



GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF
ARMED FORCES (DCAF)

WORKING PAPER NO. 119

**DEMOCRATIC CONTROL OF SECURITY
AND INTELLIGENCE SERVICES:
A LEGAL FRAMEWORK**

Ian Leigh
Professor of Law, Human Rights Centre,
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DEMOCRATIC CONTROL OF SECURITY AND INTELLIGENCE SERVICES: A LEGAL FRAMEWORK

*Ian Leigh*¹

Introduction

This paper is a contribution to a continuing project of the Geneva Centre for Democratic Control of Armed Forces (DCAF): to provide a map or 'matrix' of legal norms to govern security sector reform. Previous contributions have addressed civil-military relations² and work remains to be done on policing. The focus here is on the implications of this approach for the norms governing security and intelligence agencies.

Clear thinking on these issues is especially necessary in the aftermath of the attacks of September 11 2001. Those events have had several notable consequences for the discussion of the legal framework in this paper. The phenomenon described as 'Superterrorism'³ has led to a range of novel legal and administrative responses.

Firstly, there has been the blurring, both in international and domestic law, of the boundaries between war and peace. Most controversial has been the detention of so-called 'unlawful combatants' at the Guantanamo Naval Base with neither the benefit of Prisoner of War status under the Geneva Convention nor the constitutional rights of criminal defendants in custody, and the threat that they will be brought before military tribunals.⁴

The same tendency to resort to wartime powers can be seen in the UK's legislative response - the Anti-Terrorism Crime and Security Act 2001. This is an extensive new

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² See F. Godet, '*The Pyramid of Norms in the Security Sector*',
http://www.dcaf.ch/news/LegalissueDCAF_Geneva_060402/CF2.FRANCOIS.GODET.pdf

³ see L. Freedman (ed.) *Superterrorism: Policy Responses* (Blackwell, 2002).

⁴ Presidential Order 13 November 2001.

law, passed in December 2001, adding to what was already the most comprehensive anti-terrorism legislation in Europe.⁵ The most draconian feature is a power of indefinite detention without trial for terrorist suspects who cannot be deported. A small number of foreign nationals are now detained in prison with no obligation to bring them to trial. Article 5 of the European Convention on Human Rights has been suspended, scarcely a year after the government brought the Human Rights Act 1998 into effect.⁶ The validity of the derogation will be tested by those in detention both in domestic courts and at Strasbourg. The feeling of many critics that the legislation violated human rights was vindicated when the Special Immigration Appeals Commission declared the derogation to be incompatible with Convention rights, because the differential treatment of foreign nationals and UK citizens (to whom the power does not apply) violated Article 14 of the ECHR.⁷

Other exceptional legal powers, introduced in the US itself and in Canada have been criticised for disregarding constitutional safeguards and traditions. Unprecedented powers to conduct surveillance and to demand information have been introduced under the USA Patriot Act of 2001 HR 3162 and in Canada under the Anti-Terrorism Act 2001.⁸ Quite apart from these powers, the Canadian legislation introduces a new definition of terrorist activity, creates new terrorist offences, brings in measures to compel individuals alleged to have information concerning terrorism to divulge it under judicially supervised investigative procedures, and allows restrictions on the reporting of legal proceedings. These provisions have attracted criticism for

⁵ see H.Fenwick 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to September 11?' [2002] 65 *Modern Law Review* 724; A. Tomkins, 'Legislating Against Terror: the Anti-Terrorism, Crime and Security Act 2001, [2002] *Public Law* 106. The Joint Parliamentary Committee on Human Rights produced two critical reports on the legislation- before and after a series of amendments by the House of Lords: *Second Report of the Joint Committee*, 37 HC 372 (2001-2); *Fifth Report of the Joint Committee*, HL 51, HC 420 (2001-2). The Joint Parliamentary Committee on Human Rights produced two critical reports on the legislation- before and after a series of amendments by the House of Lords.: *Second Report of the Joint Committee*, 37 HC 372 (2001-2); *Fifth Report of the Joint Committee*, HL 51, HC 420 (2001-2).

⁶ A step which is necessary since the Convention permits detention only for limited purposes, including prior to trial and deportation. The derogation was made in November 2001, by a letter to the Secretary General of the Council of Europe. This referred to a grave domestic public emergency arising from the attacks in New York and Washington, the presence in the UK of foreign nationals who were a threat to national security and to pronouncements from the UN Security Council. In addition, it was necessary (under section 14 of the Human Rights Act 1998) to lay subordinate legislation giving notice of the derogation in order to qualify the definition of 'Convention Rights' applicable in UK courts and tribunals. The Human Rights Act (Designated Derogation) Order 2001, SI 2001 No. 3644 was laid before Parliament on 12 November 2001.

⁷ *A and others v SSHD*, Special Immigration Appeals Commission, 30 July 2002; accordingly SIAC issued a Declaration of Incompatibility under the Human Rights Act 1998. An appeal by the government is pending.

⁸ Statutes of Canada 2001, ch. 41.

vagueness, and their impact on constitutional rights of privacy, association, the right to silence and of open justice.⁹

A final notable feature is the creation of new institutions to combat the threat. In the US a single Department of Homeland Security and the Homeland Security Council has been created to co-ordinate responses to Border and Transportation Security, Emergency Preparedness and Response, Chemical, Biological, Radiological and Nuclear Countermeasures and Information Analysis and Infrastructure Protection.¹⁰ This development has been trailed as the biggest reform of Federal government for half a century.

Perhaps the major threat that terrorism poses to democratic states is that of over-reaction - the terrorists' ultimate victory is in the long-term erosion of civil liberties and a loss of openness and transparency which, in turn, undercuts the legitimacy of the state. The constitutional history of the US, Canada and the UK offers several precedents, notably in wartime powers during the second world war, the Gulf war (in the UK's case), the Quebec crisis in Canada and, of course, Northern Ireland. There is every indication from the hasty legislative response that the current 'War on Terrorism' will, in retrospect, prove to be another.

Now, more than ever, there is need to reflect upon the legal and constitutional principles applicable to the security sector. What principles should govern the creation of new agencies or the grant of new legal powers? What systems of control and review are appropriate? How can the commitment of democratic states to the security of their populations be reconciled with respect for human rights and the rule of law?

A Search for Principles

The Working Group on Legal Aspects of DCAF has proposed an ambitious project to map the existing legal provisions governing the security sector. This is a first step towards generating normative standards for the legal framework of the sector, which

⁹ see R.J.Daniels, P. Macklem and K.Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, (University of Toronto Press, 2001).

¹⁰ Homeland Security Act 2002.

may stand as a critical tool to improve existing laws and as a model for transitional states. Recent events make this exercise all the more timely.

At the mapping stage it is proposed to classify provisions from each state according to a pyramid of legal norms: that is those which are *constitutional* in nature, those which are *legislative* (i.e. laws enacted by the Parliament), and those which are *administrative*.¹¹

At the 'normative' stage it is proposed to apply broad criteria derived from notions of democracy, the rule of law and respect for human rights. For this purpose five standards have been identified: legality, transparency, accountability, proportionality and equality.¹² These principles can be applied across the board in six key areas concerning security and intelligence: the legal structure; accountability mechanisms; surveillance powers; controls on human sources; information gathering, retention and use; and independent review.

The purpose of this paper is to sketch the foundations for this 'matrix' approach in relation to security and intelligence agencies. Before we do so, however, some possible objections to this approach should be briefly addressed.

Laws can only go so far. Political and administrative culture, the media and public opinion are ultimately the best safeguards for democratic values. Modern history is littered with states that have disregarded human rights while subscribing to high-sounding constitutional documents and treaties. Nevertheless, a legal framework can help to reinforce these values and give them a symbolic status that will encourage powerful actors to respect them. This is particularly so where new institutions are created- the legal framework can be a means of inculcating a new democratic order and concretising reforms.

The search for universal principles might appear to be fruitless in view of the different political and cultural traditions of even the European states represented at this conference. Quite apart from the differences between established Western states

¹¹ See Godet, op. cit.

¹² I. Leigh, '*National Legal Dimensions of the Democratic Control of the Security Sector: Values and Standards in Developed Democracies*', http://www.dcaf.ch/news/LegalissueDCAF_Geneva_060402/CF1.IAN.LEIGH.pdf

and emerging democracies there is also a wide variety of constitutional models, notably 'Presidential executives' like the USA, 'dual executives' like France, or Westminster-style Parliamentary executives. Some countries give powers of constitutional review to their courts based on the pattern of the US Supreme Court, in others (of which the UK is the exemplar) the courts defer to Parliament. Even within the one type of system wide variations may exist - quite different patterns of oversight for security and intelligence have emerged in the UK, Australia, Canada and New Zealand, for example.¹³

Despite these differences, however, a commitment to the rule of law and to the protection of human rights is widespread. Of the more than 30 countries associated with the Geneva Foundation for DCAF most are signatories to the European Convention on Human Rights and Fundamental Freedoms 1950. Regardless of that, virtually all states recognise the value for their citizens of constitutional rights of fair trial, privacy, freedom of expression and non-discrimination. These are rights which are acknowledged in domestic constitutions, regional human rights treaties and the UN International Covenant on Civil and Political Rights.

Having acknowledged some of the limitations of the matrix approach, it is time to apply it. In the discussion which follows constitutional, legislative and administrative layers of control are each treated in turn and in relation to the respective roles of parliament and the executive. The focus then shifts to the role of the third organ of the state- the judiciary. Finally, an attempt is made to sketch the division between constitutional, legislative and administrative norms for the key areas of legal structure, accountability mechanisms, surveillance powers, controls on human sources, information gathering, retention and use, and independent review.

Constitutional Control of the Security Sector

The constitutional level is important for several reasons. In most legal systems the constitution is a form of higher law (the UK is a notable exception to this principle) and governs the distribution and exercise of power throughout all organs of the state. By creating a range of balanced institutions and public offices power can be

¹³ see L. Lustgarten and I. Leigh, *In From the Cold: National Security and Parliamentary Democracy*, (Oxford, 1994), chs. 15 and 16, which gives a much fuller treatment of the whole issue of accountability.

dispersed so that concentration of civil and military power becomes less likely. Moreover, a constitution provides a framework for stable government by different political parties so that a democratic tradition of peaceful transfer of power through elections can be established. Constitutions attempt to embody the character of a nation, the features that national security protects. They also reflect national aspirations at a critical moment in history, such as a revolution. Modern constitutions invariably provide for fundamental rights, especially against the state, and, often, review by a constitutional court.

In the context of the transitional democracies of Eastern Europe, in view of their recent histories, one would expect careful design in the constitutional documents adopted post-1988, to prevent any re-emergence of military dominance and security abuses. Civil-military relations are a recurring theme of these new European constitutions.¹⁴ It is common, therefore, to find the President, designated as Commander in Chief of the Armed Forces.¹⁵

Equally, in Parliamentary systems attempts are made to give elected Parliaments a measure of control over crucial decisions affecting national defence, such as the budget, declaration of war and peace. For example, Article 92 of the constitution of Slovenia provides:

‘A state of emergency shall be declared whenever a great and general danger threatens the existence of the state. The declaration of war or state of emergency, urgent measures and their repeal shall be decided upon by the National Assembly on the proposal of the Government.

The National Assembly decides on the use of the defence forces.

In the event that the National Assembly is unable to convene, the President of the Republic shall decide on matters from the first and second paragraphs of this article. Such decisions must be submitted for confirmation to the National Assembly immediately upon it next convening.’

¹⁴ See B. Vankovska (ed.), *Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies*, (Belgrade, 2001).

¹⁵ see, for example, Article 42 of the Latvian Constitution; Article 100 of the Croatian Constitution; Article 100 of the Bulgarian Constitution; Article 106 of the Ukrainian Constitution.

Likewise, Article 65 of the Estonian Constitution, vests the power of appointment of a number of key offices in the hands of the Parliament, including that of Commander or Commander-in-Chief of the Defense Forces.

The Constitution of Romania envisages close scrutiny by the Parliament of defence and security matters. The importance attached to this is shown by Article 62 which requires the participation of both Chambers:

‘(1) The Chamber of Deputies and the Senate shall meet in separate and joint sessions. The proceedings in a joint session shall be held in accordance with regulations passed by a majority vote of the Deputies and Senators.

(2) The Chambers shall meet in joint sessions in order:

- d) to declare a state of war;
- e) to suspend or terminate armed hostilities;
- f) to examine reports of the Supreme Council of National Defence and of the Court of Audit;
- g) to appoint, on proposal of the President of Romania, the director of the Romanian Information Service, and to exercise control over the activity of this Service.’

Similarly, Article 117 of the same constitution reserves the structure and organisation of the military as an ‘organic’ matter with the result that the necessary legislation must be passed by a special majority. In Bulgaria Parliament must approve treaties with military or political implications (Constitution of Bulgaria, Article 85).

It is common to find provision for a National Security Council. The president may have power to select the members of the National Security Council, as in Croatia (Article 100 of the Constitution) and the Ukraine (Article 106 of the Constitution). Under the Constitution of Bulgaria, Article 85(3), the Council is to be established by law and presided over by the President. One of fullest constitutional provisions for a National Security Council can be found in the Ukrainian Constitution¹⁶ which not only

¹⁶ Article 107

- The Council of National Security and Defence of Ukraine is the co-ordinating body to the President of Ukraine on issues of national security and defence.
- The Council of National Security and Defence of Ukraine co-ordinates and controls the activity of bodies of executive power in the sphere of national security and defence.

gives the Council legal status and determines its composition (including participation by the Head of the Security Service as well as ministers), but also provides for it co-ordinate and control the activity of bodies of executive power in the sphere of national security and defence.

From this brief survey it is apparent that constitutions generally, and perhaps not unexpectedly, have more to say about defence than security as such. Legislative control is for that reason all the more important.

Legislative control

Legislation is the legal embodiment of the democratic will. In most states approving legislation (along with scrutinising government actions) is among the key roles of the parliament. It is appropriate that therefore in democracies where the rule of law prevails that intelligence and security agencies derive their existence and powers from legislation, rather than exceptional powers such as the prerogative. This gives the agencies legitimacy and enables democratic representatives to address the principles that should govern this important area of state activity and to lay down limits to the work of such agencies. Moreover, in order to claim the benefit of legal exceptions for national security to human rights standards it is necessary that the security sector derive its authority of legislation.

Parliamentary approval of the creation, mandate and powers of security agencies ensures that the rule of law is followed in the fullest sense. A legal foundation gives legitimacy both for the existence of these agencies and the (often exceptional) powers that they possess. In a democracy 'national security' is protected *within* the

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- The President of Ukraine is the Chairman of the Council of National Security and Defence of Ukraine.
 - The President of Ukraine forms the personal composition of the Council of National Security and Defence of Ukraine.
 - The Prime Minister of Ukraine, the Minister of Defence of Ukraine, the Head of the Security Service of Ukraine, the Minister of Internal Affairs of Ukraine and the Minister of Foreign Affairs of Ukraine, are ex officio members of the Council of National Security and Defence of Ukraine.
 - The Chairman of the Verkhovna Rada of Ukraine may take part in the meetings of the Council of National Security and Defence of Ukraine.
 - Decisions of the Council of National Security and Defence of Ukraine are put into effect by decrees of the President of Ukraine.
 - The competence and functions of the Council of National Security and Defence of Ukraine are determined by law

rule of law and not as an exception to it, otherwise we would be unable to distinguish between the political objectives of states and those of terrorists. As in other areas, one key task of the legislature is to delegate authority to the administration but also to structure and confine discretionary powers in law.

Legislation is also necessary where it is intended to qualify or restrict the constitutional rights of individuals in the security interests of the state. At the international level the European Convention on Human Rights also follows this approach by allowing restrictions to the rights of public trial, respect for private life, freedom of religion, freedom of expression and of association '*in accordance with law*', and where '*necessary in a democratic society*' in the interests of national security.¹⁷

There are two distinct implications:

i. Security Agencies should be established by legislation

Thus, in a case from the UK, under the ECHR the lack of a specific statutory basis for MI5 was held to be fatal to the claim that its actions were 'in accordance with the law' for the purpose of complaints of surveillance and file-keeping contrary to Article 8 of the Convention.¹⁸ An administrative charter - the Maxwell-Fyfe Directive of 1952 - was insufficient authority for the surveillance and file-keeping since it did not have the force of law and its contents were not legally binding or enforceable. In addition it was couched in language which failed to indicate 'with the requisite degree of certainty the scope and the manner of the exercise of discretion by the authorities in the carrying out of secret surveillance activities'.¹⁹ As a consequence of the ruling in the case, the UK passed a statutory charter for MI5 (the Security Service Act 1989), and later took a similar step for the Secret Intelligence Service and GCHQ also (see the Intelligence Services Act 1994).

In the same way many states have now taken the step of codifying in law the constitutions of their security forces. Some recent examples include legislation in

¹⁷ Arts. 6, 8, 9, 10, and 11 ECHR.

¹⁸ *Harman and Hewitt v UK* (1992) 14 EHRR 657.

¹⁹ *Ibid.*, para.40.

Slovenia, Lithuania, Estonia and South Africa.²⁰ However, there are considerable variations. Not surprisingly concern about agencies operating in the domestic sphere gives rise to fears of abuse or scandal even in long-established democracies. In transitional states often the domestic security agency has been tainted by a repressive past.

Accordingly, many states have now legislated for these agencies, mostly in the last two decades. There are fewer reasons to place a country's own espionage agency on a legal basis - the UK was unusual in doing so in the case of the Secret Intelligence Service (MI6) in the Intelligence Services Act 1994 (the same Act also covers the signals intelligence agency, GCHQ). Again, only a few states have legislated for military intelligence (see, for example the Netherlands, Intelligence and Security Services Act 2002, Article 7) or intelligence co-ordination (Article 5 of the same Netherlands Act; National Strategic Intelligence Act 1994 of the Republic of South Africa).

ii. Specific powers that they exercise should be grounded in law

Legality requires that security forces act only within their powers in domestic law. Consequently, only lawful action can be justified by way of interference with human rights under the European Convention. For example, when the Greek National Intelligence Service was found to have been conducting surveillance on Jehovah's Witnesses outside its mandate, it was held to have violated Article 8, which guarantees respect for one's private life.²¹

The rule of law requires more than a simple veneer of legality, however. The European Court of Human Rights refers additionally to the 'quality of law' test - this requires the legal regime to be clear, foreseeable and accessible. For example, where a Royal Decree in the Netherlands set out the functions of military intelligence but omitted any reference to its powers of surveillance over civilians, this was

²⁰ Slovenia: Law on Defence, 28 December 1994, Arts. 33-36; The Basics of National Security of Lithuania, 1996; Estonia: Security Authorities Act passed 20 December 2000 ;RSA: Intelligence Services Act, 1994.

²¹ *Tsavachadis v Greece*, Appl. No. 28802/95, (1999) 27 EHRR CD 27.

inadequate, therefore.²² Similarly, in *Rotaru v Rumania*²³ the Strasbourg Court held that the law on security files was insufficiently clear as regards grounds and procedures, since it did not lay down procedures with regard to the age of files, the uses to which they could be put, or establish any mechanism for monitoring them.

The 'quality of law' test puts a particular responsibility on legislatures. One possible response is to write into the law general statements that the powers of agencies can only be used where 'necessary', that alternatives less restrictive of human rights are always to be preferred, and that the principle of proportionality should be observed. This is the approach taken in Estonia (Security Authorities Act, paragraph 3). Perhaps preferable is the alternative, followed in the new legislation from the Netherlands, of giving detailed provisions governing each investigative technique that the agency may utilise: Intelligence and Security Services Act 2002, Articles 17-34.

Other areas of concern remain largely untouched by visible legal regulation. These include: the creation of new secret agencies without legislative approval; the lack of regulation of the private security sector; the position of foreign visiting forces and security (e.g. SIGINT) installations; and the legal basis for international security and policing co-operation. All of these are of significance because of fears that the outsourcing of tasks could be a means of circumventing legal and political controls on security agencies.

Administrative / Executive Controls

In modern states the security sector plays a vital role in serving and supporting government in its domestic, defence and foreign policy by supplying and analysing relevant intelligence and countering specified threats. This is equally true of domestic security (especially counter-terrorism, counter-espionage and countering threats to the democracy nature of the state) and in the realm of international relations,

²² *V and Others v Netherlands*, Commission report of 3 Dec. 1991; and see also in applying the 'authorised by law' test to various forms of surveillance: *Malone v UK* (1984) 7 EHRR 14; *Khan v UK*, May 12, 2000, European Ct HR (2000) 8 BHRC 310; *P. G. and J.H. v UK*, European Court of Human Rights, 25 Sept. 2001, ECtHR Third Section.

²³ No. 28341/95, 4 May 2000. See also *Leander v Sweden* (1987) 9 E.H.R.R. 433, holding that in order to be 'in accordance with law' the interference with privacy must be foreseeable and authorised in terms accessible to the individual. In the context of security vetting this did not require that the applicant should be able to predict the process entirely (or it would be easy to circumvent), but rather that the authorising law should be sufficiently clear to give a general indication of the practice, which it was.

diplomacy and defence. It is essential, however, that the agencies and officials who carry out these roles are under democratic control through elected politicians, rather than accountable only to themselves: it is elected politicians who are the visible custodians of public office in a democracy.

Effective democratic control and policy support depends on a two-way process of access between ministers and officials. Ministers need access to relevant information in the hands of the agency or to assessments based upon it through intelligence assessments and to be able to give a public account where necessary about the actions of the security sector. Conversely, officials need to be able to brief government ministers on matters of extreme sensitivity .

Executive control of the security sector does, however, carry potential disadvantages. Firstly, there is the risk of excessive secrecy, where the government in effect treats information acquired by public servants as its own property; it may, for example, attempt to withhold information about security accountability or procedures which are legitimate matters of public debate, under the guise of 'national security'. Secondly, there is the temptation to use security agencies or their capacities to gather information for the purposes of domestic politics i.e. to gather information on or to discredit domestic political opponents. Safeguards for officials to refuse unreasonable governmental instructions (for example, to supply information on domestic political opponents) are therefore highly desirable.

There is delicate balance between ensuring proper democratic control of the security sector and preventing political manipulation. One method is to give legal safeguards for the agency heads through security of tenure, to set legal limits to what the agencies can be asked to do, and to establish independent mechanisms for raising concerns about abuses. Where staff from security agencies fear improper political manipulation it is vital that they have available procedures with which to raise these concerns outside the organisation. Whistle-blowing or grievance procedures are therefore significant.

If, however, to avoid the dangers of political manipulation, security agencies are given some constitutional 'insulation' from political instructions how can the government be assured that it has all the relevant information and that secret

agencies are acting according to its policies? For this reason a number of countries have devised offices such as Inspectors-General, judicial commissioners or auditors to check on the activities of the security sector and with statutory powers of access to information and staff.²⁴ There is however, a difference in principle between whether such offices are created to report to the government (in which case they are within the ring of secrecy) or to Parliament; in either case, however, careful legal delineation of their jurisdiction, independence and powers are vital.

Scrutiny of the security sector cannot, however, remain the exclusive preserve of the government alone without inviting potential abuse. It is commonplace, aside from their role in setting the legal framework, for Parliaments to take on the task of scrutinising governmental activity.

In a democracy no area of state activity should be a 'no-go' zone for Parliament, including the military and security sectors. Parliamentary involvement gives legitimacy and direct democratic accountability. It can help to ensure that the security organisations are serving the state as a whole and protecting the constitution, rather than narrower political or sectional interests. Proper control ensures a stable, politically bi-partisan approach to security which is good for the state and the agencies themselves. The involvement of Parliamentarians can help ensure that the use of public money in defence and security can be properly authorised and accounted for.

There are dangers, however, in Parliamentary scrutiny. The security sector may be drawn into party political controversy - an immature approach by Parliamentarians may lead to sensationalism in public debate, and to wild accusations and conspiracy theories being aired under parliamentary privilege. As a consequence the press and public may form an inaccurate impression and there may develop a corresponding distrust of parliamentarians by security officials. Genuine attempts at openness or leaks of sensitive material to which legislators have been given privileged access may compromise the effectiveness of military or security operations. Sensitive parliamentary investigations require in effect a parallel secure environment in parliament for witnesses and papers.

²⁴ For comparison of the powers of Inspector's General in different countries see: Intelligence and Security Committee, *Annual Report for 2001-2*, Cm 5542, Appendix 3.

Effective scrutiny of security is painstaking and unglamorous work for politicians, conducted almost entirely behind-the-scenes. The preservation of necessary secrecy may create a barrier between those parliamentarians involved and the remainder: they may be envied or distrusted by colleagues because of privileged access to secret material. It is therefore essential that a cross-section who can command widespread trust and public credibility are involved.

Parliaments are reliant on government for information, although they can seek advice from informed outsiders; they suffer from a lack of resources compared to the powers of governmental/security organs. It is essential that the legislature itself decides which parliamentarians are involved in committee work, what and how to investigate, how to report, and who has appropriate powers of access to officials and ministers to obtain information. Likewise, some say that is highly desirable that a parliamentary committee has an independent investigatory capacity so it can receive independent assurance that the security agencies are telling it the truth even if the members are not given access to all the operational details.

This is one area in which it is especially difficult for national legislatures to exercise scrutiny/review of international/supra-national bodies and co-operative arrangements. Of particular interest, therefore, is Article 85 of the Constitution of Bulgaria which requires parliamentary approval for treaties with military or political implications.

Judicial Control / Review

The previous sections have described the importance of the constitutional, legislative and administrative layers and the place of the parliament and the government in relation to them. However, the third organ of the state - the judiciary - also has a role to play, both as the ultimate guardian of the constitution and the law, and outside of court in various review functions.

There are two main strengths to judicial scrutiny. Judges are perceived to be independent of the government and, therefore, have the appearance of giving an external view which lends credibility to the system of oversight in the eyes of the public. A traditional role of the courts is the protection of the rights of the individual

and judges are well suited to oversight tasks where the interests of individuals are involved, for example, surveillance.

However, there are number of problems. Some are in-built tensions in judicial review of any governmental function, others are specific to the field of security.

Judicial involvement inevitably means that sensitive data has to be shared outside of the controlled environment of the security sector itself. Even if public proceedings in open court are avoided the judge, court staff, and lawyers may be required to handle the information. The seniority and reputation of the judges involved may be sufficient guarantee that they can be trusted with secret information (although in some countries judges are vetted; in other this would be constitutionally unacceptable).

Too intrusive control by the judges carries them into the executive sphere i.e. it blurs the separation of powers between the two branches of the state. The use of judges to conduct inquiries with a security dimension in particular runs the risk of the politicisation of judiciary. This suggests that judicial involvement may only be suitable for some functions, and not, perhaps, where policy is a substantial element.

Legal control by the courts proper only operates within the limited sphere where a person's rights are affected. Since much security work is below this horizon of visibility (e.g. gathering information on individuals from public sources/ surveillance in public places), the courts are ineffective as sources of control in these areas. Moreover, by their nature the operations of the security sector are often not apparent to the individuals most affected (for example, the targets of surveillance). Unless legal procedures, such as prosecution or deportation, are invoked these people will therefore be unlikely to challenge the legality of the activities and they will remain immune from review. However, most security work is not directed towards legal procedures and it is therefore likely to remain unchecked by these processes. In other countries legal barriers effectively prevent review; for example, in the UK evidence obtained from telephone tapping is generally not admissible in court under the Regulation of Investigatory Powers Act 2000, consequently the propriety of warrants for phone tapping cannot be challenged by that route.

Several states employ specially adapted judicial procedures in a security context: in Canada designated Federal Court judges hear surveillance application from the Canadian Security Intelligence Service and deal immigration and freedom of information cases with a security dimension. In the US the Foreign Intelligence Surveillance Act has cast judges in the guise of approving intelligence-related surveillance for nearly two decades. In the UK designated judicial Commissioners deal with some forms of authorisation of surveillance under the Regulation of Investigatory Powers Act 2000 while others are responsible for reviewing the system and the grant of ministerial warrants and authorisations to the security and intelligence services.

Even where judges are used for tasks affecting the rights of individuals there is a danger that they will in effect lose the qualities of independence and external insight through a process of acclimatisation. For example, as judges hearing warrant applications based on security information become familiar with the types of techniques, information and assessments used they may become, in effect, 'case hardened'. This suggests a pattern of declining effectiveness in protecting individual's rights in practice. Evidence from countries which require prior judicial approval of surveillance warrants such as Canada and the USA does not suggest high rates of refusal. There may be little difference in the end result to approval within the agency itself or by a government minister.

Some of these processes have produced innovations designed to balance 'open justice' with the state's security interests. One idea, adapted from Canadian procedure²⁵, is the use of special, security-cleared counsel, in deportation and employment cases. This gives protection for state secrets without totally excluding any opportunity of challenge to the evidence on the applicant's behalf.²⁶ It allows a vetted lawyer to test the strength of the government's case even where the complainant and his lawyer are excluded from parts of the legal process on security grounds. Such procedures have been commended by the European Court of Human

²⁵I. Leigh, 'Secret Proceedings in Canada' (1996) 34 *Osgoode Hall Law Journal* 113 -173.

²⁶ See (in the UK) Special Immigration Appeals Commission Act 1997 introduced in deportation cases following the ruling in *Chahal v UK* (1997) 23 E.H.R.R. 413 that the processes for review in national security cases were inadequate.

Likewise, see Employment Rights Act 1999, sched. 8 and Employment Relations Act 1999, sched. 8; Northern Ireland Act 1998, ss. 91 and 92 and sched. 11, introducing a similar procedure in claims of religious discrimination in Northern Ireland where the security exception is invoked (following *Tinnelly and McElduff v UK*, (1999) 27 EHRR 249; and see *Devlin v UK*, *The Times*, October 30, 2001).

Rights as a means of satisfying Article 6 (the right to a fair and public trial), even in security cases.

There are, however, limits to the extent to which exceptional procedures can be introduced without undermining the rule of law. The Strasbourg Court has insisted that judges trying criminal trials involving security questions must be regular civilian judges and not military officers.²⁷ Similarly, in criminal cases the defendant must be allowed to be present, notwithstanding security concerns,²⁸ and the reasons for a conviction cannot be censored on security grounds in an espionage case.²⁹

Having examined the respective competences of all three organs of the state, finally we turn to a possible division of norms between the constitutional, legislative and administrative layers for security and intelligence. This is applied to the six key areas identified earlier:

- the legal structure;
- accountability mechanisms;
- surveillance powers;
- controls on human sources;
- information gathering, retention and use;
- independent review.

A Possible Matrix of Norms for Security and Intelligence

Constitutional

- *Legal Structure*: legislative mechanisms; principles governing non-legislative sources of power (e.g. royal prerogative); emergency legislation procedure; constitutional provisions for derogations from human rights; processes governing entering international agreements for security co-operation.

²⁷ *Incal v Turkey*, 9 June 1998.

²⁸ *Zana v Turkey* (1999) 27 EHRR 667 (violation of Arts. 61 and 3 where the defendant was prevented from attending his trial on terrorist charges).

²⁹ *Hadjianastassiou v Greece*, 16 December 1992.

- *Accountability mechanisms*: allocation of authority for national defence, security and intelligence between branches of the state; prohibition on defence or security officials holding parliamentary or ministerial office; powers of the legislature; constitutional powers of the courts (e.g. constitutional review).
- *Surveillance powers*: constitutional rights of privacy; freedom of expression; religion; association; non-discrimination; fair trial; status of international human rights safeguards.
- *Controls on human sources*: constitutional rights of privacy; freedom of expression; religion; association; non-discrimination; fair trial; status of international human rights safeguards.
- *Information gathering, retention and use*: constitutional rights of privacy; freedom of expression; religion; association; non-discrimination; fair trial; status of international human rights safeguards.
- *Independent review*: security of tenure for officials: constitutional guarantees for independence of the judiciary.

Legislative

- *Legal Structure*: legislation creating and empowering agencies of the security and armed forces; specifying their distinct mandates; governing the power of appointment and removal of chiefs of agencies; legal powers necessary to prevent political manipulation and political ignorance; clear and structured investigative powers proportionate to the threats within the mandate.
- *Accountability mechanisms*: legislating establishing independent review bodies (e.g. Boards, Commissioners, tribunals); appointment of members; powers to obtain information.

- *Surveillance powers*: legislation specifying when surveillance may be conducted, who may authorise it and for how long, the legal uses that may be made of material obtained surveillance, remedies for improper surveillance.
- *Controls on human sources*: legislation specifying when informants may be used, who may authorise this and for how long, the legal uses that may be made of material obtained from informants, remedies for improper use of informants.
- *Information gathering, retention and use*: the purposes for which information may be gathered, stored, processes and disclosed to other agencies; the scope of any exceptions from relevant legislation governing freedom of information or subject access to private files; time limits for holding information; powers of any information Commissioner or ombudsman; remedies for individuals complaining about refusal to disclose information or personal data or abuse of it.
- *Independent review*: appointment processes; powers; remedies which may be granted or directions made.

Administrative

- *Legal Structure*: employment provisions for officials (disciplinary, grievance and whistle-blower provisions) for raising concerns about illegal or improper agency action; vetting processes for agency staff.
- *Accountability mechanisms*: agreements for publication of evidence obtained in reviews.
- *Surveillance powers*: conditions for the retention and destruction of 'product' within legal limits.
- *Controls on human sources*: systems for periodic review and evaluating the quality of human sources; interview and payment processes; policies on

prosecution of informants; judicial orders in trials to protect witnesses; witness protection and relocation schemes.

- *Information gathering, retention and use:* guidelines and procedures for operation of classification and weeding processes; access of officials to databases; systems for evaluating the quality of data.
- *Independent review:* determining the scope of individual reviews; procedural arrangements for the conduct of inquiries; arrangements for publication of reports.

Conclusion

Whereas it is easy to accept that the security forces should be accountable, the specifics are more controversial: to whom? (the government, the legislature or some independent body or person?); for what? (for expenditure, policy, and operations?); and when? (before carrying out operations or after?).

It is tempting, but overly simplistic, to attempt to distinguish between issues of:

Policy e.g. What constitutes a security threat; which actions should be criminal; which powers should be available; which agencies should be established and on what terms?

Operations e.g. Should this group/country be targeted and with what priority; should this form of surveillance be conducted on X?

Review e.g. Was the operational action in accordance with policy, proportionate, legal, economical, and effective?

On this schema the legal definitions within the *policy* realm would be the task of Parliament and embodied in legislation. *Operational* matters would be primarily for the executive and controls would reside at the administrative level. *Review*, however, is more problematic as parliament, the executive and the judiciary all have legitimate interests in aspects of it.

Moreover, the line between policy and operations is unclear. The development of policy must be informed by intelligence/operations which it may be necessary to keep secret. However, where governments perceive it to be necessary ways can be found around this - witness the recent release of intelligence assessments in the United Kingdom in order to win over public support for potential military action against Iraq.³⁰ Another borderline issue concerns the development of surveillance methods or technologies: these may raise controversial policy issues which are difficult to discuss publicly without rendering them ineffective by effectively giving notice to potential targets.

There are difficulties too in fully differentiating *operations* and *review*. The continuing nature of some intelligence operations makes it difficult to draw a line between authorisation and review; or to engage in review without compromising secrecy. The continuing, long term, nature of some intelligence operations makes it difficult to draw a line between authorisation and review or to engage in review without compromising secrecy.

The method outlined here of distinguishing between constitutional, legislative and administrative controls is a useful analytical tool but cannot completely solve all disagreements. What it can do is to identify some of the tasks best performed at a particular level or by a particular institution (parliament, the executive, or the judiciary). That, at least, is progress.

³⁰ <http://www.pm.gov.uk/output/Page6117.asp>.



Established in 2000 on the initiative of the Swiss government, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), encourages and supports States and non-State governed institutions in their efforts to strengthen democratic and civilian control of armed and security forces, and promotes international cooperation within this field, initially targeting the Euro-Atlantic regions.

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