In a World of Their Own: Security-cleared Counsel, Best Practice, and Procedural Tradition

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This article charts how security-cleared counsel have been constructed as a mechanism for managing the tension between security and fairness in secret trials and transferred across national boundaries as an example of ‘best practice’, before going on to evaluate recent cross-cultural and transnational research on this ‘best practice’. Particular attention is paid to the central role played by the European Court of Human Rights (ECtHR) in promoting the role of ‘special advocates’ and a contrast is made between the methodologies deployed by the Court and those used in recent research to identify and problematize ‘best practice’ within the closed world of security-cleared counsel. The article then goes on to explore the relationship between ‘best practice’ and procedural tradition and argues that normative solutions advancing ‘best practice’ need to pay careful attention to the procedural contexts and cultures in which they are embedded.

INTRODUCTION

Over the last number of decades there has been a considerable literature devoted to the increased focus on managing risk in Western democracies which has coincided with the development of technologies which are able to impose increased scrutiny on ‘risky’ individuals. Within the criminal justice system, attention has been drawn to a paradigm shift away from the ‘old penology’ with its focus on identification, prosecution, punishment, and

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treatment of offenders, towards a ‘new penology’ which is concerned with managing risk and ‘risky’ individuals in terms of the danger they pose.\(^1\) The increasing resort to intelligence-led policing that this shift entails has led to a rise in the use of secret evidence which poses challenges to the way adjudication has traditionally been managed in both civil and criminal processes.

It is now quite common in criminal trials for defendants and their counsel to be excluded when prosecutors apply to the court (in so-called ‘public interest immunity’ (PII) hearings) to have certain items of evidence kept out of the proceedings in order to protect sources of information. Aside from criminal proceedings, there are also a range of situations where non-governmental parties may be excluded in so-called ‘closed material procedures’ (CMPs) in order to protect intelligence sources in the interests of national secrecy or to protect inter-governmental international relations. Although these procedures began life in the relatively obscure setting of the Special Immigration Appeals Commission (SIAC) established to hear a small number of immigration appeals where the Home Secretary’s decision to deport an individual was based on national security concerns, these procedures have proliferated across such a large variety of different types of proceeding that they have come to be described as a ‘parallel justice system’.\(^2\) After 9/11, in particular, their use expanded to cases involving counter-terrorism measures, including preventive detention, control orders, now TPIMs (Terrorism Prevention and Investigation Measures), proscription of terrorist organizations, and domestic asset-freezing orders. They can also apply in parole hearings, employment disputes, including security vetting, care proceedings and now, under the Justice and Security Act 2013, all types of civil litigation throughout the United Kingdom.

The need to protect ‘sensitive’ information and the sources that have been used to obtain it poses challenges to core values of open and adversarial justice at the centre of our adjudicative system and has been causing compromises to be made to these key features of the adversarial tradition. Focusing specifically on the use of national security information, the New Zealand Law Commission has posed the dilemma in terms of finding solutions along a continuum between two extremes.\(^3\) At one extreme there is the ordinary traditional court process committed to open and natural justice — full disclosure of the evidence to both the public and the accused which fails to address the need for protecting national security interests. At the other extreme there is an entirely closed inquisitorial process where national

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1 M. Feeley and J. Simon, ‘Actuarial Justice: The Emerging New Criminal Law’ in The Futures of Criminology, ed. D. Nelken (1994) 173–202.
2 Amnesty International, Left in the Dark: The Use of Secret Evidence in the United Kingdom (2012) 7.
3 New Zealand Law Commission, National Security Information in Proceedings (2015) IP 38, para. 6.41.
security information is heard by the decision maker in a secret hearing without the affected person being present or represented. Somewhere between these fully open and fully closed models there are a number of models of ‘partial disclosure’. These can range from an order excluding the public from access to the court to excluding the person affected by the proceedings from the process as well, but with some kind of security-cleared lawyer appointed to represent his or her interests in it.

The use of security-cleared counsel, then, known as ‘special advocates’, is one particular procedural innovation that has been advanced as a means of resolving the conflict between due process and national security. Although they act in the interests of excluded parties, these lawyers are not appointed by them, are not responsible to them and, once they receive closed information, they can no longer communicate with them without authorization. Lord Bingham once famously said that such a lawyer is acting in a way hitherto unknown to the legal profession. This article uses this procedural innovation as a case-study for examining the strengths and weaknesses of two particular methodologies that have been invoked for identifying best practice: international human rights law and transnational comparativism. It will be argued that a human rights court such as the European Court of Human Rights (ECtHR) is poorly equipped to identify ‘best practice’ as it is concerned primarily to establish a minimum baseline of procedural fairness below which member states must not fall, rather than set higher benchmarks. Transnational comparativism offers a more promising approach but it is argued that any ‘best practice’ that is identified needs to be subjected to an ‘interpretivist’ approach whereby it is benchmarked against how well it fits within particular procedural contexts and traditions. It will be argued that, when this is done, there can be a place for special advocates, but only if greater attention is placed on the procedural settings in which they are used and the extent to which they fit within the professional cultures of different procedural traditions.

THE SPECIAL ADVOCATE AND INTERNATIONAL HUMAN RIGHTS LAW

The origins of the special advocate concept can be traced back to the adverse ruling made against the United Kingdom by the ECtHR in Chahal v. UK. The Court upheld Mr. Chahal’s contention that his detention pending deportation (on suspicion of involvement in acts of terrorism in support of Sikh separatism) breached Article 5(4) of the European Convention on

4 J. Ip, ‘The Rise and Spread of the Special Advocate’ [2008] Public Law 717, at 741.
5 R v. H; R v. C [2004] UKHL 3, [2004] 2 AC 135, para. 22.
6 Chahal v. UK (1997) EHRR 413.
Human Rights (ECHR) because he was not given an adequate opportunity to
know the case against him as it was based on confidential information and
the domestic courts were not in a position to review whether the decisions to
detain him and keep him in detention were justified on national security
grounds. Although the Court accepted that the use of confidential informa-
tion may be unavoidable where national security is at stake, it ruled that this
did not mean that national authorities can be free from effective control by
the domestic courts when they choose to assert that national security and
terrorism are involved.\(^7\) In a passage that appeared to give a green light to the
special advocate system, the Court pointed to the example of Canada where a
more effective form of judicial control had been developed through the use
of security-cleared counsel. This illustrated that there are ‘techniques which
can be employed which both accommodate legitimate security concerns
about the nature and sources of intelligence information and yet accord the
individual a substantial measure of procedural fairness.’\(^8\) Although the Court
never endorsed a special advocate system as such, it gave the impression that
such a system could provide a workable compromise between the demands
of national security and due process.

In a wide-ranging examination of how the special advocate system gained
legitimacy from the jurisprudence of the ECtHR, Jenkins has pointed to three
flaws in the Court’s comparative methodology which would negatively
influence the subsequent development of both the British and Canadian
special advocate systems in subsequent years, especially in the security-
obsessed climate after 9/11.\(^9\) The first flaw was that the Court referred
exclusively to Canada’s special advocate system without explaining why it
did so. In this sense, its comparison lacked ‘wide context’ and lent an ‘air of
arbitrariness to its limited comparative foray’.\(^10\) A survey of other common
law systems such as the United States, Australia, and New Zealand would
have shown that none of them (at that time) used a special advocate system
quite like that in Canada, and a similar survey of Council of Europe states
(closer to home) would have yielded a similar finding. Yet, many of these
states have faced similar threats from international terrorism.

The second flaw was that the Court’s description of the Canadian system
displayed an ignorance of foreign law and thereby a lack of ‘deep context’.\(^11\)
Jenkins particularly highlighted the mistaken belief that the system was used
in the Federal Court of Canada. Under the immigration scheme in Canada at
the time,\(^12\) security-cleared counsel were used before the Security Intel-

\(^7\) id., para. 131.
\(^8\) id.
\(^9\) D. Jenkins, ‘There and Back Again: The Strange Journey of Special Advocates and
Comparative Law Methodology’ (2011) 42 Columbia Human Rights Law Rev. 279.
\(^10\) id., pp. 289, 292.
\(^11\) id., p. 297.
\(^12\) See Immigration Act, R.S.C. 1985.
intelligence Review Committee (SIRC) when the government referred to it non-citizens whom it wished to exclude on national security grounds. The job of these counsel who were appointed to act for the Committee was to represent the interests of the non-citizen by reviewing material that was not available to the non-citizen’s counsel and by cross-examining government witnesses based on that material. But SIRC was not a court. It was a Committee charged with making recommendations to the Governor who could then direct the Minister to issue a security certificate against the non-citizen. Furthermore, the counsel primarily acted for the Committee, akin to the role of counsel for a public inquiry, and were not appointed exclusively to represent the interests of the non-citizen.13

The third flaw, according to Jenkins, was that the Court was inattentive to the potential problems of transplanting a foreign legal mechanism and did not caution against uncritical reliance upon its dicta. It thereby gave an ‘unintentional green light’ to the British adoption and subsequent expansion of a controversial special advocate regime without regard to ‘local context’.14 The apparent endorsement by the ECtHR in Chahal of special advocates in a particular Canadian context gave the United Kingdom the encouragement it needed to go down the special advocate route not only in the immigration context but in other contexts as well, most notably when SIAC’s role was expanded to review the indefinite detention of foreign-national terrorist suspects. When the use of secret procedures was challenged in this new context, the ECtHR had an opportunity to correct the general green-light approach adopted in Chahal and declare the special advocate system to be incompatible with Article 5(4). Instead, in its Grand Chamber decision in A v. UK15 in 2009, it gave the system a qualified endorsement. The Court accepted that in view of the dramatic impact of the lengthy deprivation of liberty on the applicants’ fundamental rights, Article 5(4) of the ECHR must import ‘substantially the same fair trial guarantees as Article 6(1) in its criminal aspect’.16 But the Court considered that the post-9/11 emergency situation justified restrictions on this right and that the use of a special advocate could constitute a sufficient counterbalance provided the individual was ‘provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate’.17

At one level this important qualification to the special advocate system may be seen as a welcome affirmation of due-process principles, setting

13 C. Forcese and L. Waldman, Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates (2007) 9.
14 Jenkins, op. cit., n. 9, p. 289.
15 A v. UK (2009) 49 EHRR 29.
16 id., para. 217.
17 id., para. 220.
minimal disclosure as a ‘baseline’ requirement. But at another level, this is an example of international human rights law equivocating on key due-process rights such as the right to full disclosure of the case against one. In contrast to its ruling in *Chahal*, where the ECtHR seemed to be suggesting that the special advocate system could be used as a technique to offer a raised level of procedural protection, the ECtHR here seemed to be endorsing their use in order to lower the level of procedural protection below that to which accused persons have always been entitled under Article 6, namely, full access to the case against them. However broadly the need for ‘sufficient information about the allegations to enable one to give effective instructions to the special advocate’ is construed, it manifestly falls short of full disclosure of the case against one. The ECtHR’s emphasis on the need for at least a minimal level of disclosure in cases where the same fair-trial safeguards as Article 6 in its criminal aspect prevail may be welcomed. But it also suggests by implication that the special advocate system alone, without any minimal disclosure to the applicant, might be an adequate safeguard where there are closed judicial procedures that do not carry the consequences of being convicted in a criminal trial or of suffering a lengthy deprivation of liberty.18 The effect was once again to give the special advocate system a green light and in certain decisions since *A*, United Kingdom courts have indeed held that the *A* standard of disclosure only applied to ‘objectively high level rights’ such as liberty.19

Having given the signal that special advocates are a satisfactory counterbalancing measure for practically any non-criminal procedure (albeit with the proviso that in certain cases an irreducible core minimum of disclosure should be provided to the excluded party), the ECtHR opened the door to the wide use of an institution that one commentator has said would previously have been unthinkable.20 Having won human rights legitimacy in the United Kingdom, special advocates have since been exported to other jurisdictions including Canada, Hong Kong, New Zealand, and Australia. This example points to a weakness in using international human rights law as a benchmark for best practice. International human rights law would appear to be all too conscious of the need to balance different interests – security against fairness – in a manner that gives member states a wide margin of appreciation in protecting populations from terrorist attacks and makes them all too willing to accede to counterbalancing safeguards whatever the context.

This raises the question whether human rights courts such as the ECtHR are an effective mechanism for identifying best practices. It may be questioned whether they have the capacity to examine wide, deep, and local

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18 See E. Nanopoulos, ‘European Human Rights Law and the Normalisation of the “Closed Material Procedure”: Limit of Source?’ (2015) 78 Modern Law Rev. 913, at 926.
19 See, for example, *AZ v. SSHD* [2017] EWCA Civ 35 paras. 29–30. See, also, *Home Office v. Tariq* [2011] UKHL 35, [2012] 1 AC 452.
20 Nanopoulos, op. cit., n. 18, p. 925.
contexts when considering whether, in a particular case, measures that are aimed at protecting national security interests comply with human rights standards. Moreover, as Jenkins himself admits, the ECtHR does not require that a state must always find the least restrictive means for balancing rights and public interests, only a proportionate one. One can argue that the Court could have adopted a wider and deeper substantive context and shown a greater awareness of the different procedural contexts in which special advocates should be used in its proportionality analysis. But at bottom, human rights courts are there to ensure that minimum (not optimal) standards are adhered to. It can be argued that in both the Chahal and A cases the Court did at least raise the minimum baselines: in Chahal to the need for judicial procedures along with techniques such as a special advocate to accord the individual a substantial measure of procedural fairness in deportation cases; in A to the need for minimal disclosure to enable detainees to instruct a special advocate in cases where a lengthy deprivation of liberty is at stake.

THE SPECIAL ADVOCATE AND TRANSNATIONAL BEST PRACTICE

The weakness of the methodologies employed by the ECtHR to identify best practices points to the need for them to be identified by other means. Jenkins contrasts a security-focused perspective adopted by governments in response to human rights law which looks for due-process baselines below which they cannot go and pushes the limits of state power with a ‘best practices’ approach which from a rights-conscious perspective looks for measures that effectively protect national security interests while minimizing restrictions on rights. Rights-consciousness is enhanced by looking comparatively for practices that involve minimal intrusion on rights. This involves adopting a methodological rigour which was lacking in the approach adopted in Chahal: looking widely across different jurisdictions at different practices; looking deeply into these practices; and paying close attention to the local context to consider whether the practices identified are effective in both protecting national security interests while minimizing restrictions on procedural rights.

Although international human rights law has accepted that there are limits to the principle of full disclosure which can be met by special advocates, different countries have developed different practices. In their comparative study, Cole and Vladeck set out to identify ‘best practices’ in the way that security-cleared counsel are used to manage the tensions between fairness and secrecy. By ‘best practices’, they meant ‘those features that maximise fairness to the affected individual without unduly jeopardising security’.21

21 D. Cole and S.L. Vladeck, ‘Navigating the Shoals of Secrecy: A Comparative Analysis of the Use of Secret Evidence and “Cleared Counsel” in the United States, the United Kingdom, and Canada’ in Reasoning Rights: Comparative Judicial Engagement, eds. L. Lazarus et al. (2014) 171.

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They took their cue from the principle established by the Canadian Supreme Court in *Charkaoui v. Canada*\(^\text{22}\) when it struck down the system of Federal Court review that replaced the SIRC model in 2002 and did not allow for any representation on behalf of the interests of excluded parties. This decision prompted the Canadian government to introduce the British special-advocate model into the Federal Court review of immigration cases involving the exclusion of resident aliens. According to *Charkaoui*, since the use of secret evidence so directly compromises the fundamental fair-trial principle that individuals should be able to see and confront the evidence used against them, those compromises should be ‘minimally intrusive’. From this principle, Cole and Vladeck adopted the prescription that where one nation has demonstrated that practices more conducive to fair processes can be undertaken without unduly compromising security, the other nations should be required to adopt those measures as well, or at a minimum, meet a heavy burden of justifying why such a procedure would not be practicable.\(^\text{23}\)

Cole and Vladeck’s research seemed to meet the comparative methodological criteria that Jenkins referred to in his critique of the poor comparative methodology employed by the ECtHR. First of all, they adopted a wider comparative perspective than that taken by the ECtHR by including the United States as well as the United Kingdom and Canada within the scope of their study. This enabled them to look at another type of security-cleared lawyer apart from the special advocate. In the United Kingdom and Canada, special advocates act in the interests of excluded parties but they do not act as their legal representatives and are appointed instead by the Attorney General in England and Wales or by the courts in Canada. In the United States there is no provision for the appointment of special advocates but there is a well-developed system in cases involving classified material, including cases involving Guantánamo Bay detainees, whereby lawyers who act for excluded parties seek security clearance in order to view classified information on a written undertaking by them not to disclose it to their clients.

Cole and Vladeck also adopted a deeper comparative perspective than that taken by the ECtHR by looking in detail at the different practices adopted by security-cleared counsel in each of the three jurisdictions examined. They looked particularly at the ways in which the United Kingdom, Canada, and the United States use security-cleared counsel to increase the adversarial character of closed procedures and found that each of the three nations adopted distinct practices with respect to the constraints on and powers of cleared counsel. The practices they identified as helping to maximize fairness included the requirement that those who face measures that impinge directly on their freedom and liberty are apprised of a core gist of the case.

\(^{22}\) *Charkaoui v. Canada (Citizenship and Immigration)* 2007 SCC 9 [2007] 1 SCR 350.

\(^{23}\) Cole and Vladeck, op. cit., n. 21, pp. 171–2.

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against them. We have seen that this was made a requirement of international human rights law in *A v. UK* but it has been entirely lacking in the habeas corpus cases where non-American citizens detained at Guantánamo Bay have attempted to challenge their detention.24 Other measures included giving security-cleared lawyers access to the entire intelligence file; permitting communication with the affected party subject to permission or signing a confidentiality or protective order not to disclose closed or classified material; and, finally, allowing counsel to actually represent clients in closed procedures if they could obtain security clearance.

Finally, Cole and Vladeck showed sensitivity to ‘local context’ by confining their study to situations where individuals risk losing their liberty on the basis of closed evidence that is not disclosed to them. Special advocates are employed in various other situations where individuals’ rights are affected, for example, in the immigration context, as noted, in employment and security vetting situations where they may be barred from employment on the basis of undisclosed evidence and, as we have seen, in civil litigation involving national security information. This raises questions as to whether individuals in these situations should be entitled to the same safeguards as those facing lengthy deprivations of liberty. The advantage in confining their study to liberty cases was that when different practices were identified, the case for ‘comparative borrowing’ of the least intrusive practices in these cases became all the more compelling. Cole and Vladeck claimed that each of the best practices they identified had been made to work in different countries without unduly jeopardizing national security, and considered that the case for the transfer of these practices across all three countries was compelling.

In many ways the arguments that Cole and Vladeck make for such a policy transfer are very cogent. But, as they concede, the identification of a best practice in one jurisdiction does not require that it be adopted in another, if that other can justify that it would not be practicable. One of the well-recognized weaknesses of comparative methodology is to assume that a particular practice that ‘works’ within one jurisdiction can be ‘transplanted’ from that jurisdiction to another without considering the appropriateness of the context in which the ‘transplanted’ practice is to be embedded.25 Of course, it is true that the jurisdictions chosen for Cole and Vladeck’s study are all deeply embedded in the common law tradition. This in itself raises questions about the appropriateness of adopting any of the best practices that are advocated, which we shall come to. But there is also a growing literature emerging on common law comparativism which emphasizes the *differences*

24 id., p. 173.
25 M. Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Process’ (2004) 45 *Harvard International Law J.* 1.
between common law adversarial systems. The United States in particular is often depicted as a ‘outlier’ in its adoption of a number of practices that other common law systems have found problematic such as plea bargaining, witness preparation, the strong Fourth Amendment exclusionary rule, and the way in which the Confrontation Clause has been developed in recent years.

This suggests that any transnational comparativism of best practice needs to be particularly sensitive to local legal culture and procedural tradition even across jurisdictions that share a broadly common procedural heritage. One way of doing this is to listen to the professional voices of those who are engaged at the ‘coalface’ in secret closed procedures across the jurisdictions examined and how they react to the ‘best practices’ that are espoused. Of course, local tradition or culture can be used as an unprincipled device for opposing reform. But in considering such practices, it is important at least to be aware of what obstacles there might be to seeking to have them implanted across different legal cultures.

BEST PRACTICES AND PROCEDURAL TRADITION

In a recent comparative study of special advocates I conducted interviews in the United Kingdom, Canada, and the United States with special advocates, other kinds of security-cleared counsel, government counsel, judges, and open counsel who represented their clients in those parts of the proceedings that do not involve closed material but who, like their clients, were excluded from the closed proceedings. The aim of the study was less to make policy prescriptions based on ‘best practice’ than to understand how such practices are likely to be received within different procedural cultures and, more normatively, whether they subverted core values underpinning the adversarial common law tradition. The methodology in this sense was more ‘interpretivist’ than ‘positivist’. What I found, perhaps not surprisingly, was that some of the best practices identified by Cole and Vladeck did

26 See, for example, J. Hunter and P. Roberts (eds.), Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions (2012).
27 See, for example, J. Jackson (ed.), ‘Anomalies of US Evidence Law’, special issue (2011) 9(2) International Commentary on Evidence.
28 See, for example, J. Jackson, ‘Playing the Culture Card in Resisting Cross-Jurisdictional Transplants (1997) 5 Cardozo J. of International and Comparative Law 51.
29 See J. Jackson, Special Advocates in the Adversarial System (2020). Altogether interviews were conducted with 18 special advocates, 7 open counsel, 7 government counsel, and 6 judges or commissioners in the United Kingdom. In Canada 4 special advocates were interviewed and in the United States 7 security-cleared counsel, 2 federal prosecutors, and a Federal Court judge were interviewed.
30 See D. Nelken, Comparative Criminal Justice: Making Sense of Difference (2010) 40–2.
indeed rub up against well-established professional practices governing the relationship between counsel and their clients. We shall look at these in turn.

1. The intelligence file

In their study Cole and Vladeck pointed to the practice that has been afforded to special advocates in Canada whereby they are given access to the full intelligence file on the affected individual, and not just the evidence that the government seeks to use and any exculpatory material. They argued that this is an important advantage as it puts the special advocate and the government on the same footing regarding the government’s evidence, allowing the special advocate to make his or her own assessment of what evidence might be helpful to the affected party and to make arguments based on contradictions in the government’s files. This practice seemed to arise from the Canadian Supreme Court decision in Charkaoui II which required the Minister to file with the Court and deliver to the special advocates any and all of the information relating to the named person. More recently, the Canadian government has reined back from this practice to the dismay of special advocates who resisted this change very strongly. For them, access to the whole intelligence file was crucial to their role. One special advocate referred to one case where he was able to trawl through an entire file and was able to come across inconsistent statements made by intelligence sources. It was, of course, extremely burdensome to comb through what was a lot of irrelevant information. But as he put it, ‘it was the equivalent of hunting for a needle in a haystack . . . But if I am given the choice between slogging through the stuff, I’d rather that then have someone else doing the selection.’

In the United Kingdom, government counsel carry out an ‘exculpatory review’ owing a ‘duty of candour’ to search for and produce material which may undermine the government’s own case or assist the excluded party. There are well-established traditions at the Bar requiring duties of candour between counsel and there appears to be a high degree of trust that government counsel will carry out the exculpatory review diligently. This does not mean the system is perfect. SIAC itself has pointed out that government counsel are not best placed to judge how particular material might be used by the special advocate. United Kingdom special advocates have not called for access to the whole intelligence file. This may be explained in part on

31 Cole and Vladeck, op. cit., n. 21, p. 174.
32 Charkaoui v. Canada (Citizenship and Immigration) [2008] 2 SCR 326, 2008 SCC 38.
33 See C. Forcelse and K. Roach, False Security – The Radicalization of Canadian Anti-Terrorism (2015) 68–9.
34 Special advocate interview 16.
35 See AS & DD (Libya) v. SSHD 27 Apr 2007, SC/42 and 50/2005, para. 416.
36 Ajouaou and A, B, C and D v. SSHD 29 Oct 2003, SC/1/2002/, SC/6/2002, SC/7/ 2002, SC/9/2002, SC/10/2002, para. 281. 

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account of the lack of time and support they would have to ‘slog’ through the material. In interviews they made constant reference to the lack of support that they had and to having to act under pressure of time. They were particularly conscious, more so than their counterparts in Canada where there is no split legal profession, of the lack of any instructing solicitor to assist them. They have also consistently complained about their lack of access to independent expertise and their inability to call witnesses. The question then arises whether either serving or former employees of the intelligence agencies could be delegated to assist special advocates in their functions which could include helping them find relevant information from the intelligence files.\(^{37}\) So far, however, this suggestion has not met with government approval.\(^{38}\)

2. **Communications**

The question whether special advocates should be given full access to the intelligence file is one that exposed a sharp difference of approach between Canadian and United Kingdom special advocates. One practice that they share in common, however, is the need to adhere to the non-communications rule whereby they are not permitted without authorization to communicate with any person about any matter connected with the proceedings once served with closed material. This rule stands in sharp contrast to practice in the United States. Here security-cleared counsel acting on behalf of excluded parties are able to communicate with them even after they have been shown classified information, although they are made subject to protective orders barring any disclosure of this information to their clients. No amount of access to the excluded party can make up for the inability of the excluded party to confront the evidence against him. But Cole and Vladeck reported that Guantánamo lawyers have learned that their questioning of detainees can often be guided usefully by the closed evidence without impermissible disclosures.\(^{39}\) One lawyer who had considerable experience of Guantánamo litigation confided in my research that being able to take meaningful instruction from the client while having the classified material was quite a ‘powerful advantage’.\(^{40}\) The combination of severe sanctions and the support of Court Security Officers who advise on what communications may be made in privileged conversations with cleared counsel would seem to have been remarkably successful in preventing any unauthorized disclosure. According to this lawyer, in more than a decade of experience with literally

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\(^{37}\) See the written submission of Lord Carlisle to the House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, HC (2004–05) 323-1, Ev. 39.

\(^{38}\) Ministry of Justice (MoJ), *Justice and Security* (2011; Cm. 8194) App. F, para. 4.

\(^{39}\) Cole and Vladeck, *op. cit.*, p. 172.

\(^{40}\) United States security-cleared counsel interview 1.
hundreds of security-cleared lawyers representing Guantánamo detainees, he was not aware of any instance where the United States government had accused cleared counsel of passing unclassified information to detainees.\(^{41}\)

When this practice was probed with interviewees in the United Kingdom, however, it seemed to be a non-starter. The British government has consistently opposed any relaxation of the non-communications rule on the ground that without detailed knowledge of the investigation, or other linked investigations, the special advocates could inadvertently disclose the identity of an agent or details of ongoing investigations.\(^{42}\) One government counsel interviewed considered that the security services simply could not tolerate a situation where they disclose information which could inadvertently get into the hands of terrorists.\(^{43}\)

Although many special advocates in the United Kingdom have called for a relaxation of the rule, when they were interviewed, more nuanced views were expressed. One accepted that it was a protection for the special advocate who might inadvertently disclose something which could have all sorts of repercussions.\(^{44}\) He considered that it all comes down to disclosure because unless one is able to discuss the allegations about the excluded party, being able to communicate with him or her is not really going to help his representation. At the same time, there were occasions when it was important to communicate matters of substance to open counsel and, according to one special advocate, a ‘real bugbear is our inability to send communications to the open representatives without them being seen by the Secretary of State.’\(^{45}\) Special advocates pointed to the system in Canada where applications to make contact with open counsel are made ex parte to a judge without the government lawyers knowing about the substance of the application.\(^{46}\) What has not been contemplated is any idea that special advocates could have access, as cleared lawyers have in the United States, to intelligence officers who could advise them in privileged conversations on what could and what could not be communicated to the excluded party or their lawyer.

3. Different models of security-cleared counsel

If the non-communications rule in the United Kingdom and Canada points to a divergence of practice between these jurisdictions and the United States, an even greater divergence is to be seen in the different models of security-
cleared counsel that operate in these jurisdictions. Whereas the United Kingdom and Canadian systems proceed by way of appointing a special advocate to act in closed proceedings while the excluded party retains his own counsel to act in the open proceedings, in the United States the excluded party’s own counsel seeks security clearance in order to represent his or her own client in the closed as well as the open proceedings. There would appear to be certain advantages for detainees in the ‘own-lawyer’ cleared-counsel model over the special advocate model. According to Cole and Vladeck, it is the inability of United Kingdom and Canadian special advocates to consult with the client and the client’s lawyer that is perhaps the single biggest obstacle to mounting an effective defence in these jurisdictions.47

In the end, however, the preference for one model over the other would seem to come down to different cultural perceptions as to which model does the least damage to adversarial principles. On the one hand, disclosure of information to the party’s own lawyer which is held back from the party would seem to allow for greater participation and engagement with the case than in the special advocate system, as it is the party’s own lawyer who is more familiar with the case and can use the secret evidence to better effect than a lawyer who is totally removed from that party once he or she sees the secret evidence. On the other hand, putting up barriers between a party and his or her own lawyer in terms of what can be discussed between them impairs the confidential relationship between lawyer and client in a manner that a special advocate who is not in a professional-client relationship does not do. It has been suggested that pragmatic clients who have confidence in their counsel will readily agree to their counsel getting disclosure of closed information and only when a client does not agree should the appointment of a special advocate be contemplated.48 But the difficulty is that many clients, especially in terrorist cases, are not pragmatic and may not be willing or able to act in their best interests. In a number of cases in the United States, defendants or detainees have insisted on defending themselves and it is then the practice for ‘stand-by’ counsel to be appointed by the court to assist such defendants in the presentation of the case, and be on ‘stand-by’ to take over the defence case should this become necessary. Such counsel are able to review classified information in the absence of the defendant once they have secured the necessary security clearance.49

Not surprisingly perhaps, the United Kingdom special advocates who were interviewed expressed a preference for the special advocate system over the ‘own-cleared’ lawyer model. Some took principled objection to what are called ‘confidentiality rings’ which require disclosed information to

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47 Cole and Vladeck, op. cit., n. 21, p. 172.
48 M. Code and K. Roach, ‘The Role of the Independent Lawyer and Security Certificates’ (2000) 52 Criminal Law Q. 85, at 110.
49 A.B. Poulin, ‘The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System’ (2000) 75 New York University Law Rev. 676.
be held back from the client because they impair the lawyer–client relationship. They considered that some excluded parties would be disadvantaged when their own lawyers failed to get security clearance or refused to apply for security clearance. On the other hand, United States lawyers expressed scepticism as to whether a special advocate model could ever be regarded within the United States as free from the taint of government interference. As one lawyer put it:

And it sounds like in the UK, you have within the barrister Bar of people who have become special advocates a defence orientation that . . . hues them as close as they can to acting in the interest of the affected party. Because if that didn’t exist, you could see how it can become basically another arm of government . . . And I suppose from the US [perspective] there would be a little bit of suspicion there culturally that it may operate in that way . . . We’d be very, very worried about the appointment power held by the Attorney General. Why is the prosecutor appointing a special advocate to act in the interests of the defence?50

Another lawyer said:

At the core of attorney ethics in the United States is client-centred representation, right? So like your first obligation is representation to your client and I think the US would be very, very itchy about some sort of special advocate system that you have in the UK because you’re not really acting in that relationship. The traditional view we have of the lawyer is you have to be the agent of someone, and we get round that by sometimes having an amicus but then the representation is to the court and not to the client.51

This reference to an amicus system points to another model of cleared counsel that was in effect the old SIRC model in Canada whereby cleared counsel acting on behalf of the Committee played the role of cross-examining intelligence officers and securing summaries of the case against excluded persons. This was referred to in Charkaoui as a less intrusive alternative than a pure court review since it introduced an adversarial process into what was otherwise an inquisitorial one. It is the model that appears to be used now in the United States within the Foreign Intelligence Surveillance Court (FISC) to assist the court in its consideration of applications to conduct foreign surveillance and collect foreign intelligence.52 It is also the model used in the United Kingdom by the Investigatory Powers Tribunal, which decides complaints of unlawful intrusion by public bodies, to assist it in its closed hearings so that submissions are made from the perspective of the claimant’s interests.53

Although the role that these counsel play is somewhat akin to that of special advocates, there are a number of respects in which the role is different. First of all, as counsel for the court they are in a stronger position

50 United States security-cleared counsel interview 5.
51 United States security-cleared counsel interview 6.
52 USA Freedom Act 2015 (50 USC s. 1803(i)).
53 See Liberty v. GCHQ; Privacy International v. SSFCO [2015] HRLR 2, para. 8.
than special advocates to demand that the government disclose relevant information. Secondly, they are able to communicate with the excluded persons after they have access to closed material before they question the government witnesses or make their submissions. Thirdly, however, although they can be asked by the court to explore all lines of inquiry including the perspective of those who cannot participate in the process, they do not act specifically in the interests of the excluded party and communications between them and the excluded party are not privileged. It would seem that the court-appointed counsel may be better equipped than a special advocate to ferret out information to assist the court or tribunal in its task of seeking the truth. But a heavy price is paid in terms of bearing any resemblance to an adversarial process where the parties retain control over the proceedings. The court appointed amicus is even more remotely connected with the excluded party than the special advocate, although by being able to communicate with the excluded party he or she may be able to get a good sense of what their position is.

SECURITY-CLEARED COUNSEL AND THE ADVERSARIAL TRADITION

We have seen that a number of practices that claim to represent best practice in terms of impacting less on due process without unduly compromising security concerns nevertheless pose challenges to well-established professional-client relationships. A particular practice may be fairer than others but if it undermines well-established norms and traditions, there will be difficulties in getting it accepted. More fundamentally, there is the normative question whether it ought to be adopted. Some traditions can over time be shed if they are seen to be obsolete and resistant to best practice. But if the practice is so at odds with fundamental core values underpinning the tradition, there are questions about whether it ought to be adopted. Cole and Vladeck were themselves mindful of this when they raised the question whether the use of security-cleared counsel, in whatever mode, is ‘inescapably flawed’ because they do not adequately compensate for the use of closed procedures that strike at the heart of core adversarial values of open and natural justice.  

One essential core value that has long been part of the common law tradition and can claim to be fundamental to any fair procedure is the right to know the case against you. In my research, mixed views were expressed as whether the best-practice minimal-disclosure test applied in A v. UK can ever compensate for not knowing the full case against one. Special advocates accepted that the test had made an important impact on the degree of

54 Cole and Vladeck, op. cit., n. 21, p. 174.
55 Al Rawi v. Security Service [2011] UKSC 34, [2012] 1 AC 531, para. 89.
disclosure which the excluded individual got but considered that it was impossible to generalize in any individual case whether the test does enough to enable the excluded person to meet the case against him or her and, of course, there are many cases involving special advocates where, as we have seen, this standard of open disclosure does not need to be met. There was a difference of view between the special advocates, government counsel, and judges interviewed as how effective special advocates can be in meeting the case against excluded individuals. Government counsel and judges considered that special advocates underestimated their effectiveness while special advocates pointed to the real difficulties there are in not being able to take full instructions from excluded individuals.56

However effective they may be in challenging closed evidence, the fact remains that special advocates operate in a closed world without the excluded party in the closed hearing. Adversarial procedure for some is not just a mode of litigation but is linked to fundamental notions such as dignity and the rule of law by giving individuals an opportunity to participate in the proceedings to which they are subject.57 The introduction of professional lawyers arguably reduces the autonomy of parties but when they act on behalf of parties, they do so owing duties to them with the parties, at least in theory, still able to make certain key decisions over the course of the litigation. When cleared lawyers go into closed procedures and are unable to disclose closed information to the excluded party, on the other hand, the excluded party loses control and the cleared lawyer is no longer so accountable to him or her.58

It is important to distinguish here between different types of judicial proceedings. There are other types of proceedings where cleared lawyers may have a more legitimate role to play. A distinction is sometimes made between ordinary civil claims where the judge sits as an ‘arbiter’ between parties (sometimes called a ‘lis inter partes’) and other civil proceedings involving interests that go beyond those of the parties before the court. One example might be in inquests or family proceedings where the interests of the child are paramount. Here, closed procedures may be more legitimate and cleared lawyers may be employed to serve gists or summaries of sensitive material to families. One special advocate expressed the view that he was more comfortable acting as a special advocate in a specialist tribunal such as SIAC where the court is charged with implementing public policy than in an ordinary civil proceeding under the Justice and Security Act where the courts are not there to uphold the public interest but to hold the ring.

56 See, also, M. Chamberlain, ‘Special Advocates and Amici Curiae in National Security Proceedings’ (2018) 68 University of Toronto Law J. 496.
57 See, for example, J. Waldron, ‘How Law Protects Dignity’ (2012) 71 Cambridge Law J. 200.
58 See A. Boon and S. Nash, ‘Special Advocacy: Political Expediency and Legal Roles in Modern Judicial Systems’ (2006) 9 Legal Ethics 100, at 116–17.
between parties and where, as he put it, ‘we managed for God knows how many centuries without closed procedures’.59

Even in more adversarial proceedings one can envisage a role for security-cleared lawyers. The reality of much modern litigation is that it is less of a dispute between two parties and more a process which has to accommodate a number of different interests at stake and which can sometimes require that information is held back from a party. As prosecutors have been required to disclose more information to the defence in criminal proceedings, other interests such as the need to secure the safety of informants and potential witnesses have led them to make PII applications that they should be exempt from having to make full disclosure. When special counsel are appointed to represent the interests of the defence in PII hearings which defendants and their counsel cannot attend, it is hard to argue that they pose a significant threat to the modern adversarial trial, especially since their role is limited to arguing for greater disclosure to the defence rather than taking over the running of the defence for the defendant and her counsel. We have seen that the use of security-cleared counsel is common in terrorist prosecutions in the United States because of the amount of classified information generated by the investigation. It can similarly be argued that in United Kingdom terrorist prosecutions where PII applications are made for a large amount of closed material, it would be beneficial for the defence to have a special counsel appointed.

There is a case then for saying that security-cleared lawyers might actually enhance adversariality in certain cases where at present they are not employed. In addition to PII applications, they could play an adversarial role in ex parte applications made for certain kinds of warrants such as search warrants or surveillance warrants. The question remains, however, whether there is a distinctive role for the special advocate as opposed to one of the other types of security-cleared model. At first sight, the special advocate seems a misfit in any type of proceeding. The security-cleared lawyer who continues to represent her client is a step removed away from the conventional professional relationship with the client as certain information is kept back from the client but she is still ultimately answerable to the client and in acting on behalf of one of the parties to the proceeding can be seen as acting in an ‘adversarial’ capacity. Conversely, when counsel are appointed by the court to put forward arguments on behalf of excluded parties they are still answerable to the court and may be seen as acting more in an ‘inquisitorial’ capacity. Special advocates by contrast are answerable to no one, exist in ‘a no man’s land’, lost in a world of their own.

That said, although other types of security-cleared lawyers may more easily fit into the ‘adversarial’ or ‘inquisitorial’ mould, one should not dismiss the special advocate concept too quickly. The special advocate

59 Special advocate interview 4.
model may offer advantages in certain types of proceedings over other models of cleared lawyer by accommodating certain cultural factors which have to be taken into account in shaping choices as to what procedures to adopt and what type of actors to deploy in legal proceedings. We have seen that such a model might be hard to transplant onto American soil. It would seem that there is a strong agency culture within the legal profession there whereby legal professionals identify strongly with their clients and develop enduring links with them, whether as prosecutors on behalf of the government or as defence lawyers on behalf of criminal defendants. This makes it difficult to conceive of a special advocate appointed by the government who is truly able to act solely in the interests of defendants. Of course, there are situations when parties are unable to appoint a lawyer to act on their behalf because they are unaware of proceedings taking place that may affect their interests, as where warrants are sought in the FISC, for example. But in this situation, it is better to appoint an amicus who is answerable at least to the court to represent such a party’s interest, as can now happen, than to resort to a special advocate who is answerable to no one. Within the United Kingdom by contrast, the cab-rank principle which has endured within the Bar makes it possible for barristers to represent very different clients from case to case. A certain distance from the client becomes inevitable in such a system. It is possible to see how the special advocate system has been able to develop in this climate. The special advocate appointed by the Attorney General but chosen from a list by the excluded party to represent their interests in the case is not so very different from the way in which he or she might be chosen from other lists to represent clients in other cases. The special advocate may be tainted through exposure to closed material and unable to engage with certain other clients, thus fettering the advocate in a manner that seems to infringe the cab-rank principle. But the special advocate is still able to act as an ordinary advocate in other cases. The service provided in each case is advocacy in the party’s interest and once the case is over, the advocate may go on to represent a completely different client in another case.

This points to the need to give careful attention to legal professional culture before ‘transplanting’ the special advocate model into other legal systems. What began as a procedural innovation that was to be used sparingly in the immigration context has spread to a number of different types of legal proceedings in England and Wales and, as we have seen, is steadily gaining traction in other common law jurisdictions, although not yet the United States. The special advocate is a new participant, invented to play a novel professional role alongside established professional and judicial players. This role needs to be understood in terms of the roles that other participants already play and assessed in terms of the added contribution it

60 Boon and Nash, op. cit., n. 58, p. 112.
makes to the administration of justice as a whole. Whether the role continues to exist will depend on how that contribution is judged.

CONCLUSION

This case-study into the closed world of security-cleared counsel permits certain conclusions to be drawn that are relevant to this Special Supplement. We have seen that the ECtHR has played a central role in helping to promote the idea of security-cleared counsel as an acceptable mechanism for accommodating legitimate security concerns about disclosing the nature and sources of intelligence information whilst according the individual a substantial measure of procedural fairness, to use the terms of the ECtHR in Chahal. But if human rights courts play a significant role in determining how certain practices become accepted, the case of security-cleared counsel points to weaknesses in their ability both to identify and prescribe ‘best’ practice. In the human rights context, this has been argued to consist of mechanisms that do more than merely accommodate security and human rights concerns but that accommodate security by measures that are minimally intrusive on human rights. Put simply, such courts do not have the time or resources to identify such practices and in any event their role is arguably limited to identifying minimal rather than optimal standards of practice. Comparative transnational research is much better equipped to identify such best practices but it has been argued that if such practices are going to be truly embedded across different domestic systems, such research needs to go beyond the positivist task of identification and prescription and embark upon the interpretivist task of determining how such practices will fit into existing domestic practice.

This suggests that comparative studies of criminal justice and security policy need to engage with the professional cultures and procedural traditions that underpin domestic and transnational practice. This case-study of security-cleared counsel drew attention to a number of respects in which best practice may jar with procedural tradition. This does not, of course, mean that any solutions that claim to represent best practice need to give way to procedural tradition. Procedural traditions are not static obstacles that always stand in the way of reform but are themselves constantly evolving, fluid, and contestable. Furthermore, we have seen that broad categorizations such as the ‘adversarial tradition’ are capable of different representations in different ‘adversarial’ environments. We have suggested that the United Kingdom with its split profession is likely to be more receptive to the concept of the ‘special advocate’ than the United States where more emphasis is put on the importance of the personal professional-client relationship.

61 S. Field, ‘Fair Trials and Procedural Tradition in Europe’ (2009) 29 Oxford J. of Legal Studies 26.
This prompts a final observation which is that one of the limitations of existing comparative studies of security-cleared counsel is that little consideration has been given to why, for all the human rights endorsement of security-cleared counsel in certain proceedings, they have not yet permeated into countries which are more steeped in the inquisitorial tradition. It might seem obvious that countries which rely more on ‘active’ judicial models will see less need for security-cleared advocates to play a role in highlighting the interests of excluded persons since a security-cleared judge will be deemed perfectly capable of fulfilling this role. But such an explanation is in danger of succumbing too readily to entrenched and static representations of ‘inquisitorialism’ and the inquisitorial tradition. The ECtHR itself has highlighted the need for member states within its jurisdiction to adhere to ‘adversarial procedure’ in the context of guaranteeing a fair trial. However this is interpreted, it clearly envisages some kind of ‘contradictory’ procedure towards which security-cleared counsel, for all the lack of transparency associated with closed procedures, may be said to contribute. On this view, security-cleared counsel representing the interests of excluded persons may in the future see their way into domestic systems traditionally viewed as inquisitorial in orientation. In the meantime, a broader set of comparisons between systems that adopt security-cleared counsel and systems that rely on an active judicial model, which pay particular regard to the differences within such systems, would help foster a better understanding of the advantages and disadvantages of using security-cleared counsel across the adversarial/inquisitorial divide.