

Unequal Knowledge, Unequal Law: Intelligence Asymmetry in Comparative Public Law

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Abstract

This article addresses a problem of public law: the predictable gap between the intelligence relevant to public power and the ability of interested parties, legislatures, and courts to acquire and challenge that intelligence. The problem of such a gap—what we call intelligence asymmetry—is not a special case involving particular trade-offs between security and other values, but rather a regularly managed aspect of public law. Through a range of techniques that are recognized and utilized in all constitutional systems of law, those who possess and rely upon intelligence related to public power manage this problem in predictable ways. Part of this article is doctrinal and comparative legal research, examining constitutional and statutory law, mechanisms of oversight, and particular cases in the European Union, the United States, and the Islamic Republic of Iran. The article identifies similar patterns of behavior in the secrecy practices of these governments, tracing intelligence activity outside normal competence and organizational channels, offering procedural alternatives to adversarial testing of the facts, and constructing doctrines of evidence and justiciability that systematically shift the burden of proof to the parties least able to meet it. The upshot of these practices is to transfer further authority to security agencies and to limit judicial review, while monitoring the behavior of such agencies through bodies that have become partial epistemic substitutes for accountability. Formally general legal rules amount to unequal law when access to the facts and law relevant to legal adjudication is unequally distributed. This article explains why this is so, and outlines a set of “information due process” proposals designed to equalize access to the information that matters while respecting legitimate secrecy.

Keywords: intelligence asymmetry; state secrecy; intelligence oversight; judicial review; rule of law; equality before the law.

JEL Classification: K23

DOI: 10.62768/PLPA/2026/15/2/10

Please cite this article as:

Abbasi, Reza, „Unequal Knowledge, Unequal Law: Intelligence Asymmetry in Comparative Public Law”, *Perspectives of Law and Public Administration* 15, no. 2 (June 2026): 343-357.

Article History

Received: 25 February 2026

Revised: 10 April 2026

Accepted: 15 May 2026

1. Introduction

Most discussions of public power take place in a geography of territory, legal jurisdiction, and hierarchy. But in growing cities and regions, knowledge, verification,

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and trust are often equally important considerations, often on an equal footing with other factors. This is particularly the case in national security governance, where intelligence is one of the key facts upon which the legality of coercion depends. Threat assessment, due regard to foreign involvement or authorship of an attack, licensing of appropriate surveillance, and claims of urgent necessity — all these depend on the ascertainment of particular facts. For the key security institutions of the United States, control of classification — what can be known by whom — directly affects the ability of law to verify out the foundational facts upon which its claims to legitimate violence rest.²

This article does not deny that there is such a thing as a conflict between security and liberty. Its purpose is, however, to expose how the usual talk about such a conflict covers up a more serious problem in public law: namely, intelligence asymmetry i.e., predictable imbalances between intelligence information and the officials, private actors, or other entities (whether within the state or not) who have access to such information or who are denied access to such information. These imbalances can occur within a single entity or across several entities: namely, between different parts of the state, on the one hand, and, on the other hand, the individuals or entities for whose security measures are undertaken as well as against third parties (including those who are used by the state as intermediaries in relation to intelligence). The article aims to map and theorize this particular problem. It contends that secrecy is not an occasional deviation from established constitutional norms but rather an increasingly usual and habitual constitutional feature. That is, secrecy is built into authorizations to collect and share intelligence, into the structure and operation of classification systems, into privileges of confidentiality or secrecy, and into the powers and procedures of regulatory oversight bodies.³

This article approaches the issue of intelligence asymmetry from a novel angle: it looks for the mechanisms of constitutional reallocation that occur in differing political systems. It is true that there are great differences between the liberal democracies of the Western world and hybrid or authoritarian regimes in other parts of the world, with the main difference lying in the strong judicial review of constitutions in the Western world as compared to the rest of the world. However, there are more fundamental similarities in the legal techniques used in differing constitutional systems to achieve the same ends, such as secreting information from some parties and allocating powers to others. This article compares the European Union legal order with the US legal order and the legal order of the Islamic Republic of Iran. The two systems do not employ the same constitutional grammar of rights and review, but they rely on the playing of information Monopolies in an increasing measure in order to achieve legality.

² David E. Pozen, “Deep Secrecy,” *Stanford Law Review* 62, no. 2 (2010): 257–339, <https://www.stanfordlawreview.org/print/article/deep-secrecy/>.

³ Dennis F. Thompson, “Democratic Secrecy,” *Political Science Quarterly* 114, no. 2 (1999): 181–193; Mark Fenster, *The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information* (Stanford, CA: Stanford University Press, 2017); Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton, NJ: Princeton University Press, 2016),

The inquiry is organized around three research questions. Q1: Organizational structures and doctrinal locations of powers, privileges and oversight concerning the powers of individual officials and units of intelligence institutions, and the doctrinal locations where the formal declaration of secrecy takes place. Q2: Common legal techniques that are used to ensure and overcome intelligence secrecy, and how intelligence asymmetry is entrenched or managed in various institutional, doctrinal and operational ways. Q3: The effects of intelligence asymmetry on rule of law values (publicity, equality, judicial review, accountability, effective remedy) and the possibilities for some trade-offs between these values and the need for secrecy to be theoretically conceptualized and doctrinally formulated.

The article is written by means of doctrinal legal research carried out from a comparative public law perspective. The content of the article is examined in the light of the relevant constitutional and statutory provisions. The relevant judicial cases are then examined in the light of the doctrinal work on secrecy, the arrangements for oversight, and the phenomenon of ‘secret law’. The comparison is not a harmonising one: the aim is to see whether certain legal instruments and structures are in place and what their implications are for the rule of law and for human rights (including those in international instruments). This introduction is followed by a section that identifies and presents the issue of intelligence asymmetry from a public law perspective. After a comparison of the legal approaches of the three selected jurisdictions, their legal structures will be discussed in more detail. Thereafter, the common legal means of secrecy detected in our comparative analysis will be presented. Finally, the consequences for the rule of law will be highlighted and linked to reform proposals, which will be conceived in terms of “information due process.

2. Conceptual Framework

The term “intelligence” has a meaning in law that is different from its usage in daily language or in academic writing on foreign policy or security issues. In law, “intelligence” refers to a number of information gathering, analysis and dissemination activities of States that are conducted under restricted publicity. Two aspects are relevant to the legal issues concerning intelligence: the way in which a “threat” is made governable, i.e. how uncertainty is translated into calculable risk, and the issue of secrecy rules, which apply not only to the secrecy of details of operations, but also to the legitimation of the collection, retention and use of intelligence.⁴

In contrast to the latter, this is not a case of informational asymmetry. While in private law and, even more so, in market theory, informational asymmetry can lead to a distortion of efficient exchange, in public law it is a distortion of institutions under which authorities have to justify coercion. The problem is the observation of individual citizens and the foreign intelligence gathering of organised crime. Here the executive has an interest in two aspects of a decision: the two legally decisive aspects

⁴ Sudha Setty, “No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn’t Let the Terrorists Win,” *Kansas Law Review* 57 (2009): 590, 579–630.

of a decision, and the circumstances in which these facts can be called into question. Thus, legality of government depends on the trust that citizens place in the very individuals whose actions it is the task of law to control. One of the central questions concerning legal government is therefore: Does law have the necessary institutions to sustain an equality of contestation short of full publicity, i.e. institutions that make it possible to create adequate scope for contestation without also creating full publicity of the material facts of a given case.⁵

Security discourse has travelled to the law. The “securitisation” literature tells us something about how that has happened. Security is a justificatory grammar that enables an otherwise contestable set of policy choices to be transformed into a threatened danger to which exceptional measures must be taken. The question for the book is rather how “securitisation” actually works in the law. Rather than opening up a space outside normal legal doctrine, the process of “securitisation” is shown to be a mechanism to lock these doctrines, classification systems, authorisation procedures and managed systems of oversight into place. In other words, secrecy is not seen as an occasional derogation from normal procedures, but as normal machinery itself.

However much the existing scholarship might wish to subvert the usual structural perspective on secrecy, it reinforces it instead. Here, ‘deep secrecy’ means more than simply that the details of a particular programme are kept hidden from public and judicial scrutiny. It means that even the existence and scale of the programmes are themselves hidden from public view, so that there is no possibility of judicial challenge or scrutiny. Yet as research on transparency and secrecy is showing, modern states are simultaneously completely transparent and completely secret. All accountability is re-framed as a series of sectoral design problems to be solved, with a single lever to open up or shut down information flows as required.

Yet this is a matter of public law. As a privileged medium of governance, intelligence is also bound to privileged procedures. In effect, the lack of access to facts on the part of most of the population is compounded by unequal distribution of reasons. Hence, there are unequal entitlements to seek out reasons, to have access to the relevant intelligence evidence, and to challenge legal premises. But these entitlements are not to be fulfilled by disclosure. Instead, they are to be realised by and through oversight bodies and procedures which function as substitutes for adversarial inquiry into facts in order to reveal legal truth. But can these institutionalised substitutes for adversarial inquiry reliably uphold the rule of law and ensure not unequal law but equal law?

3. Comparative Analysis

European Union. When transplanting the concept of national security to the European Union legal order, the reservation of national security as a matter of ‘sole

⁵ United Nations Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32 (August 23, 2007), <https://docs.un.org/en/CCPR/C/GC/32>.

responsibility of each Member State' has implications of two kinds. Firstly, it implies a competence boundary, and thereby, operational intelligence asymmetry, in that intelligence operations are considered to be beyond the scrutiny of other EU actors; secondly, it implies a secrecy boundary, in that such operations are considered to be confidential and may not be disclosed, even to other actors of the same Member State. EU law, however, cannot remain confined to the national level when surveillance and intelligence operations are carried out through digital data infrastructures including communications data retention, cross-border transfers of data, platform-governance rules, big data metadata collection and information sharing. The fundamental right of privacy and data protection re-emerges at the EU level as a potential limit to national security claims. The Court of Justice of the European Union will be an important doctrinal space in which to address issues of operational intelligence asymmetry. Recent scholarship likewise argues that emerging surveillance practices conducted under national-security rationales require a data-subject-centred approach to preserve effective EU-law safeguards.⁶

The Court's approach to dealing with the much deeper issue of intelligence asymmetry in the EU has occurred indirectly, through the lens of proportionality and the procedural safeguards that need to be in place for accessing data. In *Digital Rights Ireland*, the Court found the Data Retention Directive to be invalid because the interference with fundamental rights was excessive and lacked sufficient safeguards. Subsequent cases, such as⁷ *Tele2 Sverige/Watson*,⁸ have offered criteria as to how targeted retention and access to data can be rendered compatible with EU law. This includes reversing Engineer the building (going back to first principles) when determining proportionality, as well as retention and access measures that are based on relevant and objective criteria and subject to effective and independent review. In applying these principles, *La Quadrature du Net* has explored how national security measures fit within the broader remit of EU law. While there may be exceptional circumstances in which a measure is necessary to counter a serious threat to national security and is proportionate, any such measure must be designed and implemented on a strictly temporary basis and should not involve an ongoing, routine or indiscriminate interference with fundamental rights, including ePrivacy regulations.⁹

⁶ Maria Tzanou and Plixavra Vogiatzoglou, "National Security and New Forms of Surveillance: From the Data Retention Saga to a Data Subject Centred Approach," *European Papers* 10, no. 3 (2025): 803–836, <https://doi.org/10.15166/2499-8249/855>.

⁷ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Judgment of the Court (Grand Chamber) of April 8, 2014, ECLI:EU:C:2014:238, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0293>.

⁸ Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others*, Judgment of the Court (Grand Chamber) of December 21, 2016, ECLI:EU:C:2016:970, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJ0203>.

⁹ Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others; French Data Network and Others v. Premier ministre and Others; Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, Judgment of the Court (Grand

This article explores transparency of intelligence, from an EU and Member State perspective. Lack of secrecy is distinct from lack of a unitary ‘EU intelligence constitution’. Instead of a common model, intelligence remains organised in a national fashion. EU fundamental rights adjudication indirectly constitutes the role of intelligence by influencing governance of data and law enforcement co-operation with an intermediary effect. The result is a multi-layered system of accountability. On the one hand, there are the internal mechanisms of accountability of intelligence in the Member States. On the other hand, the institutions of the Union are called upon to control the regulatory instruments developed at the EU level for the purpose of transfers of data and co-operation of law enforcement authorities. At the very moment, where accountability is strongest, it is precisely at the borders of these separate systems of accountability, i.e. in cases of shared collection of intelligence, cross-border co-operation, and joint external intelligence activities that accountability is weakest.¹⁰

In contrast, secrecy is also built into the EU’s own transparency rules. Regulation 1049/2001 grants public and citizens access to EU documents, although this right of access is subject to a series of exceptions, including those concerning public safety and sensitive information. As a result, openness rules easily turn into secrecy rules. Two types of secrecy are therefore present at the EU: on the one hand, Member State secrecy based on the national security reservation; on the other, institutional secrecy, namely the exceptions to the right of access to documents and the rules on originator censorship. From a doctrinal point of view, the problem of the EU’s secrecy is not that of withholding information from third parties at certain points, but rather that of different regimes of visibility and of demarcation lines between them, in order to guarantee the intelligence asymmetry on a structural level.¹¹

United States. In the United States, intelligence governance is restricted to varying degrees by federal legislation, executive directives, and judicial doctrines that seek to control intelligence collection but generally keep details of the methods and activities secret. The central statutory legislation that regulates foreign intelligence surveillance is the Foreign Intelligence Surveillance Act of 1978 (FISA)¹². The legislation created a dedicated judicial branch adversary tribunal composed of a Foreign Intelligence Surveillance Court (FISC) judges who authorise foreign and international surveillance under conditions of secrecy. Surveillance regulated by FISA has, over time, gradually progressed from an individualised-warrant to a programmatic-authorisation model. Section 702 of FISA authorised the executive

Chamber) of October 6, 2020, ECLI:EU:C:2020:791, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0511>.

¹⁰ Deirdre Curtin, “Overseeing Secrets in the EU: A Democratic Perspective,” *Journal Common Market Studies* 52, Issue 3 (2014): 684–700, <https://doi.org/10.1111/jcms.12123>; Vigjilence Abazi, *Official Secrets and Oversight in the European Union: Law and Practices of Classified Information*, Oxford Studies in European Law (Oxford: Oxford University Press, 2019).

¹¹ Deirdre Curtin, “Judging EU Secrecy,” *Cahiers de Droit Européen* 48, no. 2 (2012): 459–490; Abazi, *Official Secrets and Oversight in the European Union*, 75.

¹² Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 101, 92 Stat. 1783, 1783–1786 (1978), <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg1783.pdf>.

branch to target for surveillance non-U.S. persons reasonably believed to be located at any time outside of the United States. Section 702¹³ collection and use operates by certification rather than by individual warrants. Official oversight reports examine how legality is operationalised by various parties including the compliance functions of the agencies; authorisation by the FISC; and post-decision review by both executive and congressional entities that provide formal surveillance oversight. Recent analysis of the post-RISAA Section 702 framework similarly questions whether the existing allocation of programmatic and individualized oversight between Congress and the courts provides adequate safeguards.¹⁴

While legislative and congressional oversight plays an important role in reviewing, authorising and conducting surveillance outside of the FISA framework, an additional structure of executive governance impacts intelligence activities outside of FISA. Much of this additional structure is defined by the terms and conditions of the intelligence governing Executive Order 12333¹⁵ and the authorised intelligence activities conducted pursuant to that authority. This further dimension of intelligence asymmetry as a public law condition is that the legality of activities is often determined internally and reviewed on an *ex parte* basis and then slowly disclosed over time.

Secrecy is not a new phenomenon in American law, but it has particular contours in the United States and is largely shaped by judicial rules of justiciability and procedures of evidence. The state secrets privilege, first recognized in *United States v. Reynolds*,¹⁶ allows the heads of the several departments of the executive to assert that disclosure of evidence offered against a defendant in a federal criminal prosecution is “against the interests of the national security” of the United States, and to prevent the introduction of such evidence. A related doctrine, much less dramatic in rhetoric and affecting a far greater number of claims, was first articulated in *Totten v. Patane*, and more recently reinforced in *Tenet v. Lloyd*. That doctrine bars from adjudication on the merits any claims against the United States if the adjudication of the claim itself presents any risk of disclosure of state secrets. Recent court decisions suggest that even if most of the relevant facts are public, the privilege may bar discovery of the disputed details.¹⁷

¹³ Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (Washington, DC: Privacy and Civil Liberties Oversight Board, July 2, 2014).

¹⁴ Noah C. Chauvin, “Increasing Congressional Oversight of FISA Section 702 after RISAA,” *Tennessee Law Review* 92 (2025): 1235, Widener Law Commonwealth Research Paper No. 25-1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5084391.

¹⁵ Exec. Order No. 12,333, “United States Intelligence Activities,” 3 C.F.R. 200 (1981 Comp.), <https://www.archives.gov/federal-register/codification/executive-order/12333.html>.

¹⁶ *United States v. Reynolds*, 345 U.S. 1 (1953). https://supreme.justia.com/cases/federal/us/345/1/?_cf_chl_f_tk=f.3mJBVSS5Lb8cPdpPBnHi.IDPmihJR98Kdibyw3F3E-1783099154-1.0.1.1-24ET5.acjge.geFbUjdZQbxyRW.MqIIJrEyaSffe8rU.

¹⁷ Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (Washington, DC: Privacy and Civil Liberties Oversight Board, July 2, 2014), <https://www.govinfo.gov/app/details/GOVPUB-PREX29-PURL-gpo51>

Department heads of the federal executive branch are authorized to determine whether disclosure of evidence to be used by the federal government in a criminal prosecution against a defendant will be against the interests of the national security of the United States of America.¹⁸ This doctrine, which was most recently applied in *Tenet v. Lloyd*, 239 F.3d 1128 (11th Cir. 2003), is apparently a less severe doctrine than the one set forth in *Totten v. Patane*, 179 F.3d 1292 (D.C. Cir. 1993), which held that claims against the United States are barred from merit-based adjudication whenever such adjudication would pose any risk of revealing state secrets. In recent cases, a strong defense of the privilege has been that most of the relevant facts are public and the plaintiff seeks to find out more.

Secret law raises the further ‘secretary law’ issue of where the legally significant interpretation of the legislation in question takes place but is classified or unpublished. In national security practice such a line is claimed to exist between the ‘operational’ dimension and the ‘legal’ dimension; however the latter can itself be secret. From the perspective of doctrinal public law, the issue is not one of simple obscurity, rather it is how legality is determined by one internal interpretation that cannot be questioned as opposed to another, and how the courts have developed doctrines which bar access to the forum where such challenges could be raised by those outside that internal sphere of decision.

Islamic Republic of Iran. Security governance in Iran can also provide an interesting perspective on the issues discussed here. Security governance is constitutionally security governance is constitutionally security governance is centrally organised within a leadership model and secretive institutions. The Constitution determines the special role of the Leader in the security area by fixing general policies and by commanding the armed forces. The Supreme Council for National Security as laid down in Article 176 is responsible for formulating policies in the field of defence and security for the country and for co-ordination of organisations and bodies of various government branches with a view to rationalising security policies. The Council makes decisions on defence and security issues that are binding for all organs upon confirmation by the Leader. Therefore, the issue of security co-ordination is constitutionally ‘neutralised’ by being transferred to a single power centre and managed within secretive institutions where crucial decisions are taken in order to forestall the possibility of rival centres of power influencing the decision-making process.

The architecture of the new system of security governance transforms the potential space for judicial intervention in issues of national security. While the Iranian Constitution mandates that those in authority obey the law and serve justice to the public, the constitutional provision in question operates to bar independent judicial

296. Daniel R. Cassman, “Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine,” *Stanford Law Review* 67, no. 5 (2015): 1213–17, https://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/05/67_Stan_L_Rev_1173_Cassman.pdf.

¹⁸ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013). https://www.loc.gov/item/usrep568398/?utm_source=chatgpt.com&_cf_chl_f_tk=yaqHMTliPFJl2AVcrSAJTGz.2H8ZllixwpjzL.N67Rk-1783099459-1.0.1.1-Jnmlbk41h7hhXgH5mttcejSYdlHfeMo2jb4j0RC5qs.

oversight of security governance. This is because decisions and authorizations relevant to security are taken within a field of operations in which relevant security authorities are protected from normal processes of contestation. The collisions and accommodations between juristic authority, constitutional provision and security institutions produce the machinery of security legality, a system distinguished by secrecy.¹⁹

This public law inquiry need not treat the system as a ‘black box’. Rather than viewing the causes of the failures to prevent terrorist attacks as being contained within some secret part of the system, the inquiry need only identify the particular legal sites at which intelligence asymmetry is produced and protected (i.e., the constitutional allocation of authority, the institutional insulation of security councils, the legal limits upon the judiciary’s potential for inquiry into the conduct of security agencies, etc.). In other words, intelligence asymmetry is not simply a matter of fact (i.e., evidence to be considered in particular cases) but a constitutional and institutional problem, namely how the legal order presupposes the dominance of the security state in the flow of information and how the legal order thereby affects the conditions under which law operates, including the potential of the judiciary to demand reasons.²⁰

4. Common legal Mechanisms of Secrecy

Similar practices are observed in various countries within the EU, the US, and Iran. However, the question here is not whether the same objectives and rights be permitted, but rather that similar means and instruments be employed to ensure secrecy and to handle differences in intelligence. In order to bring intelligence activities out from behind the daily legal and political constraints of governance and to incorporate them into a setting in which optimal security policy may be determined, institutions are granted a high degree of institutional insulation. Three contrasting systems are compared and analyzed, including the EU, Iran as the opposite of the Western democracy model, and the US as the ultimate democracy which, however, possesses a legal system that negates the normal politics. Although the three different constitutional regimes have different languages used to describe the role of intelligence, the same legal function is at play. This function is revealed in two different ways: to reserve competence (EU) and secrecy (US) so that the same executive-security complex is able to conduct its business in a setting in which the opportunities for contestation are minimized compared to normal governance. Security policy is thus centrally coordinated and highly insulated from external parties

¹⁹ Saïd Amir Arjomand, “Shi‘ite Jurists and the Iranian Law and Constitutional Order in the Twentieth Century,” in *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, ed. Saïd Amir Arjomand and Nathan J. Brown (Albany, NY: State University of New York Press, 2013), 15–56, <https://doi.org/10.1515/9781438445984-005>; Reza Banakar and Keyvan Ziaee, “The Life of the Law in the Islamic Republic of Iran,” *Iranian Studies* 51, no. 5 (2018): 717–46, <https://doi.org/10.1080/00210862.2018.1467266>.

²⁰ Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality* (Cambridge: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139680493>.

in order to reveal as little as possible.

But even as such ‘transparency systems’ come into existence, they develop their own procedural substitutes for adversarial scrutiny. These include secret authorization procedures; confidential committee sessions; auditing and inspection by powerful officials; selective disclosure to carefully chosen intermediaries; and carefully managed public disclosure. Such measures do not merely withhold information from outsiders, they re-organise accountability itself, trading away public contestation for the quiet negotiations of insiders. Much has been written on these measures, in which oversight bodies, inspectors, and even litigating intermediaries can serve as ‘secrecy surrogates’. The key question, however, is whether such measures are capable of bearing the ideological weight placed upon them, or whether they will ultimately serve to legitimise the absence of contestation.

Legal systems can push the burden of proving relevant facts beyond the capacity of civil society. US law of privilege and standing rules can bar merits review of rights claims as long as they plausibly exist. EU law of proportionality and adequacy in VAPs provides for opportunities to verify certain facts that are hard to verify. Facts relating to foreign law can be hard to verify because they are the conduct of another legal system. Facts relating to the conduct of security agencies can be hard to verify because such conduct is by law secret. The judicial review of security conduct in Iran is shaped by the constitutional and statutory structure of security institutions that is designed to preclude such review. Although courts are empowered to challenge the conduct of security institutions, they have to operate in an environment in which much information is by law secret. Moreover, they are also unaware of authorisation for surveillance and other forceful measures by security institutions. As a result, secrecy is not only maintained by keeping individual facts secret but also by creating “second- level secrecy” about the rules of secrecy itself that the public cannot verify, even when it suspects that it does not have complete information.

How does a formally “neutral” or “general” law actually become unequal in practice while continuing to be draped in the trappings of universals such as “rights,” “fairness,” or simply “legality”? The conditions under which such terms can be meaningfully invoked are not distributed equally; indeed, those within the legal system who are invested in or positioned to produce intelligence about a particular legal concept and its relevant classification categories have access to vastly more information than do those who are simply subject to the law’s decisions. The latter encounter the claims of the state as conclusions rather than as reasons.

5. Rule of Law Implications

Secrecy conflicts with some key values of the rule of law: publicity, the right to reason giving, equality before the law, and an effective remedy. However, the more profound problem for legitimate governance is the intelligence asymmetry problem: can a system of law committed to legality afford such a commitment when the facts and law relevant to coercion are beyond its grasp much of the time. Recent human-

rights scholarship further warns that excessive judicial deference in national-security cases can weaken effective rights protection and broader rule-of-law guarantees.²¹

Relevant provisions of national law are not alone in governing the proper use of secrecy in legal inquiry. Relevant provisions of international law sharpen the question. Article 17 (ICCPR)²² provides that: ‘No one is entitled to be ill-treated in his or her own home or during detention; or of being subject without justification to the invasion or undermining of privacy, or to the secret collection of data, or of interference with his or her correspondence or of unlawful intrusions into his or her home and/or any disturbances thereto, or to unreasonable searches of his or her person, his or her clothing or his or her dwelling.’ Article 14 guarantees the right to a ‘fair trial’ before a ‘regularly constituted court’. Significantly, that right includes the condition that all persons be afforded equal treatment to unlike persons and equality before courts and tribunals and equal respect for his or her lawful rights. Equality of arms is a crucial element of this right to a fair hearing. Article 19 guarantees the right to freedom of expression, including the right to seek and receive information. The law recognizes very limited circumstances where this right may be lawfully restricted. As a result, even where secrecy of information is needed, there are established limits on its proper use including only when necessary, lawful, and that do not unfairly restrict remedial capacity.

This article examines the relationship between the intelligence work of police and security services and the rule of law. The rule-of-law problem is not that all such intelligence work is extra legal. Rather, it is that the nature of such work — the secrecy of intelligence methods and the denial of responsibility for their results — can make it the case that important law is underenforced even when that law is codified in domestic statute and reflected in the strategic plans of security services. In order that law be seen to be applied, its requirements are lowered; in this context, lowered not in the sense of the lawmaker’s policy goals, but in the sense of denied conditions of legality. These conditions include contested fact finding, the production of proof, and clear reasoning regarding law and consequences.

The ways in which domestic public law is developing to tackle the challenge of accountability largely centre on the issue of oversight and the managed disclosure of information relevant to the performance of the agencies with powers to affect the interests of citizens. Yet oversight is not accountability. In displacing the latter with a system of oversight that depends in substantial part on bodies that are in part epistemic substitutes, doctrinal substitution has real effects. While in principle all those who are subject to the coercive powers of the state are entitled to a general condition of legality, accountability is shifted to a relatively narrow group of institutional actors. This is but one dimension of what can be seen as a ‘secrecy

²¹ Rumyana van Ark and Tarik Gherbaoui, “Excessive Judicial Deference as Rule of Law Backsliding: When National Security and Effective Rights Protection Collide,” *Utrecht Law Review* 20, no. 3 (2024): 26–41, <https://doi.org/10.36633/ulr.1081>.

²² International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights?utm_source=chatgpt.com.

surrogate' model of accountability. For those who claim to embody the interests of citizens in dealings with agencies exercising powers over them, the same information monopoly that the state possesses over citizens is determining how far to extend access to information relevant to the conduct of those agencies. Their surrogates are easy to co-opt, bounded by classification rules and constrained by the very agencies they are investigating.

This volume explores how the problems of intelligence asymmetry may affect the 'rule of law transnationally'. While the international law of espionage in peacetime is today still in a state of some uncertainty and indeed of strategic ambiguity, many forms of intelligence activity do not constitute the 'use of force' and so fall outside the well-established rules of just war. Consequently, such activities can operate in a legal 'grey area' from which it is difficult for any adjudicatory body to adduce relevant evidence. Other activities may violate international legal obligations the obligations of which are clear enough: for example, the obligation to respect diplomatic inviolability under the Vienna Convention on Diplomatic Relations. However, the problem of secrecy and the question of proper attribution to a State or agents of that State of activities of such a clandestine and covert kind creates particular difficulties for effective enforcement and compliance. The law of state responsibility is clear that internal law and internal secrecy cannot be a defence to a breach of international legal obligations entailing responsibility. However, the 'evidence problems' identified in the volume's contributions create specific difficulties in relation to the key elements of responsibility: attribution, breach, cessation and reparation.²³

That is a public law issue: the matter calls for equality of justification. Equality before the law is not limited to equality of content, it also includes equality of access to the justificatory conditions that make a legal rule contestable. These conditions are being undermined by the intelligence asymmetry. Justificatory conditions demand visibility, testability and contestability of the grounds of coercion. Suggestions for law reform going forward (*lex ferenda*) should be doctrinally realistic. Even if total transparency were achievable, it would not necessarily be desirable. In the absence of that ideal, however, the goal for information due process is to design rules of law and mechanisms for implementing them that keep from being secret things that should not be kept secret while keeping from being weapons of foreclosing controversy things that should be secret. Three reforms are set out below.

In place of the prevailing system in which secrecy claims are matters for the institutions concerned and are outside the legal review, such claims should be treated as legally reviewable claims. The courts should have a clear understanding of the criteria that would justify classification and non-disclosure, including an understanding of the nature of the alleged harm and the minimum extent of secrecy required to prevent that harm. Second, procedural substitutes to full publicity must be

²³ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries," in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN Doc. A/56/10 (2001), 30–143. https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf?utm_source=chatgpt.com.

strengthened wherever publicity is not possible. Authorisation and oversight procedures must be given greater substance and transformed from briefing occasions into procedures for testing evidence and legal interpretation.²⁴ Independent oversight bodies must be empowered to publish declassified findings and, where appropriate, also declassified legal interpretations. These measures should concretise the scope of so-called 'secret law' and limit it to tangible operational requirements, not to the arbitrary discretion of individual officials. Thirdly, remedial structures must also be able to operate in secrecy. The standing and remedy rules should not make individual rights inoperative merely because the state's interference has made it difficult to prove the injury to the individual. Legal systems must be able to fashion controlled processes of proof through secure procedures and independent review in order to establish whether an interference has occurred and whether or not that interference was lawful.

Secrecy is a constitutional resource, utilized positively and negatively across centuries and legal systems. If it becomes an omnipresent resource, always available without sufficient opposing forces, then it can contribute to vast intelligence asymmetry that will permanently transfer power from Congressional and judicial branches to the Executive and security agencies permanently imposing unequal law, "by law" but increasingly a matter of fact, with legality increasingly depending on the substance of the law less and the facts and legal interpretations accessible to particular individuals and groups more.

6. Conclusion

What does it mean to treat intelligence asymmetry as a "structural" problem of comparative public law? The article examines the different forms of, and reasons for, secrecy in the European Union legal order, the United States, and the Islamic Republic of Iran. It examines how that secrecy is in each case "stabilized" by a regularly-recurring set of legal techniques for transferring authority in varying degrees of transparency. These techniques include the institutional insulation of intelligence agencies, procedures that stand in for effective adversarial proceedings, and doctrines of evidence and justiciability that allocate the costs of investigation to those least able to bear them.

Unequal law is not random law. While formally authorized actors are required to comply with formally legitimate legal standards, in practice those standards can be applied under very different epistemic circumstances. Those who are part of the system of formal authority — executive-security institutions and some oversight actors who are invested in law — possess the factual and legal information necessary to operationalize the concept of legality. In contrast, those who are subject to the coercive claims of the state experience such claims as conclusions rather than grounds for critical inquiry. For example, in a culture of secrecy, the conditions for judicial

²⁴ Robert M. Chesney, "State Secrets and the Limits of National Security Litigation," *George Washington Law Review* 75 (2007): 1249–1332, <https://ssrn.com/abstract=946676>

review of police conduct are blocked by deference, and then by the hurdles to establishing standing, gaining access to relevant information, and obtaining relief.

This article considers how far international law can travel in identifying appropriate standards for privacy, fair trial and freedom of expression, diplomatic inviolability and responsibility of states operating in a world in which the real challenge of intelligence operations comes from an intelligence asymmetry. Why this is an interesting question is not that international law is unable to solve the problems, indeed it could solve them with ease. The real issue is that, as a result of its own intelligence deficit, international law is unable to realise that it is unable to solve them. Transparency is not on the agenda. What is on the agenda is the doctrinal obligation on public authorities to act lawfully and the corresponding obligation on citizens to challenge their actions even when secrecy is involved. I have called this obligation information due process: the process of law that is equal in substance requires institutions of public law that are equal in capability to justify their actions.

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