This paper will examine what legislative action may lead to possible preventions of miscarriages of justice with a specific focus on potential injustices suffered due to the actions committed by secret services deemed to be within the interests of national security. In assessing a statutory institution and potential risks which may derive from implementation, the proposition considers whether such potential miscarriages are so entrenched within statute, that only further legislation may be capable of any prevention. In recent decades, the perceived threats to national security have become increasingly prevalent within the public paradigm, with reported terrorist incidents in 2017 among the highest since Irish conflicts in the 1980s.[1] In light of this, it is apparent that national security remains a paramount concern of the State, with a degree of permitted discretion granted by the judiciary. This paper will further focus on the actions committed exclusively by secret and intelligence services (MI5, MI6, GCHQ), the powers afforded to them and their legal review; consequentially, the Terrorism Act 2000 and police actions will not be discussed. Where the likelihood for miscarriages of justice primarily exist are within any potential immunity afforded to secret services, granting increasing discretion in authorising criminal activity to a potentially arbitrary degree. Additionally, where such instances may occur, the varied judicial procedure for the secret services may impose barriers to justice upon victims or the services themselves through unconventional appellate considerations. Ultimately, in the event of an entrenched institutionalised potential for injustices, only statutory remedy enforcing a rule of law may prevent such possible miscarriages of justice.

In recent decades, the public and political attitude towards national security has been turbulently ephemeral, shifting with frequent reactionary policy changes. Ultimately, any insightful consideration of the implications of recent policy changes and whether potential remedy may be achievable requires comprehensive analysis of significant legal contexts. Most notably, the constitutional rule of law as a factor of consideration remains imposed upon the entirety of law-makers; judicially recognised in *Jackson*,[2] providing, '*The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based*'.[3]

[1] House of Commons Library, *Terrorism in Great Britain: the Statistics* No CBP7613 (26 March 2020).
[2] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[3] ibid [107].

Reaffirming, the modern Supreme Court emphasises the rule of law's application in all judicial measures, constitutionally dictating, '*that legislation of that extreme kind is not law which the courts will recognise*.'[4] However, assessing the scope of this 'ultimate control', the rule of law may be considered compatible with exceptional circumstances limiting otherwise typical judicial activity, requiring further constitutional analysis.

The rule of law holds no conclusive codified definition; this ambiguity remains almost wholly supported by the judiciary and remains respected by Parliament, as Lord Bingham affirmed, suggesting any attempted definition would have been interpreted out of significance,[5] constituting 'legislation of the extreme kind'. However, for interpretive purposes, the courts make reference to Dicey and his analysis on the rule of law, providing, '*Academic literature, although not directly determinative […] is of persuasive weight: see Dicey'*.[6] Dicey's rule of law considers the absolute application of legal principles, requiring a universally fair legal procedure, restricting any improper benefit or detriment, effectively preventing a State's arbitrary discretion.[7] Ultimately, Dicey's understanding of applying law equally under a 'supremacy of law' remains prevalent within English jurisprudence, with Dicey described as '*our greatest constitutional lawyer'* by the courts 120 years post-publication.[8] Despite this, one sector of political life exists in a modern setting so radically removed from any understanding from the legal era of Dicey; the interests of national security. These critical societal changes were noted by Jennings, critiquing Dicey's analysis as insufficient and assessing the State's role in '*maintaining order'*.[9] This interpretation permits the State a greater degree of discretion, encompassed within the rule of law. While Dicey's interpretation remains unauthoritative in any legal setting, the influence and relevance of the analysis remains unambiguous, with frequent judicial implementation. However, as this paper will demonstrate, the otherwise typical application of Dicey's interpretation may be reconsidered, with Jennings' supporting the interests of national security. The compatibility between the rule of law and national security ultimately requires further analysis in determining any potential injustice imposed.

[4] *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [51] (Lord Hope)
[5] Tom Bingham, *The Rule of Law* (Penguin 2011).
[6] *Jackson* (n 1) 270.
[7] Albert Venn Dicey, *The Law of the Constitution* (OUP 1885).
[8] *Jackson* (n 1) [95].
[9] Ivor Jennings, *The Law and the Constitution* (University of London Press 1959).

In spite of the supreme application of the rule of law, recent jurisprudence outlines that national security exists in a separated realm from judicial accountability. Providing clarity, Parliament codified this departure from standard judicial procedure through the assent of the Regulation of Investigatory Powers Act 2000 (RIPA). The legislation established the Investigatory Powers Tribunal (IPT); a judicial body, otherwise separated from conventional judicial function, with powers exclusively pertaining to hearing complaints against the UK's secret services acting in the interests of national security. However, IPT retains a judicial connection through the appointment of High Court justices and senior practitioners as members of the tribunal, furthered through *A v B*[10] evidencing, '*[IPT remains] a judicial body of like standing and authority to that of the High Court, but which operates subject to special procedures apt for the subject matter in hand*'.[11] Justices reaffirmed these exclusive powers, clarifying on matters of security and intelligence services, '*IPT is the "appropriate court or tribunal" and the High Court has no jurisdiction'.*[12] This Supreme Court affirmation of the tribunal's authoritative jurisdiction in all relevant matters and granting of substantial judicial powers outline how far removed matters of national security remain from the dominion of typical judicial procedure; instead existing as an independent limb almost entirely.

The disparity between judicial-tribunal objectives is further highlighted through additional statutory duties bestowed. The judiciary traditionally favours transparency within law, providing public judgments including all relevant law and applied logic; IPT '*exists under a general duty of non-disclosure*', with no requirement for holding oral hearings and no obligation to disclose information relevant to national security.[13] Furthermore, due to the frequent inclusion of matters of national security, IPT enjoys exemption from any information request under the Freedom of Information Act 2000, a landmark statutory provision with constitutional entrenchment. Finally, section 69 RIPA dictates, '*decisions of the Tribunal shall not be subject to appeal […] in any court'*. This effectively grants IPT an immunity from appellate review, potentially contrary to UK jurisprudence and rights to

[10] *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2009] UKSC 12, [2010] 2 AC 1.
[11] ibid [22] (Laws LJ).
[12] ibid [14] (Laws LJ).
[13] Hayley Hooper, 'Balancing Access to Justice and the Public Interest: Privacy International and Ouster Clauses in the Broader Constitutional Context' [2018] UK Const L Association.

appeal afforded within Article 6 European Convention of Human Rights (ECHR). The IPT as a judicial-political hybrid remains legally controversial, with opaque and secretive procedures contradicting key judicial transparency principles. Scholars assess, *'The statutory regime was designed by Parliament'*, emphasising the extent to which legal challenges resulting from matters of national security exist under a scope separated from typical legal procedure[14]

In analysis of potential miscarriages of justice directly connected to the enforcement of national security, recent judicial decisions must be examined to provide further clarity. Annually, MI5 provides their assessment on the international terrorism threat level facing the UK; since their first publication in 2006, every assessment had declared the UK to be at 'substantial' 'severe' and 'critical' threat, with the highest rating of critical declared as recently as 2017.[15] In light of this national concern, the frequency of secret service actions remains at an unprecedented level, evidenced through the number of complaints made to the IPT more than tripling between 2007 and 2016.[16] Additionally, the State is considered to be afforded a '*high level of deference'* in their discretionary enforcement of national security, with increasingly controversial acts.[17]

Significantly, a recent example is the *Begum*[18] case, and relevant government considerations. The case assessed the legality of executive action in the deprivation decision made by the Secretary of State against the applicant, revoking British citizenship and supposedly rendering them stateless.[19] Many of the considerations adopted by the judiciary are considered by scholars to '*contrast with the Supreme Courts [recent] approach in high profile constitutional cases'* promoting judicial activism, a supremacy of law and judicial review; consistent with Dicey's rule of law.[20] However, in *Begum,* the State was afforded a high level of deference, diminishing judicial scrutiny for '*democratic accountability for decisions on matters of national security'.*[21] This 'democratic accountability' appears to

[14] ibid.
[15] MI5, 'Threat Levels' (MI5 2021) <www.mi5.gov.uk/threat-levels>.
[16] Investigatory Powers Commission, *Report 2011-2015* (2016).
[17] Daniella Lock, 'The Shamima Begum Case: Difficulties with "democratic accountability" as a justification for judicial deference in the national security context' [2021] UK Const L Association.
[18] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 WLR 556.
[19] ibid [9].
[20] Lock (n 17).
[21] *Begum* (n 18) [62].

restrict judicial activism relating to national security, instead considering actions as matters of high-policy, to face accountability through a public mandate or lack thereof afforded to the State. Scholars consider this embellishment of powers afforded to the State, and subsequent self-imposed limitations on the supremacy of law, to be a '*complete abdication of the judicial role itself*', undermining the rule of law and entrenching judicial restraint within any legal challenge pertaining to national security.[22] Such judicial restraint from the highest appellate court in a controversial matter, with substantially numerous legal scholars opposed to constitutional overreach from the State, shows the extent to which national security is considered removed from the legal paradigm, often leaving individuals with no legal recourse, supposedly entrenched constitutionally. These instances may have imposed a miscarriage of justice upon applicants where a review is deemed unable to be considered in law whatsoever.

Further examining the statutory institution within the secret services, many extreme powers, seemingly incompatible with the rule of law, have been granted regarding actions approved to be in the interest of national security by the State. This protection granted to secret services remains entrenched within statute, with the greatly significant Intelligence Services Act 1994. Section 7 of the Act is publicly regarded as the '*James Bond Clause'*, granting a '*licence to kill'* to those engaging in authorised operations.[23] The statutory provision provides, '*If a person would be liable […] for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State'*. Evidently, this conflicts with principles synonymous with a constitutional rule of law; the supremacy of law and an equality within law face a constitutional threat, as all provisions reached assent through Parliament, empowered by constitutional parliamentary sovereignty. What is notable however, is that all statutory protection remains limited to acts committed outside the British Islands. Scholars emphasise the significance of the intentional limitation, providing, '*the [illegal act] takes place inside the United Kingdom. Accordingly, those activities would not attract the*

[22] Michael Foran, 'Shamima Begum, the Separation of Powers and the Common Good' [2021] UK Const L Association.
[23] Owen Bowcott, 'MI5 provides immunity for agents' criminal acts, tribunal told' *The Guardian* (4 October 2018).

protection of s.7(1)'; clarifying any domestic criminal activity whatsoever, direct or otherwise, remains prohibited.[24]

However, disparity arose on this point of law through *Privacy International,*[25] assessing the legality of criminal acts committed by MI5 agents within the borders of the British Islands. This case, held before the IPT resulted in an unprecedented split judgement, exemplifying a potential clash between the secret service and the constitutional rule of law. Finding in favour of the secret service, the tribunal concluded that MI5 agents act only when '*proportionate to the criminal activity in question'*, as per their provided guidelines,[26] and in assessing the power to conduct criminal activity at a time where they are deemed warranted, the tribunal provided, '*the Security Service does have that power as a matter of public law*.'[27] The judgement went further to challenge constitutional tenets, addressing the rights granted by the Human Rights Act 1998 and ECHR. Discussing agents' violation of ECHR, IPT assessed, '*Convention rights issues do not arise as a matter of substance in [challenges] to the policy of the Security Service*.'[28] While the courts affirm that this protection will not result in '*such legal immunity',*[29] the potential for a resulting miscarriage of justice is apparent. This IPT activism regarding RIPA and national security has further extended to MI6, the body conventionally operating overseas. The tribunal granted MI6 the same protection afforded to MI5 activities within the UK;[30] reaffirmed through the wider judiciary assessing RIPA, providing, '*the [legislation] was intended to retain the [essential] power to instruct agents to participate in criminality'*.[31]

Ultimately, common law principles have been enshrined in statute through the Covert Human Intelligence Sources Act 2021 (CHIS), showing the State's intention for the direction of national security; S1(5)(5)(a) providing '*criminal conduct authorisation […] if it is necessary in the interests of national security'*. This Statutory provision clarifies the true

[24] Jemima Stratford and Tim Johnston, 'The Snowden "revelations": is GCHQ breaking the law?' [2014] EHRLR 2, 129-141.
[25] *Privacy International v Secret Intelligence Service* [2019] UKIPTrib IPT 17 186 CH.
[26] ibid [15].
[27] ibid [67].
[28] ibid [107].
[29] ibid [37].
[30] Committee on the Administration of Justice, 'MI6 unilaterally assumed to break law on UK soil, Tribunal reveals' (CAJ 2020).
[31] *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330, [2021] 3 WLUK 97 [72].

intention of Parliament, evidently in line with judicial considerations. With secret services engaging in State authorised domestic criminal operations, there is a likelihood of instances where an agent deemed criminal activity proportionate, resulting in a miscarriage to victims with no available justice, depriving their human rights.

Furthermore, in assessing the unconventional powers and discretion granted to complaints in reference to national security, Parliament desired further institutionalised deference from typical judicial procedure. Section 69, RIPA affords the IPT substantial volition, dictating, '*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.*' This potential immunity from appeal and judicial review raises significant issues affecting the rights of the individual and those of government bodies; the power to make decisions outside the scope of legal review is one afforded almost exclusively to the IPT, with all standard judicial proceedings, executive action, and Parliamentary law-making procedure susceptible to judicial review. This '*ouster clause'* presents a risk that those complaining to IPT, and even those acting on behalf of national security, face a deprivation of their rights within Article 6 ECHR, granting the right to a universally fair judicial procedure, with the right of appeal granted to those within scope of judicial decisions. Furthermore, the Supreme Court, as the highest appellate court, are deprived of any opportunity to undertake their sacred duties as the nation's most senior judges sworn to uphold constitutional tenets.

In light of this, the Supreme Court is hesitant in adopting an ultimate indifference, while respecting Parliament's intentions and protecting the interests of national security. Firstly, the statutory provision's compatibility with the rule of law requires further analysis, considering whether this may constitute 'legislation of that extreme kind'. Secondly, the extent of this appellate immunity as accepted by the judiciary must be assessed. Finally, the standard practice which currently exits and any potential for miscarriages of justice will be examined.

Firstly, while scholars consider any '*statutory ouster of judicial review […] to offend the rule of law*',[32] in the context of national security, the judiciary show a reluctance to disregard the legislation in considering the intention of Parliament and its ultimate supremacy. Assessing the view of the modern Supreme Court, the recent *Privacy v IPT*[33] case provides a clear outline of the Law Lords' interpretations, though as seemingly typical of cases of national security matters, the court provided a split judgement 4:3, reflecting the controversial matter. As will be further considered, division between justices pertained to the extent of the '*acceptable limits*' of the appellate immunity, with ultimately all '*[taking] the view that some limits on review can be consistent with the rule of law.'*[34] Furthermore, the judiciary assessed the statutory institution's compatibility with ECHR in *Kennedy*,[35] the European Court of Human Rights providing, '*there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light [of …] national security'*.[36] With these collective judgements permitting an ouster clause, though in any potentially limited capacity, an ouster clause is not considered constitutionally impossible.

Secondly, the reality of ouster clause implementation may contrast with the perceived immunity to appeal due to the reality of judicial interpretation. Historically, the courts maintained a strong independence despite supposed statutory ouster clauses; evidenced in *Anisminic*,[37] with Lord Pearce providing, '*For that reason the courts will intervene when [a tribunal] comes to an erroneous decision through an error of law.'*[38] Further, scholars consider judicial acceptance of limitations to any extent to provide for *'[Rationed] legal control […] in the face of competing considerations'*.[39] Developing upon this, justices in *Privacy v IPT* consider the '*special allocation of judicial responsibility to the IPT in the national security context*', providing that national security remains one of these considerations conventionally left to the IPT through jurisdiction.[40] Ultimately this partially permitted ouster clause remains within the scope of the Supreme Court on matters of law

[32] Hannah Wilberg, 'The Limits of the Rule of Law's Demands: Where Privacy International Abandons Anisminic' [2019] UK Const L Association.
[33] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.
[34] Wilberg (n 32).
[35] *Kennedy v The United Kingdom* App no. 26839/05 (ECtHR 18 August 2010).
[36] ibid [184].
[37] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[38] ibid 195 (Lord Pearce).
[39] Hooper (n 13).
[40] *Privacy International* (n 33).

exclusively, however, still maintaining the statutory clause and afforded protection to IPT decisions.

Finally, while the State remains protected from likely miscarriages of justice through constitutional compatibility with IPT, individuals remain unprotected and largely restricted from utilising traditional rights of appeal. The significance is embellished upon assessing the 2,258 complaints to the tribunal up to 2016, with only 40 upheld;[41] with fewer than 2% of complaints allowed, a need for review may be considered strongly needed, with deprivation resulting in likely miscarriages of justice upon victims.

To conclude, the recent state of national security has evidently created a turbulence within the judiciary and the State itself. Following the implementation of RIPA, judicial activism on matters of national security remains diminished by statute, with only the removed branch of the IPT afforded any rights on hearing such cases. While Supreme Court interpretation may allow for such actions to fall under the scope of judicial review in a limited capacity, it is clear that there is a judicial hesitation in encompassing the powers of the IPT, allowing only an appeal on law so as to enforce procedural justice and preventing outright *ultra vires* activity through abuse of procedure. Furthermore, in Parliament granting excessive powers to secret service operatives, permitting criminal conduct with the Secretary of State's approval presents a fundamental challenge for the State, balancing the need for national security with the potential harm resulting from its enforcement. While the need for increased activity from the secret services is apparent, the resulting complaints provide a clear correlation between such activity and the complaints brought before IPT. Consequentially, rectifying potential threats of injustice clearly cannot be achieved through the judiciary alone, evidenced through the recent consideration of '*democratic accountability*'.[42] This shows the extent of deference granted to the intention of Parliament, outlining any true reform and resolution must originate from the supreme legislative body. However, with the assent of CHIS, the State currently appears on a trajectory encouraging increased powers afforded in the enforcement of national security. While the judiciary

[41] *Report 2011-2015* (n 16).
[42] *Begum* (n 18) [62].

considers the enhanced need for national security legislation compatible with the rule of law utilising Jennings' interpretation, the potential for miscarriages of justice to the individual remain and appear unlikely to be prioritised in upcoming Statute.

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