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van Ark, R.; Gherbaoui, T.

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Excessive Judicial Deference as Rule of Law Backsliding: When National Security and Effective Rights Protection Collide

RUMYANA VAN ARK 

TARIK GHERBAOUI 

*Author affiliations can be found in the back matter of this article



ARTICLE

ABSTRACT

In recent years, both domestic and international courts have become increasingly deferential to the executive in cases that concern matters of national security. This trend has resulted in rule of law backsliding and the inadequate and ineffective protection of the human rights of individuals. With the steady rise of populism and politics of fear and division, the threat of insecurity has been hyperinflated and exploited to justify national security measures. The normalisation of this 'securitisation populism' has had a profound impact on human right values, tolerance, and the rule of law. Through an analysis of illustrative case law of the European Court of Human Rights as well as domestic courts in the United Kingdom, this article focuses on the role which supranational human rights courts such as the ECtHR should play in putting (early) breaks on rule of law backsliding at the domestic level. The article concludes that it is in the long-term public interest to establish strong rule of law and human rights safeguards which are capable of holding states accountable for insufficient human rights protections through robust judicial review even, and perhaps especially, in highly charged cases that concern national security.

CORRESPONDING AUTHOR:

Dr. Rumyana van Ark

Senior Researcher in International Law and (Counter-)Terrorism, Asser Institute of the University of Amsterdam Law School, NL; Editorial Board Member ECHR Law Review, NL

R.vanArk@asser.nl

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In 1994, writing extra-judicially, Lord Justice Brown described the typical judicial approach on matters of national security as follows: ‘the mere incantation of the phrase [national security] instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies’.¹ The history of judicial decision making on both sides of the Atlantic in the 20th century in cases involving national security regrettably bears that statement out. With rather disappointing regularity, instead of taking a firm stance against onerous national security and counter-terrorist provisions, judges have tended *not* to engage in a thorough – if any – review of such national security measures.² To put it differently, historically courts have been unresponsive when called upon to protect individual liberties.³ In one of the more notorious instances of such judicial reluctance, the *Liversidge v Anderson* case, the United Kingdom (UK) House of Lords neither opposed nor questioned an emergency powers based system of executive detention without trial.⁴ In *Korematsu v United States*, the US Supreme Court upheld the relocation, segregation and internment of US citizens of Japanese descent as necessitated by the military urgency of the circumstances.⁵ While these two cases can be viewed as symptomatic of and quarantined within the particular moments in history which they represent, they are rather illustrative of the by now well-established ritual following national security emergencies.⁶ In order to be seen to respond effectively and to pre-empt further attacks, governments usually seek to expand their national security toolkits with ever more far-reaching powers.⁷ Legislative bodies loathe to be seen by the electorate as being soft on terror, or worse, as indifferent to terror.⁸ With the stakes this high, legislators have thus tended to adopt contentious provisions which may have a significant and long-lasting impact on individual rights and human dignity and, more broadly, contribute to rule of law backsliding.⁹

The various governmental responses and judicial approaches during and *after* periods of national security emergencies in the second half of the 20th century and especially since the early 2000s have further entrenched this ritual.¹⁰ Both domestic and international courts have yet again become highly deferential to the executive branch of government in cases that concern matters of national security. This trend of excessively deferential judicial reviews of national security measures has regrettably resulted in less than adequate or effective human rights protections for certain individuals and, in particular, those most vulnerable in light of their ethnicity or citizenship status. To put it differently, and in broader terms, the rule of law has backslid in certain areas of law to accommodate expansive, onerous and multi-dimensional security provisions – all in the name of the public interest.¹¹ This is not a development strictly contained

1 S Brown LJ, ‘Public Interest Immunity’ (1994) *Public Law*, 589.

2 A Kavanagh, ‘Constitutionalism, Counterterrorism, and the Courts: Changes in the British Constitutional Landscape’ (2011) 9 *International Journal of Constitutional Law* <https://doi.org/10.1093/icon/mor026>, 172.

3 K Ewing, *The Bonfire of the Liberties* (Oxford University Press, 2010) 282.

4 *Liversidge v Anderson* [1942] AC 206. This decision has been subsequently described as ‘an example of extreme judicial deference to executive decision-making, best explained by the context of wartime, and it has no authority today’ (AW Bradley & K Ewing, *Constitutional and Administrative Law* (Pearson Longman, 2011) 674).

5 *Korematsu v US*, 323 US 214 (1944). The decision has since been referred to as one of the worst decisions in the US Supreme Court’s history. It was finally overruled by *Trump v Hawaii* 585 US (2018) with *Korematsu* described as gravely wrong the day it was decided and without ‘place in law under the [US] Constitution’. (para 38).

6 L Donohue, *The Cost of Counter-Terrorism: Power, Politics and Liberty* (Cambridge University Press, 2008) 1–32.

7 *ibid.* This has resulted in the adoption of measures such as the involvement of educational and healthcare bodies in the national security toolkit (UK PREVENT Strategy and Counter-terrorism and Security Act 2015).

8 K Ewing, ‘The Political Constitution of Emergency Powers: A Comment’ (2008) 3 *International Journal of Law in Context*, <https://doi.org/10.1017/s1744552307004041>, 313; Donohue (n 6), 1–32.

9 Donohue (n 6), 1–32.

10 Kavanagh (n 2), 172–173.

11 T Bingham, *The Rule of Law* (Penguin, 2011). In this book, the former Lord Chief Justice of England and Wales, explores in depth what the rule of law is arguing, namely that it is not only a strictly legal doctrine but rather the foundation of a fair and just society, a guarantee for responsible government and the best means for securing peace and cooperation. Human rights and respect for human dignity are crucial and key components of the rule of law in this context. In line with the UN definition and state practice in most liberal democracies, this article adopts a ‘thicker’ and hence more substantive conceptualisation of the rule of law, and by extension of *rule of law backsliding*, which explicitly includes the constitutional and supranational protection of human rights as a key feature of the rule of law.

in law or within statute books however. The threat of insecurity has been hyperinflated and exploited to justify national security measures under the guise of enhanced immigration and criminal justice provisions as part of the politics of fear and division accompanying the steady rise of (right-wing) populism across both sides of the Atlantic. As a result, legislative and policy measures which would have been unpalatable a mere decade ago are now routinely used.¹² The normalisation of this ‘securitisation populism’ has had a profound impact on human right values, tolerance and the rule of law.¹³ The increasing political strength of anti-immigrant and xenophobic populist rhetoric and, unfortunately, legislative policies across the globe are apt examples of this normalisation.¹⁴ This latter development has arguably been at least partially sustained by the aforementioned securitisation populism, which often tends to be premised on the vilification of the ‘other’ and the designation of that other as a (potential) security threat as a prelude to a push for more legislative securitisation.¹⁵

It is almost trite to state that in the last two decades security policies have left a deep imprint on states’ human rights approaches.¹⁶ ‘Creeping consequentialism’¹⁷ has defined many of the adopted security measures as these have gradually transformed from emergency national security provisions and legislation to established legal responses within several branches of law.¹⁸ A robust judicial review is crucial in this context to ensure that such measures do not become normalised or spread through the statute books.¹⁹ As the last two decades have shown, both the European Court of Human Rights (ECtHR) and domestic courts have certainly not been immune to appeasing national security considerations even if they do push back at times.²⁰ While due deference, understood as a constitutionally appropriate degree of restraint,²¹ is an inherent aspect of the separation of powers in a democratic society, the excessive or undue deference often shown within national security cases can lead not only to short-term restrictions on a range of individual rights but can, inadvertently, trigger lasting backsliding of the rule of law. Through an analysis of illustrative case law of domestic courts in the UK and the jurisprudence of the ECtHR, Section 2 will show how such backsliding can develop and become first normalised and then entrenched through statutory means. As a follow on, Section 3 will assess whether judicial deference facilitates ‘the abdication of judicial responsibility in favour of reliance on the good faith or special expertise of public officials’²² before critically discussing the wider constitutional implications of rule of law backsliding. In conclusion, the article will argue

12 B J Goold & L Lazarus (eds.), *Security and Human Rights* (Hart Publishing, 2019).

13 *ibid.* Wojczewski has characterised ‘populist securitisations’ as having the following key features: ‘(1) dramatisation and fearmongering; (2) simplification and scapegoating by designating a particular actor as the single cause of a security problem and “the people” as collective victim; and (3) propagation of a state of emergency, requiring a suspension of normal politics and the endorsement of the populist actor as the only one who can secure “the people”’. T Wojczewski, “‘Enemies of the people’: Populism and the politics of (in) security’ (2020) 5 *European Journal of International Security*, <https://doi.org/10.1017/eis.2019.23>, 7.

14 See the special double issue of the *German Law Journal* (2019) 20, doi: [10.1017/glj.2019.8](https://doi.org/10.1017/glj.2019.8) for more in-depth discussions on the effects of populism on liberal constitutional norms and democratic institutions and T Ginsburg and A Z Huq, *How to Save a Constitutional Democracy* (Chicago University Press, 2019), as well as various recurrent comments made by, for example, senior members of the Conservative Party in the UK or the recent proposal of the new Dutch Government to declare a state of emergency in order to tighten immigration and asylum policies.

15 J Waldron, *Torture, Terror and Tradeoffs: Philosophy of the White House* (Oxford University Press, 2010); B J Goold, ‘Privacy, Identity and Security’ in Goold & Lazarus (n 12), p. 125–146.

16 D Jenkins et al (eds.), *The Long Decade: How 9/11 Changed the Law* (Oxford University Press, 2014) which reflects on the first decade post 9/11 and A Vedaschi & K L Scheppele (eds.), *9/11 and the Rise of Global Anti-Terrorism Law* (Cambridge University Press, 2021) which examines two decades of developments post 9/11.

17 A Ashworth, ‘Crime, community and creeping consequentialism’ (1996) *Criminal Law Review*, 220.

18 See in particular Waldron (n 15); L Zedner, ‘Terrorizing Criminal Law’ (2014) 8 *Criminal Law and Philosophy*, <https://doi.org/10.1007/s11572-012-9166-9>, 99; L Zedner, ‘The Hostile Border: Crimmigration, Counter-Terrorism, or Crossing the Line on Rights?’ (2019) 22 *New Criminal Law Review*, <https://doi.org/10.1525/nclr.2019.22.3.318>, 318.

19 A Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart Publishing, 2018).

20 F de Londras & F Davis, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanism’ (2010) 30(1) *Oxford Journal of Legal Studies*, <https://doi.org/10.1093/ojls/gqp031>, 19.

21 A Kavanagh, ‘Defending Deference in public law and constitutional theory’ (2010) 126 *Law Quarterly Review*, 222.

22 T R S Allan, ‘Human Rights and Judicial Review: a Critique of “Due Deference”’ (2006) 65(3) *Cambridge Law Journal*, 671.

that robust judicial review in national security cases is in the long-term public interest as it ensures that the backsliding does not become ‘business as usual’ within the rule of law regime.²³

The inherent risk in paying ‘judicial lip service’ to the rule of law in national security cases raised during an exceptional security situation is that gradually the judiciary becomes content with less substance in the rule of law (long) after the exigent circumstances have passed.²⁴ What the subsequent discussion will aim to show is that excessive judicial deference can – and has – inadvertently succumb(ed) to security populism, conferring ‘wholly unfettered power[s] to strip ... [the] individual right[s] of the other] ... of any practical effect’.²⁵ As the history of judicial decision making shows, such slippages into reversible backsliding are not a new phenomenon. Unlike previous occurrences, however, rather than reversible backsliding, the expansion of national security toolkits through the intertwining of immigration, criminal justice and counter-terrorism measures resulting in both lasting and multi-layered limitations on human rights has continued unabated for over two decades with the result being a rule of law hollowed out from within.

2. MORAL PANICS AND JUDICIAL DEFERENCE

Following the events of 9/11, a severe ‘moral panic’ gripped a number of states, including the US and the UK; a panic which seemed to linger throughout the 2000s and become fully reignited in the mid-2010s in response to the security furore and fear around the (returning) foreign fighters phenomenon.²⁶ While periods of moral panic are not new to societies – particularly in the context of national security emergencies – what tends to change is the episode, person or group of persons, which becomes defined as a threat to society.²⁷ Once blame is allocated, i.e. an individual or a group has been identified as responsible for causing the damage, a government will then assess the level of risk and measures required to both apprehend those responsible and to pre-empt further occurrences of violence.²⁸ To apply the security populism prism of Wojczewski, first comes the fearmongering and then the scapegoating by designating a particular actor or group as the single cause of a security problem and ‘the people’ as collective victim.²⁹ The thousands of individuals of Middle Eastern and North African descent, mostly men, who were detained in the aftermath of the events of 9/11 is a particularly illustrative example of security populism in practice.³⁰ Since the mid-2010s, exclusion and citizenship deprivation orders across a number of states have impacted almost exclusively non-citizens or dual-citizens. In other words, citizenship and the protections it offers are now conditional – and difficult to protect – for certain individuals. ‘Not people like us’ communities have become the new ‘enemy within’ – or the new folk devils – with particular manifestations of terrorist and violent extremist activities justifying the expansion of the national security toolkits and the construction of certain communities and individuals as a ‘suspect community’.³¹

23 O Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional’ (2003) 112 *Yale Law Review Journal*, 1011 and C Chan, ‘Business as usual: deference in counter-terrorism judicial review’ in F Davis & F de Londras (eds.), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, 2014), 228–250.

24 D Dyzenhaus, *The Constitution of Law; Legality in a Time of Emergency* (Cambridge University Press, 2006) 27 (Kindle edition).

25 Allan (n 22), 692.

26 D Dyzenhaus, ‘Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security’ (2003) 28 *Australian Journal of Legal Philosophy*, <https://doi.org/10.2139/ssrn.319100>, 2.

27 S Cohen, *Folk Devils and Moral Panics* (Routledge, 2002). For an event to be a moral panic, three key elements are required: a suitable enemy or folk devil, a suitable victim and a consensus that the actions being denounced were not insulated entities but could become integral parts of society or regular occurrences unless swift and decisive action is taken. See also M Tushnet, ‘Defending Korematsu? Reflections on Civil Liberties in Wartime’ (2003) *Wisconsin Law Review*, <https://doi.org/10.2139/ssrn.368323>, 273 and J Young, *The Vertigo of Late Modernity* (Sage Publications, 2007).

28 Cohen (n 27), xxxii.

29 T Wojczewski, ‘“Enemies of the people”: Populism and the politics of (in)security’ (2020) 5 *European Journal of International Security*, <https://doi.org/10.1017/eis.2019.23>, 7.

30 D Luban, ‘Eight Fallacies about Liberty and Security’ in R Wilson (ed.), *Human Rights in the ‘War on Terror’* (Cambridge University Press, 2005).

31 C Pantazis & S Pemberton, ‘From the “Old” to the “New” Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation’ (2009) 49 *British Journal of Criminology*, <https://doi.org/10.1093/bjc/azp031>, 646.

Put differently, the volatility and intensity of the moral panics triggered by the threat of terrorist and violent extremist activity since the early 2000s and, again, mid-2010s, combined with governmental decisions taken as a response, have resulted in severe restrictions of the rights and liberties of certain individuals. In aiming to dispel the perception that the state cannot guarantee public security, the legislative and policy responses by various governments have arguably permanently recalibrated the relationship between individual terrorist suspects and the state.³² Moreover, as the expansive domestic legislative and other measures suggest, this recalibration has affected not only those who are suspected of terrorist activity, but also those who *may* become a terrorist or a folk devil.³³ Those impacted have been the unsympathetic ‘other’, the non- and dual-citizens, deemed to pose a threat and, as such, whose rights can be traded-off for the enhancement of security for everyone else.³⁴ Legislators have continued apace with adding new or amending existing legislative provisions exacerbating this downward recalibration of rights, thus in essence facilitating the backsliding of the rule of law. Regrettably, by showing excessive deference, judicial bodies have at times also played a vital role in this. The following sub-section will reflect on this facilitation through an examination of illustrative case law. In particular, the case law analysis will address the longer-term consequences of *not* pushing back more robustly against executive overreach on the basis that certain questions are ones of political judgment rather than a judicial one.

2.1. IN THE AFTERMATH OF ADJUDICATING NATIONAL SECURITY – EXECUTIVE RESPONSES AND RIGHTS LIMITATIONS

The various national security measures imposed internationally and domestically on those suspected of terrorist activities in the last two decades are well rehearsed by now.³⁵ Cases such as *A and Others v Secretary of State for the Home Department* and its ECtHR counterpart were celebrated for showing judicial robustness in times of overwhelming securitisation in the early 2000s.³⁶ However, the powerful rhetoric defending human rights has at times disguised the deference afforded to the security needs of the government. In cases involving national security considerations, it is not enough to look at what judges say without looking at how they have decided a case.³⁷ Tomkins has argued that as the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), and Part 4 in particular, had already been subjected to withering criticism, the courts were merely following a path broken by others.³⁸ The *A and Others* case revolved around the (since repealed) Section 23 of the 2001 Act which allowed for the temporary or *indefinite* detention of individuals certified by the Secretary of State as (suspected) international terrorists.³⁹ The operationalisation of Section 23 (and Part 4) of the 2001 Act was accommodated by a derogation under Article 15 of the European Convention on Human Rights (ECHR). All appellants were foreign (non-UK) nationals. None of them had been the subject of a criminal charge or expected to be part of a criminal trial. In its arguments, the Government presented Section 23 (and Part 4) of the Act as a problem of immigration law thus requiring a solution within this framework. The House of Lords (now the Supreme Court) found that Section 23 was incompatible with Articles 5 and 14 of the ECHR as it was ‘disproportionate’ and permitted the detention of suspected international terrorists ‘in a way that discriminates on the grounds of nationality or immigration status’.⁴⁰

³² The concept of ‘downward recalibration’ of rights has been discussed in detail in F De Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (Cambridge University Press, 2011) and H Fenwick, ‘Recalibrating ECHR Rights and the Role of the HRA post 9/11: Reasserting International Human Rights Norms in the “War on Terror”?’ (2010) 63 *Current Legal Problems*, <https://doi.org/10.1093/clp/63.1.153>, 153.

³³ H Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press, 2015); Goold & Lazarus (n 12); Vedaschi & Scheppelle (n 16).

³⁴ Luban (n 30); Waldron (n 15).

³⁵ F Ni Aoláin & O Gross (eds.) *Guantanamo and Beyond* (Cambridge University Press, 2013); Vedaschi & Scheppelle (n 16); De Londras (n 32).

³⁶ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

³⁷ Ewing (n 3), 283.

³⁸ A Tomkins, ‘Readings of *A v Secretary of State for the Home Department*’ (2005) *Public Law*, 259.

³⁹ The full original (as enacted) version of the Act is available at <https://www.legislation.gov.uk/ukpga/2001/24/contents/enacted>.

⁴⁰ *A and Others v Secretary of State for the Home Department* (n 36), para 73 (Judgment of Lord Bingham).

Aside from the challenge against the discriminatory nature and operation of Section 23 (and Part 4), the appellants also contested the lawfulness of the derogation and, in particular, the existence of an emergency in the UK, emphasising that the UK was the *only* state to derogate from the ECHR following the events of 9/11. On behalf of the majority, Lord Bingham, expressly – and famously – noted that ‘great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament ... because they were called on to exercise a pre-eminently political judgment’⁴¹ and it is the function of political and not judicial bodies to resolve political questions. Only Lord Hoffmann dissented on this point emphasising that the power to indefinitely detain suspected terrorists in any form is incompatible with the UK constitution.⁴² He went on to strongly – and memorably – remark that the ‘real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these’.⁴³

The aftermath of *A and Others* has ostensibly vindicated Lord Hoffmann’s view as the decision in the case *did not* secure the release of the appellants but rather triggered a series of legislative responses which embedded a range of immigration, criminal law and national security measures to continue detaining them and restricting their liberty for extended periods of time.

Unsurprisingly, in line with its own jurisprudence, the ECtHR similarly dismissed the complaints under Article 15.⁴⁴ The ECtHR reiterated that ‘national authorities enjoy a wide margin of appreciation under Article 15’.⁴⁵ While it was indeed striking that the UK was the only derogating High Contracting Party despite other states also being threatened, it was nevertheless for the UK Government to assess whether there was a public emergency. In addition, when determining the nature and degree of the actual or imminent threat to the nation, the ECtHR was prepared to take into account a broad range of factors.⁴⁶ Like the House of Lords, the ECtHR found that the derogating measures were disproportionate as they discriminated between nationals and non-nationals thus violating Article 5 (1).⁴⁷

Neither court reflected on how Section 23 was operationalised however. In fact, large parts of the 2001 Act remained intact – for example, the extensive invasions of liberty and privacy permitted under Part 3 of the Act (on disclosure of information) and under Part 11 of the Act (on retention of communications data) were left entirely untouched.⁴⁸ In addition, lurking behind the utilisation of the powers of indefinite detention under Part 4 of ATCSA 2001, the subsequent imposition of control orders,⁴⁹ the exclusion of individuals from the UK on national security grounds and the deprivation of citizenship powers even when an individual was outside the jurisdiction of the UK,⁵⁰ was the reliance on a procedure to be employed within the Special Immigration Appeals Commission (SIAC). Section 5 (3) of the SIAC Act of 1997 introduced to the UK’s legislative and judicial framework the use of both secret evidence and closed proceedings – within immigration cases only at first. Under a closed material procedure (CMP), secret intelligence evidence can be considered by a judicial body *without* the defendant, or the defendant’s legal team being given access to hear the evidence. A Special Advocate is tasked with representing the interests of the excluded party in closed hearings and subjecting the sensitive material to scrutiny with the aim of promoting the fairness of the proceedings.⁵¹ Upon

⁴¹ *ibid*, para 29 (Judgment of Lord Bingham).

⁴² *ibid*, para 97 (Judgment of Lord Hoffmann).

⁴³ *ibid*.

⁴⁴ *A and Others v UK*, App. no. 3455/05 [2009] ECtHR. See also H Fenwick, ‘Post 9/11 UK counter-terrorism cases in the European Court of Human Rights: a “dialogic” approach to rights protection or appeasement of national authorities?’ in Davis & de Londras (eds.) (n 23); O Gross and F Ni Aoláin, *Law in Times of Crisis* (Cambridge University Press, 2006).

⁴⁵ *A and Others v UK* (n 44), para 180.

⁴⁶ *ibid*, para 179.

⁴⁷ *ibid*, para 190.

⁴⁸ Tomkins (n 38), 265.

⁴⁹ Under the Prevention of Terrorism Act 2005 (now repealed). The original version of the Act is available at <https://www.legislation.gov.uk/ukpga/2005/2/enacted>.

⁵⁰ See Case C-300/11 *ZZ v the Secretary of State for the Home Department* [2013] ECR II-363; *IR and GT v UK*, App. nos. 14876/12 and 63339/12 [2014] ECtHR.

⁵¹ The role of Special Advocate was introduced by Special Immigration Appeals Commission Act 1997 (Section 6).

introduction, the CMPs were perceived as a legal abnormality and were heavily criticised on human rights and rule of law grounds.⁵² The Law Lords did make references to the use of closed materials within the SIAC proceedings; however, they felt that the impact of these materials did not go further than to substantiate and strengthen the openly available evidence.⁵³ They made no comments on the fairness, transparency or (un)desirability of CMPs. For the ECtHR, SIAC, a fully independent court which could examine both closed and open evidence, was best placed to ensure that no material was unnecessarily withheld and that the procedural rights of the applicant were respected.⁵⁴ On the material before it, the ECtHR had no basis to find that excessive and unjustified secrecy was employed in respect of any of the applicants' appeals or that there were not compelling reasons for the lack of disclosure in each case.⁵⁵ This lack of engagement in such a high profile case has been subsequently criticised for unintentionally facilitating both the introduction of highly restrictive control orders as a replacement for indefinite detention and, more significantly, the reliance on tainted (i.e. obtained in violation of Article 3 ECHR) or independently unverifiable evidence within CMPs.⁵⁶

It is the cases with a CMP that have gone somewhat under the radar, however, that illustrate just how problematic excessive deference to governments in pursuit of enhanced national security can be. It is also these latter cases that aptly demonstrate that if deemed useful, unconventional and originally limited in scope, national security procedures can become a deeply embedded and malignant part of existing legislation, i.e. a harmful malignancy that gradually erodes certain legal protections from within the statute books and results in rule of law backsliding. What is arguably even more problematic is that all of these cases have involved either non- or dual-nationals. The case of *IR and GT v the United Kingdom* involved two foreign nationals whom the Secretary of State for the Home Department (SSHD) had chosen to exclude from the UK on the basis that their conduct was 'not conducive to the public good', the rather broad legal standard enshrined in the British Nationality Act 1981.⁵⁷ As the decision was taken on the grounds of national security, the applicants' appeals were heard not by the then Asylum and Immigration Tribunal but by SIAC.⁵⁸ The applicants complained that their exclusion from the UK and the proceedings before SIAC violated their rights under Articles 8 and 13 of the ECHR. While SIAC noted that the first applicant had been provided with limited information on the national security case against him, the decision to exclude him was deemed proportionate.⁵⁹ Crucially, the interests sought to be protected by the exclusion order – the national security of the UK and the public security of its citizens – were deemed to be of the highest importance.⁶⁰ In relation to the second applicant, it was noted that he was unable to give instructions to the Special Advocate about the essential features of the SSHD case, which apart from the 'most general words', was *entirely contained* in the closed case.⁶¹ SIAC stated for reasons *only* set out in the closed judgment, that it was satisfied that the decision to exclude the second applicant was justified.⁶² In a unanimous decision, the Court of Appeal⁶³ found that what the relevant authorities require is an 'independent scrutiny of the claims with "independent scrutiny" requiring a *sine qua non* of the protection against arbitrariness' demanded by the *Al-Nashif v Bulgaria* case.⁶⁴ The need for *some form* of adversarial proceedings was satisfied by the SIAC proceedings. While the CMP procedure may not be perfect, it was consonant with Strasbourg

52 E Nanopoulos, 'European Human Rights Law and the Normalisation of the "Closed Material Procedure": Limit or Source?' (2015) 78 *Modern Law Review*, <https://doi.org/10.1111/1468-2230.12155>, 913.

53 *A and Others v Secretary of State for the Home Department* (n 36), para 27.

54 *A and Others v UK* (n 44), para 219.

55 *ibid.*

56 *Ewing* (n 3), 283.

57 *IR and GT v UK*, App. nos. 14876/12 and 63339/12 [2014] ECtHR.

58 *IR v SSHD* [2009] UKSIAC SC/70/2008 and *GT v SSHD* [2009] UKSIAC SC/68/2008.

59 *IR v SSHD* (n 58), para 10.

60 *ibid.*

61 *GT v SSHD* [2009] UKSIAC SC/68/2008, para 2.

62 *ibid.*, para. 3.

63 *IR and GT v UK*, App. nos. 14876/12 and 63339/12 [2014] ECtHR.

64 *Al-Nashif v Bulgaria*, App. no. 50963/99 [2002] ECtHR.

procedure from the *Chahal* case⁶⁵ where the introduction of CMPs was anticipated and to more recent case law in relation to deportation or exclusion on national grounds, which endorses ‘appropriate procedural limitations on the use of classified information’.⁶⁶

The ECtHR emphasised that, as a matter of well-established international law and subject to their treaty obligations, states have the right to control the entry, residence and expulsion of aliens.⁶⁷ The ECHR does not guarantee the right of an alien to enter or to reside in a particular country.⁶⁸ The existing case law in relation to removal decisions under Article 8 does clearly indicate that where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require measures affecting fundamental human rights to be subject to ‘some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence, if need be with appropriate procedural limitations on the use of classified information’.⁶⁹ However, the use of confidential information in the proceedings may be *unavoidable* where national security is at stake.⁷⁰ In conclusion, the ECtHR was satisfied that CMPs offer sufficient procedural guarantees for the purposes of Article 8.⁷¹ The subsequent case of *K2 v the United Kingdom* reaffirmed these findings.⁷² Here, the ECtHR found that K2 was not rendered stateless as a consequence of the revocation of citizenship because he was entitled to a Sudanese passport. Thus, his claim that his deprivation of citizenship had violated Article 8 was deemed to be manifestly ill-founded. In many respects, the judicial approach adopted in these cases – both domestically and at ECtHR level – was a precursor to the legal proceedings involving Shamima Begum which will be discussed below.

The ‘creep’ of national security considerations has recently extended beyond the imposition of national security or immigration measures to essentially employment disputes. The case of *Home Office v Tariq* involved the withdrawal of the security clearance of Mr Tariq, an immigration officer.⁷³ The Home Office’s decision to suspend his security clearance related to the arrests of his brother and cousin in connection with the investigation into a suspected terrorist plot to attack multiple transatlantic airline flights in August 2006. There was no information or evidence that Mr Tariq himself had any involvement. The concern however was that, given his close association with persons suspected of involvement in planning an attack, he *might* be vulnerable to outside attempts to have him abuse his position as an immigration officer. In short, the domestic UK courts were happy to affirm what were, effectively, pre-emptive measures against an as of yet unmaterialised threat.

In April 2018, Tariq’s case was heard by the ECtHR in a joint hearing with yet another similar one – that of Mr Bilal Gulamhussein. The ECtHR found that even though some of the proceedings had been held in a CMP due to the reliance on classified information, both men had been provided with proper safeguards for their rights to a fair trial, including by being provided with Special Advocates who could attend those closed hearings. In the case of Mr Tariq, the ECtHR found that the Employment Tribunal proceedings had respected the safeguards set out in the case of *Regner v the Czech Republic*, in which a Czech civil servant had been deprived of his security clearance in proceedings that had involved classified evidence.⁷⁴ The safeguards in question were that the Employment Tribunal had had the necessary independence and impartiality, unlimited access to all the classified documents which justified the decision and had duly exercised the powers of scrutiny available to it. The use of a CMP had also not been arbitrary or manifestly unreasonable and the Tribunal had been able to quash the security clearance decision if necessary. The proceedings had therefore been in accordance with Article 6 (1). In Mr

65 *Chahal v UK*, App. no. 22414/93 [1996] ECtHR.

66 *Al-Nashif v Bulgaria* (n 64), para 133.

67 *IR and GT v UK* (n 57), para 55.

68 *ibid.* See further *De Souza Ribeiro v France*, App. no. 22689/07 [2012] ECtHR, para 77.

69 *IR and GT v UK* (n 57), para 57.

70 *ibid.*, para 58.

71 *ibid.*, paras 63–64.

72 *K2 v UK*, App. no. 42387/13 [2017] ECtHR.

73 *Home Office v Tariq* [2011] UKSC 35. See also the somewhat similar case of *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776.

74 *Regner v Czech Republic*, App. no. 35289/11 [2017] ECtHR.

Gulamhussein's case, the ECtHR noted the Government's argument that Article 6 (1) was not applicable to the Security Vetting Panel as it did not determine any rights. The ECtHR agreed.⁷⁵

At face value, the CMP and similar conditional inclusion of intelligence information models⁷⁶ have most of the trappings of an adversarial procedure – the possibility to challenge closed evidence, the presence of a security cleared and highly trained counsel (UK) and hearing in front of experienced justices. However, such proceedings heavily favour one side over the other. As expressly stated by UK Special Advocates in their responses to the Government's 2011 Green Paper consultations: 'our experience as [Special Advocates] involved in statutory and non-statutory [CMPs] leaves us in no doubt that CMPs are *inherently unfair*; they do not (...) deliver *real procedural fairness*'.⁷⁷ Further, not only is the definition of what is 'sensitive information' very wide⁷⁸ but also the Secretary of State may certify additional information as non-disclosable if it would cause damage to the interests of national security.⁷⁹ In principle, these specialised proceedings are relied on in order to 'balance'⁸⁰ national security considerations and the rights of the individuals suspected of terrorist activities in a manner compliant with the rule of law. Engaging the concept of 'balancing' in this context is, however, rather misguided as it suggests that there is an equal starting point or equilibrium between individual rights on one scale and national security on the other. It further implies that human rights are an impediment to defence and national security. The preambles and texts of the relevant regional and international human rights documents clearly demonstrate that the human rights framework has been designed to afford states some flexibility when they need to respond to exigent circumstances and imminent threats. Judicial bodies have often acknowledged this built-in flexibility before nevertheless proceeding to afford excessive deference to states leading to the normalisation of emergency measures. In essence, the weight of national security has been *double counted* by an enforcement of the prescribed rules (in the ECtHR context a very wide margin of appreciation) and application of a diluted proportionality test due to the heavy weight generally afforded to national security considerations.⁸¹ So why do courts come close to giving governments an effective *carte blanche* on national security matters despite serious concerns over irreversible rule of law backsliding?

2.2. DUE AND UNDUE JUDICIAL DEFERENCE

The key question that confronts courts when reviewing the compatibility of national security measures with human rights and other relevant legal norms is how intensely to scrutinise the government's claims of imminent threat to the public.⁸² In reaching their determination on this question, judges tend to face two opposing forces, both pulling strongly in their own direction. On the one side, the risks associated with terrorist and violent extremist activities demand of judicial bodies to afford a large degree of deference to governmental expertise and intelligence-gathering powers.⁸³ 'In matters of national security, the cost of failure can be high' as noted by Lord Hoffmann in the *Rehman* case.⁸⁴ On the other side, domestic constitutional expectations and regional and international obligations necessitate courts to scrutinise encroachments on rights made in the name of national security.⁸⁵ Regrettably, the tendency of judges is to get

⁷⁵ *Gulamhussein and Tariq v UK*, App. nos. 46538/11 and 3960/12 [2018] ECtHR.

⁷⁶ R Van Ark, 'The Long Hand of 9/11: The Normalisation of Secrecy in the UK and Dutch Courts' in M Scheinin, & C Paulussen (eds.) *Human Dignity and Human Security in Times of Terrorism* (Springer/T.M.C. Asser Press, 2020).

⁷⁷ D Anderson QC, Independent Reviewer of Terrorism Legislation – Memorandum for the Joint Committee on Human Rights of 26 January 2012, Justice and Security Green Paper Cm 8194 (emphasis added).

⁷⁸ Section 17 (3) Part 2 Justice and Security Act (JSA) 2013.

⁷⁹ JSA 2013 – Section 17 (3) (e), (4), (5).

⁸⁰ 'CMP strikes a necessary balance between the fundamental principle of open justice, and the protection of national security': Policy Paper 'Closed material procedure: government response' (2024) <<https://www.gov.uk/government/publications/review-of-closed-material-procedure-government-response/closed-material-procedure-government-response>>.

⁸¹ C Chan, 'Business as usual: deference in counter-terrorism judicial review' in Davis & de Londras (n 23), 228–250.

⁸² *ibid.*, 228.

⁸³ *ibid.*

⁸⁴ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

⁸⁵ *ibid.*

pulled by the first force and defer to the executive, at times excessively, leading to long-term negative implications for individual rights and other constitutional protections.

The rationale behind this deference revolves around the following constitutional objection – what constitutes an appropriate matter for the judiciary and what is the prerogative of the government?⁸⁶ To put it differently, is the assessment of whether a particular national security measure is in the public interest a matter of governmental judgment or a matter of law? The reasoning behind judicial deference rests on two related explanations.⁸⁷ The first one can be described as the constitutional objection – eloquently explained in the *Rehman* case.⁸⁸ The meaning of national security is ‘a question of construction and therefore a question of law’ within the jurisdiction of the courts.⁸⁹ The related question of whether something is ‘*in the interests*’ of national security is a matter of executive judgment and policy however and thus not a matter of law.⁹⁰ To use the *A and Others*⁹¹ case as an example here – when deciding whether there was an emergency threatening the life of the nation, the majority accepted the government’s assessment in part due to the presumption that the government possessed the required expertise to make national security judgments.⁹² According to this argument, the judiciary’s alleged lack of expertise would make it incapable of properly evaluating information that concerns national security whereas the executive, due to its alleged possession of special knowledge and expertise, would be uniquely positioned to evaluate and assess such information.⁹³ According to Dyzenhaus, these concerns can be addressed through ‘imagination in institutional design’ and putting in place ‘constitutional furniture’ that facilitates judicial evaluation.⁹⁴ Crucially, however, the majority in *A and Others* did not explain *why* they accepted this expertise notwithstanding the ‘widespread scepticism (...) [over] intelligence assessments since the fiasco over Iraqi weapons’.⁹⁵ In this case the House of Lords seems to have granted extra weight to the government’s case on the basis of insufficiently cogent or convincing institutional capacity reasons. In other words, the court deferred to the government, accepting that the reasons for restricting rights through a state of emergency were sufficiently pressing and important, thus requiring reduced scrutiny by the courts as to the encroachment on various rights and the rule of law.⁹⁶

The second rationale for judicial deference is more evidential – the perceived unsuitability of the courts to deal with highly secret material through conventional legal procedures.⁹⁷ This objection rests on the argument that intelligence information, due to its principal purpose and covert nature, has until recently not been intended for use within legal actions.⁹⁸ It is within this context that conditional intelligence inclusion models such as a CMP are inherently problematic. While the reliance on such sensitive information within the court rooms continues to increase, the nature of intelligence has remained the same – it is uncertain, often fragmented and at times difficult to evaluate or verify expeditiously.⁹⁹ Concomitantly, the criteria for sharing such information tend to be rather surreptitious, vague and discretionary with levels of relevance and significance assessed and reassessed on a case by case basis.¹⁰⁰ Aside from the fast-moving technology, which is arguably outpacing the relevant oversight bodies, the blurring of the lines between domestic, regional and international intelligence services has deepened the

⁸⁶ H Born et al. (eds.), *International Intelligence Cooperation and Accountability* (Routledge, 2011), 232.

⁸⁷ *ibid.*

⁸⁸ *Secretary of State for the Home Department v Rehman* (n 83).

⁸⁹ *ibid.*, para 50.

⁹⁰ *ibid.*

⁹¹ *A and Others v the United Kingdom* (n 36); See also Chan (n 23), Ewing (n 3) and Tomkins (n 38).

⁹² Chan (n 23), 233. See also *Secretary of State for the Home Department v Rehman* (n 83).

⁹³ Dyzenhaus (n 24), 219. See also de Londras & Davis (n 20), 28.

⁹⁴ Dyzenhaus, (n 24), 219.

⁹⁵ *ibid.* See Ewing (n 3) and Tomkins (n 38) on this point.

⁹⁶ Chan (n 23), 231–232.

⁹⁷ Born et al. (n 86), 232–233.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

opaqueness surrounding intelligence collection and processing operations.¹⁰¹ The utilisation of private companies in intelligence gathering, processing and sharing of data – and the subsequent blurring of the lines between the public and private divide – has added yet another layer of opacity.¹⁰² In short, when sensitive intelligence information becomes a core part of legal proceedings in addition to discretionary powers granted to a particular governmental member, a claimant can face a number of unsurmountable evidential difficulties and a substantially reduced possibility of obtaining a legal remedy.

What happens at this intersection of excessive judicial deference, reliance on CMPs, negative public sentiment and an unsympathetic defendant is perhaps best illustrated by the ongoing legal efforts of Shamima Begum to restore her British citizenship. Her personal story is well rehearsed by now – certainly after her ill-advised interview with Anthony Loyd.¹⁰³ Within days of this interview and the subsequent, at times vitriolic, ‘trial by media’, the former Home Secretary issued a deprivation order stipulating that Begum was no longer a British citizen. As was implicitly admitted by the former Home Secretary, there was insufficient evidence available to secure more than a brief prison sentence.¹⁰⁴ Nevertheless, operating on the presumption that it is ‘self-evident’ that those who have voluntarily left to join a terrorist organisation and have for a number of years supported a terrorist organisation pose a security risk, as openly asserted by the Home Secretary himself, the lack of more extensive evidence in respect of her activities proved not to be barrier to imposing the far-reaching counter-terrorism measure that is deprivation of citizenship.¹⁰⁵ From the government’s perspective, despite the option of using a CMP, it was arguably much less legally cumbersome, more symbolic and efficient to deprive Begum of her citizenship under Section 40 of the British Nationality Act 1981 and its ‘conducive to the public good’ stipulation than to run a trial. In short, it was good security politics.

In Wojczewski’s conceptualisation of populist securitisation,¹⁰⁶ the treatment of Begum is another classic example of the scapegoating of one particular actor as the ‘enemy of the people’ or the quintessential folk devil, even if the individual concerned is arguably very vulnerable. Thus, to resolve the problem of perceived insecurity back home, a robust – and, in this particular case, symbolic – response on behalf of ‘the people’ was deemed necessary with existing legislative measures facilitating the political posturing. Her subsequent highly politicised legal battles not only highlight some of the crucial constitutional ramifications of excessive judicial deference to the executive in the context of a particular national security measure, but also demonstrate the need to enforce human rights safeguards more robustly in order to put a firm break on rule of law backsliding and the further populist securitisation of immigration law. A CMP was relied on in all of SIAC’s proceedings against Begum. In its 2021 decision, the Supreme Court ruled in favour of the Home Secretary on all grounds and noted rather critically that the Court of Appeal’s approach did not give the ‘Home Secretary’s assessment *the respect*¹⁰⁷ which it should have received’; further, according to the Supreme Court, ‘the Court of Appeal *mistakenly*¹⁰⁸ believed that, when an individual’s right to have a fair hearing came into conflict with the requirements of national security, her right to a fair hearing must prevail’.¹⁰⁹ Citing

¹⁰¹ Goold & Lazarus (n 12), 45–72; C Forcese, ‘Spies Without Borders: International Law and Intelligence Collection’ (2011) 5 *Journal of National Security Law and Policy*, 179; L A Dickinson, ‘Outsourcing Covert Activities’ (2012) 5 *Journal of National Security Law and Policy*, 521.

¹⁰² See Born et al. (n 86); L Cameron & V Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) and N D White, ‘Regulation of Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?’ (2016) 16 *Human Rights Law Review* <<https://doi.org/10.1093/hrlr/ngw019>>, 585.

¹⁰³ A Loyd, ‘Shamima Begum: Bring Me Home, Says Bethnal Green Girl Who Left to Join Isis’, *The Times* (4 April 2024) <<https://www.thetimes.co.uk/article/shamima-begum-bring-me-home-says-bethnal-green-girl-who-fled-to-join-isis-hgvqw765d>>. Q Sommerville, ‘Shamima Begum in Syria: Where Now for IS Bride?’ *BBC News* (22 February 2019) <<https://www.bbc.com/news/world-middle-east-47335731>>.

¹⁰⁴ HC Deb 20 February 2019, vol 654, cols 1485–1496 <<https://hansard.parliament.uk/commons/2019-02-20/debates/4DEC2589-7212-48A0-8507-9D38C0DEC42A/DeprivationOfCitizenshipStatus>>.

¹⁰⁵ *ibid.*, col 1498.

¹⁰⁶ Wojczewski (n 13), 7.

¹⁰⁷ Emphasis added by the authors.

¹⁰⁸ *ibid.*

¹⁰⁹ *Begum v Home Secretary* [2021] UKSC 7, para. 135.

Lord Hoffmann in *Rehman*¹¹⁰ and Lord Bingham in *A and Others*,¹¹¹ the Supreme Court re-affirmed that ‘the Secretary of State’s assessment should be accorded *appropriate respect*,¹¹² for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability’.¹¹³ In short, the Supreme Court chastised the Court of Appeal for not being sufficiently deferential.

Lord Hoffmann made his, by now, infamous, remarks in the immediate aftermath of the 9/11 attacks, which could have somewhat influenced his views on the matter. As such perhaps, aside from the constitutional reasons for judicial deference on matters of national security, there are arguably moral ones as well.¹¹⁴ In the immediate aftermath of seismic events such as those of 9/11, judicial decisions on matters of national security might feel particularly onerous to make – from both a professional and personal perspective.¹¹⁵ The push for and pull of deferring to the more tangible concept of democratic legitimacy may become stronger in the pressing circumstances where (further) lives might be at stake than the more abstract and technical demands of human rights and the rule of law.¹¹⁶ Both historically and recently, judges have been drawn by the former. What is particularly worrying about the more recent turn into excessive judicial deference, however, is that the well adhered to ritual for governments and legislative bodies to succumb to the ‘essential attractiveness of the punitive response ... as an authoritative intervention to deal with a serious, anxiety-ridden problem’ has truly become ‘business as usual’.¹¹⁷ While such responses can be seen as essential palliative care for a risk-obsessed society, panicked by insecurity and the unknowable threats of the future, their temporality and reach should be limited.¹¹⁸ Currently, far-reaching security measures seem to be the expected minimum. In this context, a strong judicial push back may be seen as difficult to justify. Yet, it is precisely at junctures where the security stakes are presented as (very) high that it is crucial to put brakes on the over-broad and moral panic driven legislation that tends to follow particularly affecting national security crises. While hostile public and political responses to robust judicial review are lamentably not uncommon, it is ultimately the courts’ role and *responsibility* to assess whether the measures taken in the name of national security comply with human rights.¹¹⁹ The *Begum* case is one of many illustrative examples of how excessive deference and rule of law backsliding can make real-world human rights protections so practically ineffective as to *de facto*, if not *de jure*, preclude access to any remedy regardless of the vulnerability of the individual in question. In essence, the rule of law is being hollowed out from within.

3. THE CONSTITUTIONAL IMPLICATIONS OF RULE OF LAW BACKSLIDING CAUSED BY EXCESSIVE JUDICIAL DEFERENCE

The recent judicial return to *Rehman* in cases such as *Begum*’s fits somewhat poorly with the ‘constitutional shift’ that Kavanagh identified following cases such as *A and Others* and

¹¹⁰ *Secretary of State for the Home Department v Rehman* (n 83), para 62: ‘[i]t is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process’.

¹¹¹ *A and Others v Secretary of State for the Home Department* (n 36), para 29: ‘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 ... It is the function of political and not judicial bodies to resolve political questions.’

¹¹² Emphasis added by the authors.

¹¹³ *Begum v Home Secretary* (n 109) para. 70.

¹¹⁴ G Philipson, ‘Deference and dialogue in the real-world counter-terrorism context’ in Davis & de Londras (n 23), 252.

¹¹⁵ The masterful work of Albie Sachs is highly recommended on this point. A Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2009).

¹¹⁶ *ibid.*

¹¹⁷ D Garland, ‘The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society’ (1996) 36 *British Journal of Criminology* <<https://doi.org/10.1093/oxfordjournals.bjc.a014105>>, 131.

¹¹⁸ F de Londras, *Detention in the ‘War on Terror’: Can Human Rights Fight Back?* (Cambridge University Press, 2011); Philipson (n 114).

¹¹⁹ For some examples, of hostile responses see Philipson (n 114), 252–253.

AF.¹²⁰ On the basis of these cases, among several others, Kavanagh has argued that ‘when reviewing counterterrorist legislation for compliance with fundamental rights ... there has been a “constitutional shift” from a completely hands-off approach to a more hands-on approach’ i.e. rather than reliance on the doctrine of non-justiciability, there is instead a variable intensity of judicial review combined with a degree of deference.¹²¹ Yet, the *Begum* judgment, the latest in a line of similar decisions, has been described as an abdication of judicial responsibility.¹²² The legal vacuum in which *Begum* now finds herself and the lack of any effective remedy to contest the decision to deprive her of her nationality constitutes evidence of a more permanent rather than temporary turn to rule of law backsliding in the domestic constitutional context of the UK; a turn unlikely to be reversed either domestically¹²³ or within the ECtHR based on decisions such as *IR and GT* and *K2* amongst others.

For some, the Supreme Court did not in fact defer to the executive: ‘if there has been deference in this case, it has been to the rule of law and the separation of powers, including the executive’s role in determining what is in the common good, subject always to the constraint of legality’.¹²⁴ Contextualised within the existing jurisprudence, the *Begum* case constitutes the latest clash between a branch of government primarily motivated by short-term political interests, in principle accountable to the electorate, and a branch of government better equipped to assess legal facts impartially but not subject to electoral accountability if it makes an erroneous decision with potentially serious consequences. The doctrine of separation of powers is an essential part of the rule of law; however, so are the relevant human rights and constitutional protections. While some observers might disagree about what is an appropriate interplay between these principles in an individual case, the legal vacuum¹²⁵ that excessive judicial deference has consistently created in cases involving national security considerations demonstrates the importance of a more human rights-centred approach that can act as a break on rule of law backsliding.

While human rights obligations *do* present legal constraints on counter-terrorism powers, it is crucial not to equate – or approach – these constraints as onerous or restrictive impediments to the legislation and operationalisation of national security measures.¹²⁶ The available mechanisms through Article 15 of the ECHR, Article 4 of the International Covenant on Civil and Political Rights or the UK’s Civil Contingency Act of 2004 are apt examples of when and how states can qualify a broad range of individual rights on the basis of national security considerations in exigent circumstances provided these restrictions have a legal basis and are proportionate to the objective. The expansive legislative counter-terrorism toolkits of the UK as well as other countries such as France and the Netherlands are notable illustrations of the following: human rights obligations have neither prevented the development or implementation of expansive counter-terrorism measures nor have halted the creep and normalisation of exceptional security measures into various other areas of law. By affording excessive deference when the weight of national security has already been *double counted*, as noted in Section 2.1. above, courts can often prolong and, inadvertently, entrench the backsliding of the rule of law. To come back to the aforementioned ritual following national security emergencies, it is the

¹²⁰ Kavanagh (n 2), 174.

¹²¹ *ibid.*

¹²² A Greene, ‘Shamima Begum and The Humpty Dumpty Supreme Court’ (2011) Oxford Human Rights Hub Blog, 8 March 2021, <<https://ohrh.law.ox.ac.uk/shamima-begum-and-the-humpty-dumpty-supreme-court/>>.

¹²³ Despite being sceptical about depriving *Begum* of her British citizenship, Lord Sumption, has argued that the *Begum* judgment fits well into recent jurisprudence, including the landmark case *Miller II* in which the Supreme Court had adopted an approach that emphasises Parliamentary sovereignty over more meaningful judicial review. *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC 41 and J Sumption, ‘Supreme Court rules that home secretary is the best judge of national security risk’ *The Times*, 4 March 2021, <<https://www.thetimes.co.uk/article/supreme-court-rules-that-home-secretary-is-the-best-judge-of-national-security-risk-rfs067gw9>>.

¹²⁴ M Foran, ‘Shamima Begum, the Separation of Powers, and the Common Good’ (2021) UK Constitutional Law Association, 17 March 2021, <<https://ukconstitutionallaw.org/2021/03/17/michael-foran-shamima-begum-the-separation-of-powers-and-the-common-good/>>.

¹²⁵ For a detailed reflection on this vacuum and, in particular, the distinction between legal grey and black holes, see Dyzenhaus (n 24). Due to strict word limitations, a broader discussion is unfortunately beyond the scope of this article.

¹²⁶ L Lazarus, ‘Do Human Rights Impede Effective Counterterrorism?’ (2017) UK Constitutional Law Association, 15 June 2017, <<https://ukconstitutionallaw.org/2017/06/15/liora-lazarus-do-human-rights-impede-effective-counterterrorism/>>.

courts that have been entrusted with this task precisely because they are unelected and thus free from majoritarian pressure.¹²⁷

The relationship between judicial deference and rule of law backsliding is thus complex and multi-faceted. To an extent, this is an inevitable result of the fact that the rule of law itself is an open-textured concept that consists of different elements that may clash with each other at times. Take for example the fairly comprehensive UN definition of the rule of law, one of the more authoritative legal definitions that exist at the international level.¹²⁸ Under this definition, the rule of law requires measures to ensure, amongst others, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹²⁹ The idea of judicial deference to the executive has long been approached through the lens of Montesquieu's classic if sometimes poorly understood tripartite conceptualisation of the separation of powers between the legislative, executive and judicial branches of government and in particular the argument that the judiciary is merely the mouthpiece of the law.¹³⁰ As constitutional law gradually progressed across liberal democracies, the boundaries between the executive and the judiciary further crystallised as a result of the landmark judgment in *Marbury v Madison*,¹³¹ which granted courts in the United States the power to enforce constitutional limits to executive power and strike down laws that violate the constitution. Under most modern theories of constitutionalism, it is now clear that constitutional limits should be subject to interpretation by an independent judiciary which is responsible for the interpretation and enforcement of legal norms.

Despite this clear trend within the wider field of constitutional law, there is nevertheless a long history of declaring cases concerning matters of national security non-justiciable.¹³² Matters concerning national security have long been considered to be exceptionally sensitive and thus strictly within the remit of the executive. Perhaps because of its close proximity to non-justiciability, the concept of judicial deference is sometimes misrepresented as a black-and-white issue: a court decision is classified as either deferential or not. A more accurate conceptualisation, that has the additional benefit of corresponding to legal complexities of the 21st century, is that when judicial deference occurs, it is influenced by many interrelated factors and manifests itself along a continuous spectrum. Deference, as opposed to non-justiciability, can be a matter of degree rather than a blanket rule entirely preventing judicial scrutiny.¹³³ In other words, 'deference can maintain some flexibility by requiring the courts to assess their institutional competence or expertise to deal with a particular issue (...) and, accordingly, show some restraint to the extent that their competence is limited'.¹³⁴

The securitisation ritual referred to throughout this article does expose why excessive deference – and not some or undue judicial restraint – can become highly problematic. All institutional actors involved in the proposal, implementation and assessment of national security measures – the executive in particular – tend to demonstrate a compulsion for legality or the compulsion to justify all acts of state as having a legal basis or the authority of law.¹³⁵ The executive's compulsion for legality can set in motion or catalyse two distinct cycles of legality. The significant difference between these two cycles can be quite important in the context of an intense moral panic as such a panic can influence the executive to undertake a more minimalist approach

¹²⁷ Chan (n 23), 241–242.

¹²⁸ The concept of the rule of law is, of course, infinitely more complex than portrayed by the UN definition of the rule of law: T Bingham, *The Rule of Law* (Allen Lane, 2010); J Raz, *The Authority of Law* (Oxford University Press, 2002), Chapter 11.

¹²⁹ UNSC 'Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies' UN Doc. S/2004/616 (2004).

¹³⁰ Montesquieu (1748) as cited in A Cohler et al. (eds.), *The Spirit of the Laws* (Cambridge University Press, 1989), Chapter 6.

¹³¹ *Marbury v Madison*, 5 US 137 (1803).

¹³² D McGoldrick 'The Boundaries of Justiciability' (2010) 59 *International and Comparative Law Quarterly*, <<https://doi.org/10.1017/s002058931000059x>>, 981–1019.

¹³³ Kavanagh (n 2), 175.

¹³⁴ *ibid.*

¹³⁵ D Dyzenhaus, 'Introduction: Legality in a Time of Emergency' (2008) 24 *Windsor Review of Legal & Social Issues*, 1. For further discussion on legalism and legality please refer to L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review*, 616; J Shklar, *Legalism* (Harvard University Press, 1964); S Shapiro, *Legality* (Harvard University Press, 2011); Dyzenhaus (n 24).

to its obligations towards the ‘folk devils’.¹³⁶ While in the first cycle the institutions of the legal order cooperate and ensure compliance with legality (understood as a substantive conception of the rule of law), in the second cycle the content of legality or the rule of law is approached in an increasingly more formal or empty manner resulting in the mere appearance or pretence of legality.¹³⁷ Such an approach to the rule of law is problematic not just in itself but also in combination with what has been described by Raz as the ‘danger created by law itself’.¹³⁸ He noted that the law could be uncertain, unstable or obscure and thus potentially infringe on individual rights and freedoms; however the rule of law is designed to prevent such dangers.¹³⁹ Thus, the rule of law could be seen as a negative virtue – ‘the evil which is avoided is evil which could only have been caused by the law itself’.¹⁴⁰

The judiciary thus should, through more robust judicial review, ensure that national security considerations are *not* double counted. In other words, as the domestic constitutional frameworks already factor in the possibility for qualifying rights in exigent circumstances, the judiciary should curb the creep and normalisation of emergency or, initially, highly specialised measures into other areas of law and the statute books more broadly. To use the example of CMPs, had the judiciary pushed back harder at the introduction and subsequent gradual expansion of this very controversial procedure, the outcomes of cases such as *Tariq* and *Begum* may have been rather different. Instead, both domestically and at ECtHR level, the courts appear to have accepted that, as CMPs offer a procedural measure of justice if not necessarily a substantive one, this would be sufficient to respect the rule of law. To paraphrase Dyzenhaus,¹⁴¹ the judiciary have not only become content with less substance in the rule of law, they are actively entrenching it.

4. CONCLUSIONS

The rise of populist ideologies in the past decade, and the worrying development of extreme ideas entering mainstream political discourse, arguably warrant a more nuanced understanding of the interplay between democratic backsliding, rule of law backsliding and the constitutional protection of human rights. In our hyperconnected world characterised by globalisation, rapid digitalisation and extreme polarisation of political debate, the prospect of true democratic accountability, used as a justification for judicial deference to the executive, is challenged by various actors. As a result, the true democratic legitimacy of decisions by the executive and legislative vis-à-vis the judiciary is increasingly threatened by populist securitisation discourse across the globe. European legal responses to the perceived risks and threats to national security have increasingly been affected by populist securitisation by both the press and political parties. The ongoing practice in both the United Kingdom and on the European continent of revoking the citizenship of terrorist suspects, often dual nationals from ethnic and religious minority groups, reflects a shift towards populist securitisation. This situation calls for strong measures to halt rule of law backsliding, with the aim of restoring both legal integrity and a healthy democratic environment, and counteracting the excessive tendencies of populist securitisation. As populism continues to gain ground domestically, it is often international and supranational human rights bodies such as the ECtHR that are called upon to reinforce human rights safeguards. It is thus crucial that such bodies do so robustly even if that leads to domestically unpopular decisions. The alternative is further entrenchment of expansive and multi-layered immigration, criminal justice and counter-terrorism measures with the result being a rule of law causing the evil from within. At present, there is regrettably little scope for optimism.

¹³⁶ Dyzenhaus (n 135), 1.

¹³⁷ *ibid.*, 4.

¹³⁸ J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 223–224.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ Dyzenhaus (n 24).

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AUTHOR AFFILIATIONS

Dr. Romyana van Ark  orcid.org/0000-0002-5825-5327

Senior Researcher in International Law and (Counter-)Terrorism, Asser Institute of the University of Amsterdam Law School, NL; Editorial Board Member ECHR Law Review, NL

Dr. Tarik Gherbaoui  orcid.org/0000-0001-5550-3316

Researcher in International Law and (Counter-)Terrorism, Asser Institute of the University of Amsterdam Law School, NL

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