant they had behaved ultra vires. The courts would not be able to override an ouster clause if the error made did not take the body outside of its allotted power. In *Cheltenham Commissioners*, the corrupt behaviour of the three interested magistrates sitting in the quarter session may have made the body reviewable, but the actual determination reached by that local court alone would have had no justiciability.

For non-jurisdictional errors, therefore, the courts were not considered competent to override any ouster clauses or to review any executive bodies they covered. The case of *Smith v East Elloe Rural District Council*,[23] decided in a period of "judicial quietism",[24] saw the House of Lords interpret an ouster clause so broadly that not even corrupt action by the executive body was considered to have invalidated it. In the facts of this case, there was a challenge to a compulsory purchase order under the Acquisition of Land (Authorisation Procedure) Act 1946, which held that a challenge had to be made within six weeks of the order. If this deadline was not met, per paragraph 16 of schedule 1, the compulsory purchase order "shall not… be questioned in any legal proceedings whatsoever."[25]

[21] *Cheltenham Commissioners* (n 17) 303 (Lord Denman CJ).

[22] *ibid*, 305 (Williams J).

[23] *Smith v East Elloe Rural District Council* [1956] 1 All ER 855 (HL).

[24] *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 395.

[25] Acquisition of Land (Authorisation Procedure) Act 1946, schedule 1, part 4, para 16.

The order in question was made in 1948, against which Mrs Smith took action in 1954 on the grounds that it "had been made and confirmed wrongfully and in bad faith," and invalidated the clause to have no application in ousting the jurisdiction of the courts.[26]

This challenge against the district council failed. First, the appellant's lateness in bringing action was held to immediately breach the time limit clause, which was arguably fair. As Adler wrote, there were clear policy reasons for the time limit placed in the Act, and only a "conceptual purist" would be unhappy with this despite having an adequate remedy in place.[27] Second, in addressing the appellant's argument that the compulsory purchase order would only be valid if made in good faith, Viscount Simonds held it "impossible to qualify the words of the paragraph" as such. The view of his Lordship was that the pure reading of the words of the statute meant that any chance of undermining the ouster clause for fraud was impossible:

> It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 bars… What else can "compulsory purchase order" mean but an act apparently valid in the law, formally authorised, made, and confirmed?[28]

Under this authority a fraudulent act amounting to a jurisdictional error of law would be considered both valid and legal by the very nature of its being made. Any ouster clause could be inviolable, because the sovereignty of a Parliamentary direction would override any erroneous aspects of the determination made by an executive body: jurisdictional errors could be interpreted as non-jurisdictional errors and the courts' powers to review would be dead in the water. This was a judgement that favoured the orthodox view of parliamentary sovereignty and the purposive approach to the statutory intentions of the legislature. In doing so, it created a forceful rationale for ousting the courts' jurisdiction. Lord Morton took this further, writing that "it does not seem to me inconceivable, though it does seem surprising, that the legislature should have intended to make it impossible for anyone to question in any court the validity of a compulsory purchase order on the ground that it was made in bad faith."[29] Taking this judgement to its furthest theoretical conclusion, an executive body could do anything illegal or fraudulent,

[26] *Smith v East Elloe Rural* (n 23) 855D–E.

[27] J Adler, "Time Limit Clauses and Judicial Review – *Smith v East Elloe* Revisited" (1975) 38 MLR 274, 276.

[28] *Smith v East Elloe Rural* (n 23) 859A–B (Viscount Simonds).

[29] ibid 863C (Lord Morton).

and a sufficiently-drafted clause would succeed in precluding the court from its power to review. This would undermine a key principle of the rule of law as we understand it today.

The judgement in *Smith* was an extreme decision and not an authority that was followed for long, but its extremity is worth noting. It demonstrated that, in a post-war environment, the House of Lords was willing to protect executive decisions from the courts. This decision represents a conceptual definition that certain academics favoured in limiting the power of the courts to arbitrarily review. Taylor expressed disdain with the way that abuse of discretion was a treated like a "grab-bag" for some courts, "from which a ground of review can always be found to suit the conclusion sought to be reached on the merits."[30] At a time of social and industrial change, and representative of the 'green-light' interpretation, their Lordships were willing to limit individual protection from fraudulent executive behaviour in favour of government projects. It was a period in which the court held the concept of executive jurisdiction to be broad. Not only did the time limit clause have effect, but so too did the words of the Act to prevent review in a more general sense. In this intellectual environment, the onus was on the claimant—not the government—to prove that their reading of the clause had effect. In the dissenting judgement, Lord Reid held that the general words used in paragraph 16 did not exclude fraudulent action, but were "limited so as to accord with the principle" that "words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty."[31] There was now a precarious relationship between the courts' jurisdiction to review and Parliament's capacity to oust justiciability, as the traditional distinction between legal errors was thrown out. It was in this uneasy judicial precedent that two formative cases on ouster clauses were decided.

B. Expanding justiciability: *ex parte Gilmore and Anisminic Ltd*

The well-documented cases of *R v Medical Appeal Tribunal, ex parte Gilmore*[32] and *Anisminic* provided the leading authority on ouster clauses from the mid-twentieth century onward. *Ex parte Gilmore*, the leading judgement that holds finality clauses are not to be recognised by the courts as an effective method of ousting review, addressed legislation that sought to provide that no decision by the Medical Appeal Tribunal could not be challenged in a court.[33] In this case, section 36(3) the National Insurance (Industrial Injuries) Act 1946 stated that "any

[30] GDS Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations" (1976) 35 CLJ 272, 272.

[31] *Smith v East Elloe Rural* (n 23) 869D (Lord Reid).

[32] *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 (CA).

[33] *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 393.

decision of a claim or question… shall be final",[34] covering the injury of a collier worker that left him blind. Although two of the three medical boards assessed the disablement at 100 per cent, one made no award, and on appeal the Tribunal assessed the damage as 20 per cent. Mr Gilmore applied for a certiorari against this decision by claiming that it failed to meet the requirements of regulation 2(5) of the National Insurance (Industrial Injuries) (Benefit) Regulations 1948.[35]

Surely finding for this appeal and allowing the certiorari would fly in the face of direction of their Lordships in *Smith*? At its face, this could be conceived as a non-jurisdictional error, as the tribunal was within its powers to reach the conclusion that it did. Even when interpreted as a jurisdictional error, the House of Lords had held that clear wording such as section 36(3) would make a tribunal decision unreviewable by the courts. Denning LJ characteristically turned to authorities over three hundred years old to hold that the clause was ineffective to oust the courts' ability to issue a certiorari and revisited the decision of the Medical Appeal Tribunal: "I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words."[36]

According to Denning LJ, section 36(3) did not suffice to be 'clear and explicit', and the court called the House of Lords' bluff. The judgement found for the traditional distinction between jurisdictional and non-jurisdictional errors, identified the facts of this as jurisdictional, and made it clear that the words of the statute were not sufficient to oust the right of certiorari. Denning LJ held the decision to be a jurisdictional error of law due to the incorrect application of a medical report by the Tribunal, so that it was "open for this court to issue a certiorari to quash it for an error of law on the face of the record."[37] Therefore, as a traditionally jurisdictional error of law, the statute would not be enough to oust the review of the court: "The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law."[38]

Just months after the disruption to the traditional distinction in the judgement of *Smith*, the Court of Appeal repaired and reused it. In an effective history lesson, Denning LJ then explained why legislation that sought to quash the right of certiorari should not be effective in modern hearings. In earlier centuries certiorari was used too liberally by the courts "to quash for technical defects" instead of defeating "a substantial miscarriage of justice."[39] Now that

[34] National Insurance (Industrial Injuries) Act 1946, s 36(3).
[35] *ex parte Gilmore* (n 32) 575.
[36] *ex parte Gilmore* (n 32) 583 (Denning LJ).
[37] *ibid* 585 (Denning LJ).
[38] *ibid* 583 (Denning LJ).
[39] *ibid* 586 (Denning LJ).

this was no longer the case, the need to protect the executive from unnecessary orders of certiorari was gone, and clauses could not be effective in ousting the "ancient writ".[40] The decision in *ex parte Gilmore* was representative of the policy considerations that lie behind ouster clauses just as much as the legal reasoning. Per Griffiths, later judgements would come to rely on this subversion of the rule in *Smith*, by reaffirming the position on finality clauses and jurisdictional errors.[41] The judgement was important in maintaining the traditional distinction between errors of law and, moreover, providing the factual and legal logic for the restrictions on ouster clauses. It was not until a decade later, however, that the House of Lords would once again comment on the issue.

The landmark case of *Anisminic* turned on a loss of property from the British mining company during the Suez Crisis in 1956, which was sold on to the Egyptian company TEDO. Anisminic Ltd were deeply dissatisfied with the compensation of £500,000 in addition to the property being sold at less than real value. In 1959, a treaty was agreed between the UK and Egypt to provide £27.5 million for any British property confiscated, for which distribution responsibility was vested in the Foreign Compensation Commission.[42] The Commission operated under the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 which held a claim could be established if, (a) the applicant was the person referred to as owner of the property, and (b) the person referred to *and* any person who became successor in title were British nationals.[43] This Order, in turn, was governed by the Foreign Compensation Act 1950 section 4(4) which provided: "The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."[44] When the Commission held that Anisminic Ltd failed in its application for compensation because TEDO was not a British national, the company argued that the Commission had misunderstood the Order, and the House of Lords had to consider whether section 4(4) of the Foreign Compensation Act did oust the courts' power to review.[45] Following the reasoning in *Smith*, it would do so because the process of discovering whether the Commission had acted ultra vires and misunderstood the Order would be excluded by the statute.

However, in the majority their Lordships rejected this line of argument, with Lord Reid stating that: "It is a well-established principle that a provision

[40] *ibid*.
[41] J Griffiths, "Judicial Review for Jurisdictional Error" (1978) 38 CLJ 11, 11–2.
[42] *Anisminic* (n 2) 164D–F.
[43] Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 (SI 1962 No 2187).
[44] Foreign Compensation Act 1950, section 4(4).
[45] *Anisminic* (n 2) 164F–G.

ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court."[46]

Righting the perceived wrong in *Smith* that Lord Reid was a dissenting voice against thirteen years earlier, the House of Lords expanded the definition of what a jurisdictional error might consist of. It was held that "there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is nullity."[47] In this reasoning, therefore, a tribunal or other executive body could act well within its allotted jurisdiction but do something that would compromise the decision. Giving a non-exhaustive list of what this something might include; his Lordship took great pains to insist that this did not extend the definition of jurisdictional error into the non-jurisdictional realm.[48]

However, not everyone has found this convincing: Griffiths wrote that "the decision effectively obliterated the distinction between errors of law made within, as distinct from in excess of, jurisdiction."[49] Reminiscent of *Cheltenham Commissioners*, and defining a typically non-jurisdictional error as a jurisdictional one due to marred decision-making, the decision flipped the reasoning in *Smith* on its head. Where Viscount Simonds had expanded non-jurisdictional error, Lord Reid used a mirrored reasoning to expand jurisdictional error, into which fell the purported misunderstanding by the Commission of the Order's nationality requirement. Dissenting, Lord Morris held this unnecessary: the Act, he stated, did not prevent inquiries "to decide whether the commission has acted within its authority or jurisdiction."[50] His Lordship expressed concern that the majority judgement would provide the impetus for judicial intervention in previously protected situations.[51]

As Leyland and Anthony have highlighted, this reasoning protects the basic right of the court to review from total exclusion, as the judge sitting on the application for judicial review will determine whether the decision is valid.[52] This must be considered when examining the decision in *Privacy International* because, per Griffiths, although the House of Lords "took a very generous view of the jurisdictional error in the circumstances of that case, each of the majority judgements in that decision insisted that an error of law could still occur within

46 *ibid* 169B (Lord Reid).
47 *ibid* 170B–D (Lord Reid).
48 *ibid*.
49 Griffiths, "Judicial Review for Jurisdictional Error" (n 41) 11.
50 *Anisminic* (n 2) 179D (Lord Morris).
51 *ibid* 180D–G (Lord Morris).
52 *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 396.

jurisdiction."[53] The language adapted, so that decisions outside of the body's jurisdiction became 'purported' determinations, and any legal error would be capable of review. Just two years earlier, Taylor had advocated for further entrenchment of the distinction between grounds, which he argued would clarify the law on judicial review of improper purposes.[54] *Anisminic*, however, decided that clarity was to be found in a conceptual opposite. The decision of the House of Lords expanded the errors capable of disabling an ouster clause, but did so under the one title of jurisdiction. In the decades following, the courts applied the reasoning of *Anisminic* in a consensus that, whilst legitimising the capability of certain ouster clauses, shifted the realm of jurisdictional error.

C. The post-*Anisminic* consensus

In the decades leading up to *Privacy International*, judgments followed a consensus laid down in *Anisminic*. Although some cases on ouster clauses reached the House of Lords, and later the Supreme Court, none really called into question the ambit of jurisdictional error. In *Pearlman*, the Court of Appeal considered whether a judge's decision was open to certiorari, concerning the Housing Act 1974. Schedule 8 to the Act held that "works amounting to structural alteration, extension or addition" to a rented house by a tenant entitled them to a reduction in rates.[55] The judge held that the tenant's own installation of modern central heating to the flat did not amount to such works under Schedule 8.[56] Moreover, concerning the decision of the judge, paragraph 2(2) of the Schedule provided that "any such determination shall be final and conclusive."[57] The court was also asked to consider the authority of the County Courts Act 1959, which provided that "no judgement or order of any judge or county courts… shall be removed by appeal, motion, certiorari or otherwise into any other court whatsoever…"[58]

Lord Denning MR, Lane and Eveleigh LJJ all held that the judge erred in his decision that the works did not amount to structural alteration; Lord Denning MR and Eveleigh LJ went further, and applied the decision in *Anisminic* to state that this error was one "in law", so that the judge "wrongly deprived himself of jurisdiction" and paragraph 2(2) of the Schedule failed to exclude certiorari.[59] As the case concerned an error made on a point of law, Lord Denning MR held

[53] Griffiths, "Judicial Review for Jurisdictional Error" (n 41) 14.
[54] Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations" (n 30) 291.
[55] Housing Act 1974, schedule 8, para 1(1).
[56] *Pearlman* (n 4) 736H–7C.
[57] Housing Act 1974, schedule 8, para 2(2).
[58] County Courts Act 1959, section 107.
[59] *Pearlman* (n 4) 737C–F.

that section 107 of the County Courts Act did not remove the right of certiorari, because the judge had acted without jurisdiction. He then went further, to suggest that the traditional jurisdictional/non-jurisdictional distinction defunct, breaching the decision in *Anisminic* by removing any erroneous determination in which an ouster clause may have effect.[60]

This was not a popular decision, which revealed the fragility of the consensus created by *Anisminic*: as Griffiths wrote, it "threaten[ed] to expose the courts to a direct confrontation with Parliament."[61] Even if the distinction between jurisdictional and non-jurisdictional errors existed in name only, it was held to be a principle central to the rule of law and separation of powers, that underpin the relationship between the courts and the Parliament. Parliamentary intention to allow a body to err within its own jurisdiction is still a valid intention; for the courts to ignore that would undermine the very notion of parliamentary sovereignty. On this matter, Lane LJ dissented strongly from the majority, stating that "if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law."[62]

The majority judgement in *Pearlman* extended the judicial power beyond what *Anisminic* had permitted and, soon after in *Re Racal Communications*,[63] the House of Lords returned to the consensus. Their Lordships held that section 441(3) of the Companies Act 1948, which stated that a decision by a High Court judge "shall not be appealable",[64] was effective under *Anisminic*. The decision was two-fold: first, that in considering the case the Court of Appeal had acted beyond its own jurisdiction, and was therefore itself erroneous; second, that although errors of law are reviewable, where a power is granted to a tribunal it is not for the courts to assume its limits: "there was no presumption that Parliament did not intend to confer on it a power to determine questions of law going to its jurisdiction as well as questions of fact".[65] What the majority decision in *Pearlman* had read as an automatic authority of the courts to review anything erroneous was now limited by the House of Lords. The consensus, therefore, was one of complex logic that found executive bodies to be justiciable on a case-by-case basis. Per Lord Diplock,

60 *ibid*, 743G–4G (Lord Denning MR).
61 Griffiths, "Judicial Review for Jurisdictional Error" (n 41) 14.
62 *Pearlman* (n 4) 750A (Lane LJ).
63 *Re Racal Communications* [1981] AC 374 (HL).
64 Companies Act 1948, section 441(3).
65 *Re Racal Communications* (n 63) 375E–G.

when legislation "provides that the judge's decision shall not be appealable, they cannot be corrected at all."[66]

Following the authority of *Re Racal Communications*, the distinction still existed, but on the precarious understanding that executive bodies may be capable of determining their own reviewability if the statute confers such purview upon them. Following this, in *R v Lord President of the Privy Council, ex parte Page*,[67] the nature of a legal error was considered with a more conservative understanding of what powers fell under jurisdiction. The House of Lords held that the Lord President of the Privy Council – acting as visitor on behalf of Hull University – was within their powers to reject a petition for review. The appellant argued that, because he had been laid off without "good cause" per the requirements of the university statutes, this was a jurisdictional error under *Anisminic*. Lord Browne-Wilkinson simply stated that this was an error of law which was covered within the discretion of the visitor; as such, it was held to be a traditionally non-jurisdictional case, and the court's ability to review was limited. He noted that the decision in *Anisminic*:

> [R]endered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires… Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires.[68]

The judgement in *ex parte Page* ascertained that a jurisdictional error did not occur automatically unless an executive action question had been ultra vires. This in turn expanded the scope of what might be considered a body's jurisdiction. In the Court of Appeal case of *R v Secretary of State for the Home Department, ex parte Fayed*,[69] two brothers who applied for British naturalisation were refused, a decision for which the Home Secretary refused to give any reasons. Under the British Nationality Act 1981, the Home Secretary was not "required to assign any reason for the grant or refusal of any application," which would "not be subject to appeal to, or review in, any court".[70]

Lord Woolf MR held, however, because no explanation was given, the brothers were not given the legal fairness to which they were entitled.[71] It was a

66 *ibid* 384F (Lord Diplock).
67 *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 (HL).
68 *ibid* 701F (Lord Browne-Wilkinson).
69 *R v Secretary of State for the Home Department, ex parte Fayed* [1997] 1 All ER 228 (CA).
70 British Nationality Act 1981, section 44(2).
71 *ex parte Fayed* (n 69) 242B (Lord Woolf MR).

purely jurisdictional error that had been made, and as a result, the decision was open to review. This decision denotes a period in which, as Poole has identified, the Human Rights Act 1998 began to take precedence and introduced "a structure in which the responsibilities that public authorities have in relation to rights" for the courts to reinforce.[72] Slowly, an individual rights-based concept of judicial review replaced the purely ultra vires position advanced in *Anisminic*.

In *R (on the application of Cart) v Upper Tribunal*[73] the Supreme Court upheld the decision in *Anisminic*, citing the rule of law for holding judicial review of the Upper Tribunal available when the challenge raises a point of principle or if there is a compelling reason to hear the claim.[74] In this case, the Supreme Court was required to consider the Tribunals, Courts and Enforcement Act 2007, which provided that there was a right to appeal "any point of law arising from a decision made by the Upper Tribunal other than an excluded decision".[75] Did this suffice to oust judicial review of unappealable, 'excluded' decisions in the Upper Tribunal?

Lady Hale held that it did not: first, because there was a lack of the clear words required to make an ouster clause effective; second, that it was illogical for the statute to distinguish judicial review in certain situations which were "gathered together" in the legislation; third, that the rule of law requires tribunals and courts, which "are Parliament's bidding", to be justiciable.[76] Applying the decision provided in *Anisminic*, the judgement held that the Upper Tribunal had to be reviewable, in order to ensure that bad law did not become entrenched in the then-new tribunal system. Lord Phillips stated that reviewability was required "to guard against the risk that errors of law of real significance slip through the system."[77] The judgment in *Cart* conceptualised errors of law in a more modern framework. This was a broad definition, which made decision or determination with the potential to affect future cases capable of judicial review.[78]

However, this decision still turned on how legal errors fell outside the jurisdiction of the system. As the Upper Tribunal is an appellate court, questions of legal points and principle are reviewable, because an error of law would take the body out of its jurisdiction. The distinction that was applied in the earlier case

[72] Poole, "The Reformation of English Administrative Law" (n 11) 166.

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

[74] *ibid* [37] (Lady Hale).

[75] Tribunals, Courts and Enforcement Act 2007, section 13(1)

[76] *Cart* (n 73) [37] (Lady Hale).

[77] *ibid* [91] (Lord Phillips).

[78] E Craven, "Case Comment: *R (Cart) v The Upper Tribunal; R (MR (Pakistan)) v The Upper Tribunal (IAC)* [2011] UKSC 28" (*UKSC Blog*, 4 July 2011) <http://ukscblog.com/case-comment-r-cart-v-the-upper-tribunal-r-mr-pakistan-fc-v-the-upper-tribunal-immigration-asylum-chamber-2011-uksc-28/> (accessed 20 July 2019).

law exists in this judgement, with the Supreme Court emphasising that the danger of erroneous law becoming stuck in the decisions of the Upper Tribunal prevents an ouster clause from being effective, as it goes to the heart of the purpose of the Upper Tribunal. The consensus established in *Anisminic* is one that respected the sovereignty of Parliament whilst ensuring that individuals had the right to judicial protection against an overbearing executive. The danger with increasing the definition of jurisdictional error, as seen in the decision in *Pearlman*, is that it allowed the courts to conflate law and fact to create situations in which ouster clauses would be ineffective. As Beatson has noted, such an administrative legal system does not use the concept of jurisdictional error, but makes error of law "a façade" for a system that favours potentially arbitrary decisions as to whether the courts may review.[79] What followed *Anisminic* was a series of attempts by the courts to ensure that all legal errors were justiciable whilst conforming to Diceyan constitutional theory on Parliamentary sovereignty. The judgement in *Privacy International* must be read as part of this legal history.

IV. The *Privacy International* case

As this paper has demonstrated, prior to the decision in *Privacy International* there was a period of general stability in which it was held that in order to be considered jurisdictional, an error must be one that is fatal to the very purpose of the executive body in question. The question in *Privacy International* turned on whether an error of determination, subject to the influence of *Anisminic* and a new conceptual environment that emphasised rights-based review.

A. The facts

The Investigatory Powers Tribunal (IPT) was established to hear complaints relating to the use of investigatory powers by the intelligence services. It was set up under the Regulation of Investigatory Powers Act 2000, section 67(8) which provided that: "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."[80]

The IPT allowed the hacking of computers under the Intelligence Services Act 1994, which provides that the Secretary of State may issue a warrant "authorising the taking of such action as is specified in the warrant in respect of any property so

[79] Beatson, "The Scope of Judicial Review for Error of Law" (n 12) 43.
[80] Regulation of Investigatory Powers Act 2000, section 67(8).

specified".[81] Advocating that they were the victims of unlawful surveillance by the intelligence services, Privacy International argued this behaviour was incompatible with Convention rights and amounted to an error of law. This challenge failed before the IPT, which held that section 5 of the Intelligence Services Act allowed the surveillance to take place, and Privacy International sought judicial review.[82] Two issues went before the court: first, whether the Act was effective in ousting the jurisdiction of the court to review the Investigatory Powers Tribunal for a legal error, and second, whether Parliament can oust the jurisdiction of the court to quash the decision of an inferior court or tribunal.[83] Underlying this was the issue of whether section 67(8) of the Regulation of Investigatory Powers Act was of equivalent effect to section 4(4) of the Foreign Compensation Act, which the House of Lords had deemed insufficient in *Anisminic* to oust judicial review.

B. The judgements of the divisional court and the court of appeal

Both the Divisional Court and the Court of Appeal held that section 67(8) of the Regulation of Investigatory Powers Act was effective in precluding judicial review of the IPT. In 2017, the Divisional Court stated that because the tribunal was already in a position of exercising supervision over the intelligence services, the facts of the case were in contrast with *Anisminic*. The role of the tribunal, Sir Brian Leveson P held, was that of expert oversight in quasi-judicial form. As a result, judicial review of the decision was effectively ousted by the Act, because the decision of the IPT had not breached its jurisdiction. He held that:

> There is a material difference between a tribunal—such as the Foreign Compensation Commission whose "determination" was in issue in *Anisminic*, SIAC, or the Upper Tribunal (when dealing with appeals from the First-tier Tribunal)—which is adjudicating on claims brought to enforce individual rights and the IPT which is exercising a supervisory jurisdiction over the actions of public

[81] Intelligence Services Act 1994, section 5.

[82] A Tucker, "Parliamentary Intention, Anisminic, and the Privacy International Case (Part One)" (*UK Constitutional Law Blog*, 18 December 2018) <https://ukconstitutionallaw.org/2018/12/18/adam-tucker-parliamentary-intention-anisminic-and-the-privacy-international-case-part-one/> (accessed 20 July 2019).

[83] *Privacy International* (SC) (n 1) [21] (Lord Carnwath).

authorities.[84]

As Daly noted, this line of argument made review of the IPT a logical difficulty: to review the IPT would be akin to judicial review of judicial review.[85] Leggatt J, however, held that the relevance of *Anisminic* lay with the traditional distinction of jurisdiction and protected the IPT from review in this case. *Anisminic* "decided that any determination based on an error of law, whether going to the jurisdiction of the tribunal or not, was not a "determination" within the meaning of the statutory provision."[86] Therefore, the decision of the IPT was not one that lay beyond the scope of its jurisdictional power, and as such the ouster clause was effective. For both judges the IPT was protected from review, but for considerably different reasons.

In the Court of Appeal, Sales LJ held that the language and context of the case differed from *Anisminic*. The Court held that, in the Act, "the word "decision" is stated to include a decision which (if judicial review or an appeal were available) might be found to have been made without jurisdiction because of an error of law on the part of the IPT".[87] According to Sales LJ, the purported determination that *Anisminic* turned on did not exist in this case, because section 67(8) of the Act had sufficiently extended the jurisdiction of the Tribunal. This prevented the Court of Appeal from doing what the House of Lords had done in *Anisminic*—finding purported decisions to lie outside the discretion of the Tribunal—by bringing them into its jurisdiction. The Court of Appeal held that this was effective due to the "very high quality" of the IPT, designed by Parliament to have expertise and independence in the delicate matter of national intelligence.[88]

This decision turned on the statutory differences between the Foreign Compensation Act and the Regulation of Investigatory Powers Act, and the role of Parliamentary intention in creating the IPT's authority over controversial security issues. Policy played just as big a role in the decision of the Court as the legal issues

[84] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin) (DC) [42] (Sir Brian Leveson P).

[85] P Daly, "Ousting the Jurisdiction of the Courts: R (*Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin)" (*Administrative Law Matters*, 6 February 2017) <https://www.administrativelawmatters.com/blog/2017/02/06/ousting-the-jurisdiction-of-the-courts-r-privacy-international-v-investigatory-powers-tribunal-2017-ewhc-114-admin/> (accessed 20 July 2019).

[86] *Privacy International* (DC) (n 84) [55] (Leggatt J).

[87] *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 (CA) [34] (Sales LJ).

[88] *ibid* [38], [42] (Sales LJ).

did. As Elliot has written, such scope means that the actual issue of the ouster clause in this case is "merely the tip of the constitutional iceberg".[89]

C. The judgement of the supreme court

Just months previously the Supreme Court had been asked to consider, in the case of *Lee v Ashers Baking Company Ltd and others*,[90] whether a decision of the Court of Appeal of Northern Ireland was precluded from appeal by devolution. In that judgement, Lord Mance distinguished between decisions of a judicial body and an administrative tribunal, and held that an ouster clause would be sufficient in principle to exclude an appeal on merits but not on procedural error.[91] In *Privacy International*, the Supreme Court took a different view. The judgement began from the point that the jurisdictional/non-jurisdictional divide is irrelevant: now, Lord Carnwath held, the starting assumption is that all errors of law are subject to review in a nuanced approach.[92] As this paper has shown, however, the hangover of the distinction between jurisdictional and non-jurisdictional errors is still felt, as ouster clauses attempt to expand a tribunal's jurisdiction over 'purported' decisions. The majority held that an ordinary reading of section 67(8) in the language of *Anisminic* failed to oust reviewability because "a decision which is vitiated by error of law, whether "as to jurisdiction" or otherwise, is no decision at all."[93] Tucker has argued that Parliament is aware of this: the authority of *Anisminic*, he argued, means that to be successful in drafting an efficient ouster would involve writing a clause that framed its intentions to protect it from a hostile interpretation by the courts.[94]

In *Privacy International*, therefore, the clause failed to oust the power of the courts to review because legal errors would fundamentally undermine it. Although the IPT is a specialist tribunal, Lord Carnwath held that this does not exempt it from justiciability, because the rule of law requires that it "conforms to the general law of the land."[95] It is important not to underestimate this decision: neither statutory expression, nor policy concerns, can protect a tribunal from review. Moreover, considering the second issue, the majority held that: "In all cases, regardless of

[89] M Elliott, "*Privacy International* in the Court of Appeal: *Anisminic* distinguished – again" (*Public Law for Everyone*, 26 November 2017) <https://publiclawforeveryone.com/2017/02/10/distinguishing-anisminic-ouster-clauses-parliamentary-sovereignty-and-the-privacy-international-case/> (accessed 20 July 2019).

[90] *Lee v Ashers Baking Company Ltd and others* [2018] UKSC 49.

[91] *ibid* [86], [88] (Lord Mance).

[92] *Privacy International* (SC) (n 1) [38] (Lord Carnwath).

[93] *ibid* [109] (Lord Carnwath).

[94] Tucker, "Parliamentary Intention, Anisminic, and the Privacy International Case (Part One)" (n 82).

[95] *Privacy International* (SC) (n 1) [139] (Lord Carnwath).

the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld".[96] By extending the decision in *Anisminic* to cover the IPT, hopes for ouster clauses are limited without expert statutory manipulation.

In response, Lord Sumption's dissenting judgement recognised the presence of the distinction between "errors of law going to jurisdiction and errors of law within jurisdiction", but held that the preceding case law had removed such subtleties from the judgement in *Anisminic*.[97] Although access to a court to review the legality of executive acts is essential to the rule of law, Lord Sumption held that "a right of appeal from such a body or right to call for a review of its decisions" is not.[98] If a body is by its nature expertly judicial, upon which Parliament has given authority, then decisions covered within its field ought to be conclusive. Lord Sumption provided the reasoning that, given the direction in *Anisminic* which had considered any error to exceed jurisdiction, Parliament had worded section 67(8) to cover the "merits" of the IPT's decisions.[99] His Lordship held that the Act had statutory clarity so to remove justiciability of the IPT's determinations, but not any procedural errors.[100] Furthermore, Lord Wilson held the legal authority of the IPT akin to the High Court in *Re Racal Communications*, the county court in *Pearlman* and the Upper Tribunal in *R (on the application of Cart)*, all of which made errors of law in unappealable decisions.[101] The dissenting judgements found in favour of the traditional jurisdictional distinction, and held the Tribunal to be protected by the ouster clause.

V. The ouster clause, ousted?

Reading the decision in *Privacy International*, it is possible to interpret this broad application of the decision in *Anisminic* as preventing any future ouster clause from being effective. The expansion of jurisdictional error now covers in essence every and any determination by a tribunal with which an appellant is dissatisfied, by arguing that there is an error of law, and it will then be for the court to decide upon. A common theme in judgements on ouster clauses is a complaint that Parliament has not been sufficiently clear in its language to oust the jurisdiction of the courts, as is the case in *Privacy International*.[102] However, it is difficult to see how

96 *ibid* [144] (Lord Carnwath).
97 *ibid* [181] (Lord Sumption).
98 *ibid* [182] (Lord Sumption).
99 *ibid* [201] (Lord Sumption).
100 *ibid* [205] (Lord Sumption).
101 *ibid* [244]–[252] (Lord Wilson).
102 *ibid* [111] (Lord Carnwath).

Parliamentary intention could be any clearer than section 67(8) of the Regulation of Investigatory Powers Act 2000. The legal protection that would be afforded to the IPT due to its expert opinion and judicial authority, too, has been completely undermined: if the courts lack confidence in the IPT's jurisdiction over its expertise in intelligence services, then there is little hope for any other specialised tribunal. As Elliott noted, "the factual matrix presented in *Privacy International* is some way from the most egregious forms of ouster",[103] and yet it has been judicially cauterised.

There are two things to take from this new direction. First, that this is perhaps an unsurprising judgement, being the inevitable result of an expansion of jurisdictional error since the decision of the House of Lords in *Anisminic*. With the attempts to end the distinction between jurisdictional and non-jurisdictional error, as Leyland and Anthony noted and this paper has plotted, the courts held that any error of law is reviewable.[104] Surely to no sane person would this be seen as a negative development in the rule of law; indeed, it was part and parcel of the development of a clear principle of ultra vires. As Forsyth wrote, without ultra vires, "ouster clauses would be much more effective at excluding judicial review than they are today."[105] However, the decision in *Privacy International* may go too far, so that not only is any error of law reviewable, but so is any perceived error of fact. In removing the traditional distinction between jurisdictional and non-jurisdictional error, any error is reviewable, and the protection afforded to executive bodies in English constitutional conventions is undermined. What is the point, one might ask, of an expert tribunal, if their expertise is considered erroneous by a court and can be called into question? Although there is no legal principle to prevent Parliament drawing up an ouster clause, logically, their effectiveness is now limited by the conflation of errors within jurisdiction and errors without.

Second, that despite clarifying the law on ouster clauses, the Supreme Court judgement has the potential to cause conflict with Parliamentary authority by such expansion. Academics such as Tucker have held that the decision in *Anisminic* is emblematic of a common law doctrine of interpretation in which the court may depart from parliamentary intention when assessing ouster clauses. This is not new, but extends from a principle of "interpretive hostility" of intention in decisions

[103] Elliott, "*Privacy International* in the Court of Appeal" (n 89).

[104] *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 393.

[105] C Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 CLJ 122, 128.

such as *R v Secretary of State for Transport, ex parte Factortame*,[106] and the requirements of the Human Rights Act 1998.[107]

The decision in *Privacy International*, therefore, is merely indicative of a judicial right and duty to ensure that the executive does not behave ultra vires. This is a sound argument until one considers the facts of the *Privacy International* case and the jurisdiction of the IPT: Parliament had vested a decision-making power concerning the intelligence services on the Tribunal. An "interpretive hostility" towards parliamentary intention in this case meant that the Supreme Court made a policy decision by holding a determination of the Intelligence Services Act by the IPT to be erroneous and disabling the ouster clause. Not only that, but the Supreme Court made a policy decision in a delicate political matter of national security. Winterton explained why, with ouster clauses, the buck must always stop with parliamentary sovereignty:

> Because ours is a government under law and the courts are the guardians of the law, those who seek to limit or oust judicial review should bear the burden of proving that in the particular case it is necessary or advisable to do so, and that an effective alternative form of review has been provided, but in a democracy the decision must be made by *Parliament*, not by the courts.[108]

Parliament, for better or worse, decided that the expertise of the IPT sufficed to prove that the ouster clause in section 67(8) was necessary in this case. As Lord Sumption held, the IPT was provided with "prescribed area of competence", which the facts of the case did not breach.[109] This is unsurprising, given his Lordship's numerous comments on the delicate relationship between Parliament and the judiciary, and his concerns with judicial resolution to political issues.[110] The elephant in the room of the judgement is the purpose of the Regulation of Investigatory Powers Act, which covers communication interception, use of data, and intrusive surveillance. These issues carry the sort of political complexity in which, for practical reasons, the courts previously would respect the authority of

[106] *R v Secretary of State for Transport, ex parte Factortame* [2000] 1 AC 524 (HL).
[107] Tucker, "Parliamentary Intention, Anisminic, and the Privacy International Case (Part One)" (n 82).
[108] G Winterton, "Parliamentary Sovereignty and the Judiciary" (1981) 97 LQR 265, 266.
[109] *Privacy International* (SC) (n 1) [211] (Lord Sumption).
[110] Lord J Sumption, "The Limits of Law" 27 Sultan Azlan Shah Lecture (20 November 2013).

ouster clauses.[111] In *A v Secretary of State for the Home Department*[112] Lord Bingham drew the line between political and judicial issues:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.[113]

The Supreme Court judgement in *Privacy International*, however, presents itself as a modern day *Entick v Carrington*[114] protecting English liberties from an invasive political class and its computerised trespasses. The traditional 'green-light'-'red-light' interpretation of pro- and anti-ouster clause ideological camps is somewhat defunct in this judgement. Those opposed to the ouster clauses in *Privacy International* do so from a middle ground, as the consistency of the Tribunal's expertise in this controversial area of law does not suffice to oust judicial review of an intrusive executive: an 'amber-light' perspective.

This new perspective is one legitimised by the gradual move of judicial review from an administrative authority to a protector of rights. As Poole identified, the Human Rights Act 1998 has allowed a "new order" of judicial review to become the norm, the features of which are a "lack of any built-in limit to the proportionality test" in order to protect the rights of claimants.[115] In the decision of the Supreme Court in *Privacy International*, it is evident that this rights-based definition of judicial review has expanded, so that it now covers judicial interpretations of executive jurisdiction. In this conceptual environment an error of law undermines an ouster clause from precluding review, not because of administrative mistake, but because it undermines individual rights. The danger of this is a potential to cross into the political sphere. Where the ultra vires doctrine provided as clear boundaries to justiciable behaviour, a rights-based view of the ouster clause allows the courts to intrude on political decisions. In *Gibson v Lord Advocate*[116] Lord Keith's assessment of the separation of powers demonstrated why this might be the case. He held that:

> The making of decisions upon what must essentially be a political matter is no part of the function of the Court, and it is highly

[111] *Textbook on Administrative Law*, "Express and Implied Limits on Judicial Review" (n 6) 402.
[112] *A v Secretary of State for the Home Department* [2005] 1 AC 68 (HL).
[113] *ibid* [29] (Lord Bingham).
[114] *Entick v Carrington* (1765) 2 Wils KB 275.
[115] Poole, "The Reformation of English Administrative Law" (n 11) 145–6.
[116] *Gibson v Lord Advocate* [1975] SC 136 (CSOH).

> undesirable that it should be. The function of the court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain circumstances, to the State.[117]

The decision in *Privacy International* expands the jurisdiction of the court itself into policy issues under the title of rights-based review. In so doing, decisions of a political matter have been made by the judiciary. The boundaries of executive jurisdiction in relation to the ouster clause have been redefined by the Supreme Court.

It is not improbable that the reader may feel this is a rather alarmist conclusion to the decision in *Privacy International*. After all, any expansion of the rule of law is surely a beneficial development, and the Supreme Court's advancement to access to judicial review of the IPT is likely to have a positive impact on digital rights. What is concerning, however, is how the judgement infringes upon the consensus established between the courts and Parliament on legislative ability to oust judicial review. As this paper has demonstrated, throughout the case law concerning ouster clauses, there has been a fine line drawn between the attempts to respect parliamentary sovereignty whilst simultaneously protecting the justiciable right of the courts in this jurisdiction. It has been, generally, a successful development.

In dialectic fashion, from a thesis in *Smith* via an antithesis in *ex parte Gilmore* to a hypothesis in *Anisminic* and the following case law, a consensus was met which held that, if an executive body or tribunal erred in a way that breached their jurisdictional capacity, they would not be exempt from review by the courts. As this paper has emphasised, however, this is a delicate consensus that the decision in *Privacy International* threatens.

In 1980, off the back of the decision in *Anisminic*, Wade celebrated that judges were beginning to stand up to illegal application of executive authority and discover "a deeper constitutional logic than the crude absolute of statutory omnipotence."[118] He was right: the law on ouster clauses is indicative of a hard-fought collaboration between the judiciary and Parliament that advanced key principles of the rule of law. Parliament remained sovereign, with the right to delegate its powers to executive tribunals, which would be protected provided they behaved legally. It is not coincidental that this developed alongside the doctrine of ultra vires. As Forsyth wrote in 1996, although the judiciary had "little concrete guidance as to the reach of judicial review and the scope and content of the various grounds of review… The judges no longer challenge legislative supremacy,

[117] *ibid* 144 (Lord Keith).
[118] Wade, *Constitutional Fundamentals* (n 15) 68.

the ouster clause remains attenuated, and there is sound constitutional basis for judicial review."[119] This description of the constitutional tenets is no longer as certain, because of how the decision in *Privacy International* has weakened the ouster clause, and legislative supremacy is faced off in the courts. The decision in this case has undermined the consensus between Parliament and the courts by removing the effectiveness of any potential ouster clause.

Qureshi, Tench and Hopkins noted that reference to Parliamentary intention is "strikingly absent" from the Supreme Court's judgement in *Privacy International*, which traditionally would have been the court's "touchstone" for judging an ouster clause.[120] In doing so, the Supreme Court has removed the intention of Parliament from the picture of justiciability. In this environment, what options lie before Parliament, if it wants to preclude the courts from review of tribunal determinations? As Edin has written, "The rule of law goes only so far as Parliament permits."[121] It is a fundamental principle of the rule of law that the judiciary are able to hold the executive to account, but if the courts show a willingness to step further out of the traditional bounds of the common law, into statutory intervention and invention through review, Parliament may feel the need to find other legal measures to oust its jurisdiction. "Abuse of legislative power," Winterton wrote, "should be rectified by political means, not by encouraging abuse of judicial power."[122] Disturbing the fragile consensus that was developed in *Anisminic* may prove to be dangerous, particularly at a time of constitutional uncertainty. There is a place in this dynamic, as the previous case law has demonstrated, for judicial review and parliamentary sovereignty to work in harmony. If manipulated as a process for introducing judge-made law, or undermining statutory authority, such a harmony is unlikely to last long.

VI. Conclusion

This paper, in exploring the historical and legal development of the ouster clause, has demonstrated the conceptual difficulty that ouster clauses pose. A question about an ouster clause is invariably a question about parliamentary

[119] Forsyth, "Of Fig Leaves and Fairy Tales" (n 105) 135–6.

[120] O Qureshi, D Tench and C Hopkins, "Case Comment: *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22" (*UKSC Blog*, 23 May 2019) <http://uksc-blog.com/case-comment-r-on-the-application-of-privacy-international-v-investigatory-powers-tribunal-and-others-2019-uksc-22/> (accessed 20 July 2019).

[121] Edin, "A Constitutional Right to Judicial Review" (n 14) 80.

[122] Winterton, "Parliamentary Sovereignty and the Judiciary" (n 108) 267.

sovereignty and the rule of law, framed within executive power and statutory interpretation. However, this complexity turns primarily on three main issues.

The first concerns the relationship between Parliament and the judiciary: ouster clauses are a fascinating depiction of the centuries' old conflict between law and politics playing out in real time. The courts' willingness to find in favour of ouster clauses mirrors judicial concerns that go much further than adherence to one single legal principle.

The second concerns the relationship between Parliament and the executive bodies, lower courts, and tribunals that seek to be protected by ouster clauses: it goes to the conceptual heart of what a body's legal jurisdiction consists of if it has been granted authority by Parliament, and which errors might undermine this. Despite the attempts by judges to move away from the traditional distinction between jurisdictional and non-jurisdictional errors, this division still haunts the case law, and will do so due to its fundamental relationship with the doctrine of ultra vires.

The third concerns the nature of legislative language: what, if any, words in statute will suffice to effectively oust the jurisdiction of the courts? And what, if any, interpretive action can the courts take to mediate this?

Underpinning all of these issues, this paper hopes to have demonstrated, are the practical political concerns that the ouster clauses touch. Due to their controversial nature, ouster clauses will only ever be used in politically-fragile situations where Parliament does not want judicial intervention. Ironically, it is this very aversion to review that draws the courts' attention. Should the courts stay away? This paper has argued that in certain cases, and for the sake of stability, yes. Sir John Laws rightly stated that, in the rule of law, "the greater the intrusion proposed by a body possessing public power over the citizen into an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate."[123] This works more than one way for each of the branches of legal power, as the greater the intrusion proposed by the judiciary into an area of legislative jurisdiction, the greater must be the justification which the judiciary must demonstrate. With no written constitution, and to ensure a continued consensus between Parliament and the judiciary, the courts must not forget to rely on the principles of ultra vires to support judicial review of executive bodies. There is value in remembering the traditional distinction between errors, which provides certainty for all political and legal bodies.

The Supreme Court has created a clarity on the law of ouster clauses in its decision in *Privacy International*. There is an elegant simplicity in extending *Anisminic*

[123] Sir J Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" (1993) PL 59, 69.

to hold any error as undermining jurisdiction, and it will be interesting to see where both Parliament and the case law go from this stage. If this is a dialectic, then the upheaval of *Privacy International* may well have started a new phase. It is likely that Parliament and the more conservative judiciary will develop logical ways around the direction of the Supreme Court.

As this paper has shown, however, this change to the definition of ouster clauses is not new. From *Smith* to *Anisminic*, and *Anisminic* to *Privacy International*, there is a long history of conceptual and linguistic changes which have led to new interactions and applications of administrative law. As Tucker has written, the story of the ouster clause is one of an "iterative game of 'cat and mouse'" between Parliament and the judiciary.[124] As concerns continue and evolve it is highly likely that this game will still play out, but within a different conceptual and linguistic arena. If a consensus between the courts and the legislature is to continue, particularly at a time when constitutional conventions are being questioned, rediscovered, and undermined, the ball is now in Parliament's court.

[124] Tucker, "Parliamentary Intention, Anisminic, and the Privacy International Case (Part One)" (n 82).