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# COMMENTARY



Oversight of the surveillance – best practices from the UK

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**T**he wiretapping scandal in Macedonia revealed many deficiencies in the functioning of the security services, but also the absence of proper oversight and controlling mechanisms of the surveillance. In October 2016, the Prime Minister Emil Dimitriev announced a project on consolidation of the security services which, among other things, aims to make them more efficient, transparent and accountable. Undertaking reforms as a response to a particular event is not uncommon practice worldwide. The driving force behind reforming the agencies towards greater transparency and accountability including democratic oversight in many established democracies, including the UK, have often been scandals and alleged illegal activities. Therefore, it is worth looking into these experiences in order to identify the lessons learnt that could be applied within our context.

## 1. REFORMING THE SERVICES AS AN ONGOING PROCESS

In the UK, even introducing the legislation on the security service (and admitting its existence in the first place) was done at the beginning of the 1990s as not doing so would have meant breaching the regulations of the European Convention on Human Rights.<sup>1</sup> Nevertheless, the biggest scandal in recent time is definitely the Edward Snowden's revelations on surveillance

1 Born, H. and Johnson, L.K. "Balancing Operational Efficiency and Democratic Legitimacy," in *Who's Watching the Spies: Establishing Intelligence Service Accountability* (Washington, D.C.: Potomac Books, Inc., 2005). 225-240

practices of the American National Security Agency and the British Government Communications Headquarters. The Intelligence and Security Committee conducted an investigation where it found the alleged interception of communications under the PRISM Program as unfounded, however, it did access the legal framework at that time as unsatisfactory.<sup>2</sup> This was followed by an in-depth inquiry into the intelligence and security agencies' intrusive capabilities published in March 2015 where the MPs recommended a completely new legal framework with strengthened privacy protections and enhanced transparency.<sup>3</sup>

It wasn't only the parliamentary committee reviewing the work of the services. David Anderson, the Independent Reviewer of Terrorism Legislation was tasked and delivered a comprehensive, critical and publicly available report on the intrusive powers with recommendations directed towards reforming all stakeholders (including the services and the oversight and controlling system which is in place).<sup>4</sup>

2 Intelligence and Security Committee of Parliament Statement on GCHQ's Alleged Interception of Communications under the US PRISM Programme (July 2013).

3 Intelligence and Security Committee of Parliament Privacy and Security: A Modern and Transparent Legal Framework, March 2015.

4 David Anderson, A Question of Trust. Report

Anderson's report is also important as it shows how the countries need to evaluate their surveillance system constantly so they keep up with the new technological developments but also introducing new safeguards as the measures are becoming more and more intrusive, even when it seems that the public is not much worried about it.

It is important for Macedonian stakeholders not to lose the momentum and to see the ongoing scandals as 'a window of opportunity' for systematic changes and introduce safeguards that will limit the prospects of further misuse of the security services. It is of paramount importance for this reform to rely on comprehensive analysis of the current systematic deficiencies that led to the wiretapping scandal. Moreover, emphasis should be put on building the oversight and controlling mechanisms.

## 2. CAPACITY OF THE PARLIAMENTARY OVERSIGHT COMMITTEES

One of the prerequisites for conducting effective oversight is the knowledge how to do it. Understanding surveillance techniques requires technical knowledge, but also legal proficiency and familiarity in human rights (such as privacy), counter-terrorism strategies

of the Investigatory Powers Review (Independent Reviewer of Terrorism Legislation, June 2015).

and the work of the services in general. MPs are not expected to become experts during their mandate, but they need to be given access to expertise and enough financial means.

Even in countries with long democratic traditions such as the UK, the Intelligence and Security Committee since its inception in the beginning of the 1990s faced many challenges such as confusion about its role and powers, denial of access to materials from the agencies or no follow up on its recommendations.<sup>5</sup> Moreover, it took it until 2013 to establish itself as a select parliamentary committee rather than a body of the executive responding to the Prime Minister when it also got its powers extended to oversee the operational activities of the services and not just the policies, administration and finances.<sup>6</sup> The Committee is supported in its work by its own independent Secretariat and an Investigator and its members seem satisfied with their access to legal, technical and financial expertise where necessary.<sup>7</sup> In line with the increased oversight powers in the recent years, its budget was also planned to be doubled in 2015 and additional staff to be employed.<sup>8</sup>

The British parliamentary com-

5 Phythian, M. "The British Experience with Intelligence Accountability," *Intelligence and National Security* 22, no. 1 (February 1, 2007): 75-99.

6 Justice and Security Act 2013 c.18

7 Intelligence and Security Committee of Parliament Privacy and Security: A Modern and Transparent Legal Framework, March 2015

8 Intelligence and Security Committee of Parliament, Annual Report 2013 - 2014, 2014, 7.

mittee conducts investigations into individual cases and the individual practices highlight the systematic deficiencies. Also, the oversight bodies occasionally look into concrete areas such as involvement of women in the intelligence community.<sup>9</sup> On this point, the British committee should be praised for being very transparent and having publicly available reports. Its annual reports are also very comprehensive and as such play an important educational role for the public.

### 3. SYSTEM OF ACCOUNTABILITY

Democratic (parliamentary) oversight is just one aspect in ensuring accountability about the surveillance. The security and intelligence services should be subject to several layers of oversight – judicial, ministerial, independent and sound internal controlling mechanisms.

The UK has established a very complex system of oversight and control. An important part of the system are the six commissioners specialising in surveillance cameras, interception of communications, retention and use of biometric data etc. This is a judge-based system where commissioners are retired judges (appointed by the Prime Minister) which are a good choice because they have the legal experience and expertise about the services' work when performing investigations while being distanced and independent from the services themselves. In the same

time, they are surrounded by staff who brings the necessary technical knowledge and support. However, the complexity of the system sometimes means overlapping and confusion in the work of the separate bodies. Therefore, it has been recommended that a new Surveillance and Intelligence Commissioner should replace the work of three of the existing commissioners, while the parliamentary committee should take over the functions of the Intelligence and Security Commissioner.<sup>10</sup>

Another important British body is the Investigatory Powers Tribunal which investigates complaints of unlawful use of covert techniques used by the public authorities. Established in 2000, this special court struggled to establish itself as an important safeguard and to gain the public confidence.<sup>11</sup> It started showing results only after persistent pressure from several NGOs which started in 2013.<sup>12</sup> This is an important note since it shows the role that civil society could and should play to foster climate of accountability. Civil society organisations are considered important stakeholders in the UK – for example, the leading think tank RUSI

played an important part in reviewing the intelligence and security establishment after the Snowden revelations.<sup>13</sup> Therefore, we should also recognise the importance of the NGOs and the benefit they can bring in reforming the services.

There is no recipe for establishing an effective parliamentary oversight of the surveillance as part of the work of the security and intelligence services. However, what we can learn from the established democracies such as the UK is, first of all, to use the ongoing scandal to truly reform the security bodies into professional and accountable services that will gain the trust of the citizens. Also, we should ensure that our oversight bodies have the necessary means including sufficient powers and access to expertise and support to do their work as prerequisites for effective oversight. Moreover, we should all work on encouraging a climate of accountability and transparency where the agencies' work is being overseen by different bodies including independent oversight.

<sup>10</sup> Andreson, D. A Question of Trust. Report of the Investigatory Powers Review. Recommendations 82-112, pp 280-282

<sup>11</sup> Ibid. Pp 121 - 122

<sup>12</sup> Ibid.

<sup>13</sup> Royal United Services Institute for Defence and Security Studies A Democratic License to Operate: Report of the Independent Surveillance Review Whitehall Report 2-15, July 2015



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<sup>9</sup> List of all special reports available at: <http://isc.independent.gov.uk/committee-reports/special-reports>