

## Part 2

### **Democratic oversight of the security services**

*Report of the European Commission for Democracy through Law<sup>12</sup>*

#### **Executive summary**

##### **The need to control security services**

1. The maintenance of the internal and external security of the state is vital and essential for the protection of the other values and interests of the state. In order to anticipate, prevent or protect itself against threats to its national security, a state needs effective intelligence and security services: intelligence is thus an inescapable necessity for modern governments.
2. Security agencies are expected to collect as much information as possible on threats to the state; this involves collecting information on individuals. Security services therefore, by their very nature, impinge on individual rights. It is therefore essential that there be internal limits as well as external limits to their activities.
3. In addition, the terrorist threats of the post-9/11 era have brought about new security challenges. Intelligence is one of the main weapons the state has in the struggle against terrorism and the spread of weapons of mass destruction. A transnational and network-based response from states is necessary, and inter-agency co-operation must be enhanced. A tighter democratic control, and a different kind of control, is nowadays necessary.

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12. Adopted by the Venice Commission at its 71st plenary session (Venice, 1-2 June 2007), on the basis of comments by MM. Iain Cameron (substitute member, Sweden), Olivier Dutheillet de Lamothe (substitute member, France), Jan Helgesen (member, Norway), Ian Leigh (expert, United Kingdom), Franz Matscher (expert, Austria), Valery Zorkin (member, Russian Federation).

4. Security services naturally receive instructions from the government. They need to be adequately controlled by the executive in order to avoid developing a “state within the state” mentality. They are, and need to be, equipped with considerable technological tools and enjoy exceptional powers. They have a natural tendency to over-collect information, and individuals must be protected against abusive or illegitimate use of the information collected about them.

5. Security services, by their very nature, have the potential to abuse state power. The subjectivity and flexibility of the notion of “national security”, combined with its vital importance to the state, mean that governments have a wide margin of manoeuvre in this area. They could be tempted to use the security services to pursue illegitimate aims. It is thus necessary to establish mechanisms to prevent political abuse, while providing for effective governance of the agencies.

### **Accountability**

6. Security services must be “accountable”. A working definition of accountability is “being liable to be required to give an account or explanation of actions and, where appropriate, to suffer the consequences, take the blame or undertake to put matters right, if it should appear that errors have been made”.

7. In simplified form, four different forms of state accountability can be identified:

- parliamentary accountability;
- judicial accountability;
- expert accountability;
- complaints mechanisms.

The latter two forms are supplements or replacements for the first two forms of accountability.

8. Making secret services accountable presents special problems. A large degree of secrecy must accompany national security policy and operations, which increases government control at the expense of the legislative power, and insulates governments from criticism.

9. Control even by government is made difficult by the very nature of the work of the secret services: the government is dependent on the special knowledge of experts.

10. Control by the courts then becomes even more important, but the ordinary courts, if their formal competence to review decisions in this field is not blocked by procedural devices (immunity, secrecy of documentation, etc.), are often faced

with great practical difficulties reviewing the large discretion which governments have in this area.

11. Monitoring the assessment of intelligence is a difficult exercise in itself, given that what needs to be checked is not only hard data (purely factual information) but also, and more importantly, subjective assessments as to whether facts or people constitute a present or future threat to national security.

12. A variety of patterns for organising the internal security function exists. A single agency can be given this function or it can be split between different agencies and/or the police. The organisational context determines the actual power or influence of the agency.

13. As concerns the form of the mandate, it is preferable that the primary rules are in statute form. It is essential that the norms concerning the internal security services are as clear and concise as possible and kept secret only if absolutely necessary.

14. The content of the mandate can vary considerably from state to state, depending on security priorities, determined by socio-political factors, and the character, more or less "proactive", of the tasks allocated to the security services.

15. Internal control of security services is exercised by the security agency itself and by the administrative control exercised by hierarchically superior permanent civil servants in the government department to which the agency is subordinated. Internal control is the primary guarantee against abuses of power, when staff working in the agencies are committed to the democratic values of the state and respect for human rights. Different mechanisms exist for strengthening internal control, for example: the quality of the staff (which can be improved by recruitment and training, etc.); the existence of an independent official (an inspector general) designated to oversee the agency on behalf of the government; clear internal rules on delegation of, and responsibility for, decision making, expenditure and financial auditing.

16. A precondition of effective parliamentary oversight is adequate governmental control. However, strengthening governmental control over an agency carries with it the risk of political manipulation and abuse. Certain mechanisms may lower this risk: security of tenure of the agency head; legal limits to what agencies can do; independent mechanisms for raising concerns about abuses; proper documentation of political directives ('paper trails'); etc.

17. International co-operation between intelligence agencies is increasingly necessary to fight terrorism, but often involves even more secrecy, hence raising issues of accountability. International exchanges of intelligence can escape the existing national mechanisms of control.

## Parliamentary accountability

18. The ultimate legitimacy and authority of security agencies should be derived from legislative approval of their powers; parliamentary accountability is designed to avoid political abuse and ensure appropriate use of public money. Parliamentary oversight also carries with it dangers: lack of expertise and professionalism on the part of parliamentarians; leaks of sensitive material to the press or the public. The possibility of the security agency withholding or concealing information from an “amateur” investigator means that parliamentary questions or ad hoc parliamentary commissions of inquiry are usually only of limited efficacy in this field.

19. In presidential regimes, where the president has control over internal security matters, an antagonistic relationship with the parliament may arise.

20. The remit of a parliamentary oversight body may vary (in policy, operations, questions of legality, effectiveness, respect for human rights). When it extends to operations, however, the oversight body must refrain from disclosing certain operational detail to the full parliament and to the public. Access to operational details will often be *ex post*, but it is difficult to establish when the operation has ceased, and the ongoing nature of intelligence operation may be used as an excuse if mutual trust is lacking between the agency and the oversight body. When its remit extends beyond mere policy, the oversight body should have at least a residual investigative capability of its own (meaning that it should have some staff) and should also have access to information and documents from experts.

21. As concerns the staff of the oversight body, these need to possess adequate expertise. This means that these will normally have previously served in intelligence-related functions.

22. Additionally or alternatively, the oversight body might be assisted by an Inspector General to investigate a particular issue and report back to it.

23. An oversight body which reports to parliament should be able to decide when and how often to report. It should also be able to decide the content of the report, but should be sensitive to the need for secrecy. Different procedures can be designed to reconcile openness with the need for security.

24. As far as membership is concerned, the leading principle should be autonomy: parliament should be free to make appointments. There should be cross-party representation. There must be a clear demarcation between the oversight body and the agencies overseen. It is important that members should sit on the body long enough to acquire the necessary expertise (intelligence has a long learning curve). Vetting of members may be desirable in order to have an enhanced access to confidential information, although parliament might not allow the vetting of its members. A tailor-made parliamentary committee would therefore be preferable.

25. International co-operation raises specific problems. Engaging in an international network of security agencies is certainly an adequate response to the recent terrorism threats. However, it is necessary to create a legal framework in which co-operation with foreign agencies is only permissible according to principles established by law (including human rights safeguards) authorised according to strict routines (with proper paper trails) and controlled or supervised by applicable parliamentary or expert bodies.

26. Other roles for parliament in securing better accountability of secret services can exist, for example involvement in the appointment of the Head of the agencies and auditing the services.

### **Judicial review and authorisation**

27. There are different forms of judicial control of the security services.

28. First, prior authorisation in a pre-trial phase or post ad hoc review of special investigative measures. Secondly, control in court cases concerning security issues (particularly in criminal cases on security-related offences). Thirdly, investigating magistrates, often specialists in security issues, may be given a general supervisory control over ongoing security investigations. Judges may also be given a role in chairing ad hoc commissions of inquiry; serving or retired judges may sit on expert bodies, but this should be regarded as a form of expert rather than judicial control.

29. Judicial authorisation protects individual cases. Much security work is not directed towards pre-trial legal procedures (for example data-mining). This kind of security work thus tends to escape judicial control.

30. In order for judicial control to be effective, the judges must be independent and possess the necessary expertise. Considerable experience and specialist training is advisable as otherwise they may not be able in practice to question the experts' threat assessments. However, "case-hardening" (a tendency of specialised judges to identify with security officials) must be avoided, so judges should not serve for long periods in this role.

31. Special security-cleared advocates may in some cases serve the need to balance open justice (a fair trial) with security interests.

### **Expert bodies' accountability**

32. These can replace or supplement a parliamentary body or judicial accountability. Expert bodies can allow for greater expertise and time to be devoted to oversight, and do not present the same risks of political division as a parliamentary body. However, they do not have the same legitimacy as a parliamentary body. Different methods exist for strengthening their legitimacy.

33. Their mandate can be agency-specific or field-specific (for example only over databanks or surveillance). However, nowadays the integrated approach to security issues means that such specific forms of oversight miss other important parts of the security spectrum. Like parliamentary bodies the focus can be on different things. They can supervise certain aspects of the security work (legality, efficacy, efficiency, budgeting, conformity with human rights, policy), or certain activities (for example security data banks). Such bodies can also be given certain control functions, for example approving surveillance.

34. Their members should be legally trained if the mandate is a review of legality, or a more varied background if the mandate is broader. Expert bodies need the trust of parliament and the public. Parliament involvement is thus necessary in establishing the expert body, in choosing its membership and in receiving its reports. An alternative to a purely expert body which combines expertise with legitimacy is to have part of the membership consist of serving or retired politicians (a "hybrid body"). Expert bodies should be able to present special reports as well as an annual report. As regards the content of the report, different methods exist for reconciling government concerns for secrecy with the need for the expert body to provide plausible reassurance to parliament and the public. However, the government should not normally have control over whether and when a report is published.

### **Complaints mechanisms**

35. It is clearly necessary for individuals who claim to have been adversely affected by security services to have avenues of redress before an independent body. This strengthens accountability and leads to improved performance through highlighting administrative failings.

36. The capacity of ordinary courts to serve as an adequate remedy in security fields is limited. Alternative, specialist tribunal or ombudsman-like systems exist in some states. In some cases, parliamentary bodies also deal with individual complaints. The ECHR requires control and remedies functions to be performed by different bodies.

## **I. Introduction**

37. In its Recommendation 1713(2005) "on democratic oversight of the security sector in member States", the Parliamentary Assembly recommended "that the Committee of Ministers prepare and adopt guidelines for governments setting out the political rules, standards and practical approaches required to apply the principle of democratic supervision of the security sector in member States ...". It further identified certain principles in some areas including the Intelligence Services.

38. On 7 July 2005, the Committee of Ministers of the Council of Europe decided to request an opinion of the Venice Commission on PACE Recommendation 1713 (2005), which was subsequently adopted by the Commission on 21-22 October 2005.

39. In its opinion (CDL-AD(2005)033), the Commission recalled that, in 1998, it had examined, at the request of the Committee on Legal Affairs of the Parliamentary Assembly, the question of constitutional relations between internal security services and other state organs, and had reached certain conclusions in respect of the need for ensuring close control of the security services by the executive, parliament and the judiciary (CDL-INF(1998)006). The Commission also noted that, since 9/11, the need to increase the efficacy of ISS had become apparent, while the parallel strengthening of democratic intelligence oversight had to be seen as necessary and a priority. The Commission accordingly recommended a comparative study of legislation and practice in respect of democratic oversight of national security in the Council of Europe member states .

40. On 21 June 2006, the Committee of Ministers invited the Venice Commission to carry out the aforementioned comparative study, giving special emphasis to the role of parliaments and their specialised committees, as well as national courts in overseeing internal security services.

41. A working group was subsequently set up within the Venice Commission, composed of Iain Cameron, Olivier Dutheillet de Lamothe, Ian Leigh, Jan Helgesen, Franz Matscher and Valery Zorkin. The working group met in Venice on 12 October 2006 and in Paris on 1 December 2006 and 26 March 2007.

42. The present report, which was prepared from contributions of members of the working group, was discussed within the sub-Commission on Democratic Institutions on 31 May 2007 and was subsequently adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).

## **II. Previous Council of Europe work in this area**

### **A. The Venice Commission study<sup>13</sup>**

43. In 1998, the Venice Commission was requested by the Committee on Legal Affairs of the Parliamentary Assembly to examine the question of constitutional relations between internal security services and other organs of the state.

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13. See Venice Commission, Internal Security Services in Europe, Report adopted at the 34th Plenary meeting (Venice, 7 March 1998), CDL-INF(1998)006.