

RETHINKING LEGAL FRAMEWORKS FOR INTELLIGENCE AGENCIES: RECONCILING THE STRUCTURE AND PROCESS OF INTELLIGENCE WITHIN THE LAW

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Abstract

Intelligence has evolved organically in response to a rapidly changing security environment and currently involves a range of actors who partake in the intelligence process. This evolution for the most part has not been accompanied by appropriate legislative reform, which has created a serious gap between the law and the activities of the intelligence sector. There is currently no single national framework governing intelligence activities. This is due to the fact that there are a number of state and non-state actors carrying out intelligence work, including general intelligence, the police, the military, financial institutions, the private sector and civilians. These actors are all subject to different regulations, leading to a potential breakdown in the intelligence process. This blurring of boundaries has also raised serious concerns over public policy and civil liberties. In order to address this issue, both the structure and function of Intelligence should be taken in to account when proposing law reform, which ensures that all actors are sufficiently covered by a common set of rules and regulations, which will not only ensure that all actors engaged in the process are sufficiently regulated, but will also ensure that the intelligence process is working effectively.

Keywords: *Intelligence Actors, Intelligence Process, Intelligence Structure, National Legal Frameworks, Human Rights, Effectiveness*

Introduction

In recent years the global security environment has experienced significant change. In an effort to combat and contain security threats, national security policies across the globe continue to evolve and become tougher. As part of this evolution, Intelligence activities are now carried out by a range of actors, including non-state actors, such as private companies and individuals. In addition, the lines between state actors have become

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blurred, with a trend towards increasing integration between the police and Intelligence services.

As a result of the vast number of actors involved in intelligence, national legal frameworks have become increasingly complex, with different rules and regulations governing different actors involved in the intelligence process. In some circumstances, no appropriate legal frameworks exist at all. This not only complicates attempts to initiate legislative reform, but also potentially creates fragmentation within the process itself, as well as creating a disconnect between Intelligence as an organisational structure and the process of Intelligence. In the absence of appropriate legal reform in this area which clarifies the roles and functions of different actors involved in the Intelligence process, it is likely that the law will continue to undermine rather than promote organisational effectiveness, as well as the protection of human rights.

1. The Use of State and Non-State Actors in the Intelligence Process

There are a number of different legislative frameworks governing the activities of actors involved in the intelligence process.¹ This is due to a range of different state and non-state actors currently engaged in intelligence work, including general intelligence, the military, law enforcement, private entities and private persons.² In the UK, the use of actors, including healthcare professionals and school teachers, has been heavily criticized. The UK, as part of the 'prevent' strand of its counter-terrorism strategy (CONTEST), has 'laid down a vast infrastructure' of surveillance through institutions and communities, including schools, the National Health Service (NHS) and nurseries, in order to map the Muslim population in an effort to prevent radicalisation.³ According to Elshimi, Intelligence should be left to the professionals and not delegated to teachers and health care workers. He points out that this is not only bad practice, but also counterproductive because of the risks of producing poor intelligence.⁴ The use of private sector contractors has also been a subject of some concern. Although Intelligence was traditionally a function of government institutions, strategic intelligence

¹ Peter Roudick "Foreign Intelligence Gathering Laws" *The Law Library of Congress*, 2006, p. 1

² Ibid., p. 1

³ M S Elshimi, *De-Radicalisation in the UK Prevent Strategy: Security, Identity and Religion* (Routledge, 2017)

⁴ Ibid.

is increasingly been used by the private sector.⁵ For example, the private sector now uses open source information in a fashion similar to that of government intelligence agencies.⁶ In addition to private actors, attempts to integrate the activities of state actors, as well as the growing trend towards the establishment of fusion centres has raised serious questions both with respect to the protection of human rights and the effectiveness of such operations.

The core function of Intelligence agencies is the 'collection, analysis and dissemination' of information for the purposes of protecting national security. According to a 2010 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering Terrorism', many countries limit the functions of their intelligence agencies to carrying out this core function, thus preventing them from becoming involved in other security functions, which are already undertaken by other state actors. This, according to the report, is a matter of good practice and should be clearly defined in legislation.⁷

However, a number of countries now have a mixture of 'national security intelligence' and 'policing intelligence' contexts. Walsh points out that post 9/11, what fits in to the category of 'national security intelligence' and that of 'policing intelligence' has blurred significantly. When examining countries which make up the 'five eyes' network, Walsh found that attempts have been made to harmonise certain aspects of their core intelligence activities, including collection and the production of intelligence products.⁸ Walsh argues that intelligence frameworks, which include the use of non-intelligence staff, must ensure that these actors are sufficiently engaged through all stages of the implementation of these frameworks at agency and local level, through a 'well-crafted intelligence doctrine providing a common set of policies'.⁹ Lutterbeck points out that the convergence of intelligence and police services has led to both the 'policisation' of intelligence services and 'intelligence - isation' of police work including the use of sophisticated

⁵ Lisa Krizan "Intelligence Essentials for Everyone" *Joint Military Intelligence College Washington D.C.*, Occasional Paper no. 6, 1999, p. 7

⁶ *Ibid.*, p.10

⁷ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/14/46

⁸ Patrick F Walsh "Building Better Intelligence Frameworks Through Effective Governance" *International Journal of Intelligence and Counter Intelligence*, Vol. 28, No.1, 2005, p. 126

⁹ *Ibid.*, p.132

surveillance techniques, which were originally intended for intelligence use.¹⁰ This has resulted in the boundaries between actors becoming increasingly blurred, overlapping with one another, or in some circumstances disappearing entirely. This shift towards more intrusive policing and the involvement of intelligence services in crime control and policing, Lutterbeck points out, is not a neutral development, as the absence of such separations are often associated with authoritarian or repressive regimes, raising difficult ethical and political questions.¹¹

1.1. Outsourcing Intelligence to Private Actors

Given the lack of regulatory controls, one of the biggest threats to civil liberties is likely to come from private agencies in the future.¹² A significant number of intelligence activities are now been outsourced to private companies.¹³ According to the Ministry of Justice in the Netherlands, it has been estimated that the number of 'private entities' who now collect information is between 500 and 1000.¹⁴ Hoogenboom points out that one of the implications of the growth of informal intelligence activities carried out by private actors including debt collectors, multinationals, information brokers and private security consultants, is that State agents can potentially outsource activities that they would otherwise not be allowed to carry out due to national regulatory control¹⁵ because these private actors are generally not subject to judicial or parliamentary oversight. Chesterman also argues that the involvement of private companies in top level analysis is problematic because this analysis often forms the basis of public policy, raising questions about whether it's appropriate for the private sector to have this amount of influence on the Executive.¹⁶ The abuse of sensitive information is also a concern, when 'a profit motive is inserted in to intelligence activities'.¹⁷

¹⁰ Derek Lutterbeck "Blurring the Dividing Line: The Convergence of Internal and External Security in Western Europe" *European Security*, Vol. 14 No. 2, 2005, pp. 240-250

¹¹ Ales Zavrsnik "Blurring the Line between Law Enforcement and Intelligence: Sharpening the Gaze of Surveillance?" *Journal of Contemporary European Research*, Vol. 9, No. 1, 2013, pp. 181 - 202

¹² Ibid.

¹³ Siobhan Martin "Spying in a Transparent World: Ethics and Intelligence in the 21st Century" *GPSC, Geneva Papers*, Vol. 19, No. 16, 2016, p.18

¹⁴ Bob Hoogenboom "Grey Intelligence" *Springer, Crime Law Soc Change*, Vol. 45, 2006, p.380

¹⁵ Ibid., p. 377

¹⁶ Simon Chesterman "We Can't Spy ... If We Can't Buy! :The Privatization of Intelligence and the Limits of Outsourcing ' Inherently Government Functions, *The European Journal of International Law*, Vol. 19, No. 5, 2008, p. 1057

¹⁷ Ibid., p.1068

In some circumstances, such as the case of private contractors who carry out intelligence functions, the profitability of these companies rely entirely on carrying out security intelligence. In countries, such as the United States, where the outsourcing of Intelligence has become commonplace (already by 2005, private contractors received 70 percent of the US intelligence budget, totalling 42 billion dollars.¹⁸), it has been reported that almost one third of private intelligence contractors have top level security clearance¹⁹. In 2007, a US House Permanent Select Committee report expressed concern about the growing number of private contractors involved in intelligence activities, suggesting that some functions should remain inherently governmental. The report stated:

*"Intelligence Community leaders do not have an adequate understanding of the size and composition of the contractor work force, a consistent and well-articulated method of assessing contractor performance, or strategies for managing a combined staff – contractor workforce. In addition, the Committee is concerned that the Intelligence Community does not have a clear definition of what functions are 'inherently governmental' and, as result, whether there are contractors performing inherently governmental functions."*²⁰

The use of private intelligence contractors is problematic with respect to a number of issues, including the gathering of information by means that would otherwise be illegal and immunity from prosecution. Hoogenboom, uses the term 'grey intelligence', which is derived from research in to the blurring of boundaries between 'public and private security' in the UK, to describe the complex nature of the relationship which exists between the private sector and Intelligence, arguing that the public is often far too focused on the traditional structures of intelligence, such as MI5, MI6 and the CIA, whilst it should be more concerned about the grey area in which private intelligence corporations are now operating and the grey lines which separate state and private actors carrying out state functions.²¹

¹⁸ Ibid., p. 1057

¹⁹ Peter Gil "The Implications of Intelligence Practice Within and Beyond the State: An Analytical Model, *Journal of Regional Security*" Vol. 8, No. 2, 2013, pp.93-144

²⁰ House of Representatives Report on Intelligence Authorization Act for Fiscal Year 2008 (Permanent Select Committee on Intelligence, Report 110-131, Washington, DC, 7 May 2007) in Ibid.

²¹ Ibid.,p.373

Martin points out that the leaking of over 200,000 classified documents by Edward Snowden in 2013 and revelations with regard to the outsourcing of operations and interrogations reveal the degree to which intelligence agencies have become dependent on private actors, who are not subject to the same regulatory frameworks or accountability mechanisms. In this regard, these actors need to be subjected to increased oversight and regulation.²² Gill further argues that whilst much has happened in terms of legislating for state intelligence agencies, as well as providing appropriate oversight mechanisms in the past twenty to thirty years, the same has not happened with respect to private corporations carrying out intelligence activities.²³

1.2. The Fading Line between State Actors: Integration between Intelligence and the Police in Europe

With respect to state actors, the disintegration of the boundary between the police and intelligence services has given rise to grave concerns. Whilst the police and intelligence services have traditionally been kept separate, with police services been subject to much stricter regulations, these two fields have seen increasing convergence due to the changing nature of threats. Close cooperation between the police and intelligence services can be seen in a number of countries across Europe. In France, for example, there is very strong cooperation between the Internal Intelligence service, the DST (Directorate of Territorial Surveillance) and the police in France. In addition, collaboration exists with respect to surveillance of migrant populations with the National Police (Direction Generale de la Police Nationale) under the auspices of the Ministry of the Interior, and the Gendarmerie (responsible for rural areas), which falls under the auspices of the Ministry of Defence.²⁴ The Anti-Terrorism Coordination Unit (Unité de Coordination de la Lutte Anti-Terroriste (UCLAT)) also coordinates interactions between internal intelligence and the police. In the Netherlands, although a strict separation exists between Intelligence and Law enforcement, a 2002 AIVD (General Intelligence and Security Service) report showed that police had made a number of arrests based on AIVD information.²⁵ The validity of this evidence

²² Op. Cit. Siobhan Martin, p.1

²³ Op. Cit., Peter Gill, p.107

²⁴ Pater Chalk, William Rosenau "Confronting "the enemy within": security intelligence, the police, and counterterrorism in four democracies" *Rand*, 2004, p. 20

²⁵ Erik Akerboom "Counter-terrorism in the Netherlands. General Intelligence and Security Service of the Netherlands" *AIVD*, 2000, p.1

was questioned by the Rotterdam Regional court, but the court of appeal in The Hague found that the use of such evidence was lawful.²⁶ Traditionally in the UK, counter-terrorism functions were carried out by MI5, the anti-terrorism branch of the MPS and special branch officers within the police force. The role of special branch officers was to collect information for the purposes of legal proceedings.²⁷ In the past the sharing of 'intelligence data' between these three bodies was prohibited, but a number of interviews carried out in 2004 confirmed that this was no longer the case, and revealed that closer cooperation and intelligence sharing had between these organisations had now become commonplace.²⁸ In 2000, the NIM (National Intelligence Model) was introduced which allowed the police to collect and process intelligence data.

Brown and Korff, point out that the police are increasingly seen as part of the 'full societal alliance' with respect to the implementation of state policies in Europe, which they argue has widened the area in which the state is now likely to act against those who have still not committed a crime. For example the UK's Anti-Terrorism, Crime and Security Act 2001 provides for the preventative detention of those suspected of potential terrorist activities. In addition, the definitions with respect to what constitutes the 'grounds of suspicion' in this regard have become increasingly vague.²⁹ A number of countries have now criminalised activities that 'support terrorism', "apologising for terrorism' or the possession of materials which may be used for terrorist activities, regardless of whether the intention was to use such materials for the purposes of terrorist acts or not. According to Brown and Korff, widening the powers of the police in such a manner, leaves the door open to penalising citizens for their political beliefs and clamping down on their right to free expression. Also, discriminatory practices are widespread, with individuals belonging to certain ethnic groups been regularly targeted.³⁰

In addition, information sharing has become more commonplace. This has led to a degree of secrecy around where police interest in a particular

²⁶ Ibid., p. 4

²⁷ Martin Innes "Policing Uncertainty: Countering Terror through Community Intelligence and Democratic Policing" *AAPSS*, Vol. 605, May, 2006, p.6

²⁸ Martin Innes, James W E Sheptycki "From Detection to Disruption: Some Consequences of Intelligence-led crime control in the UK" *International Criminal Justice Review*, Vol. 14. 2004, pp.1-14 in Ibid.

²⁹ Ian Brown, Douw Korff, 2009. Terrorism and the Proportionality of Internet Surveillance, *European Journal of Criminology*, Vol. 6, No. 2, p.126

³⁰ Ibid., p. 127

suspect has originated from, in addition to how evidence against a suspect has been collected, violating due process rights.³¹ The use of this 'shared information' in judicial proceedings is only legislated for in two European countries. The UK³² and the Netherlands³³ are currently the only European member states which have legislation that allows for the use of classified information in judicial proceedings. In the UK, they controversially have 'Closed Evidence Procedures' and the Netherlands allows a procedure known as 'shielded witnesses' which allows magistrates to examine intelligence officials in court.³⁴ The 2005 Piranha case in the Netherlands illustrates the use of the shielded witness act, where information provided by intelligence services formed a central component of the case and included a video message from one of the defendants. The defence team were unable to access the entire transcript of the video footage nor question intelligence officers.³⁵ According to Freedman, law enforcement and Intelligence communities were created and operate in line with a set of clear objectives which differ from one another. For example, law enforcement collects evidence in line with a set of concrete legal requirements, so that such evidence can be presented in court. On the other hand, intelligence agencies generally gather information in secret in the interests of national security, in a manner which is not designed for use in a court of law.³⁶ A report of the European Union's Agency for Fundamental Rights (FRA) pointed out that a separation between the police and intelligence services is important so as to avoid a 'concentration of power' within one service, in addition to protecting against the 'arbitrary use of information' gained by secret means.³⁷

³¹ Ibid.

³² Justice and Security Act 2013 (JSA) codified previous legislation on closed court proceedings. See the full text of the Act at www.legislation.gov.uk/ukpga/2013/18/contents/enacted/data.htm.

³³ Act on Shielded Witnesses 2006 (*Wet afgeschermdde getuigen*). Allows AIVD and MIVD to be heard before a special court. See full text of the Act at www.eerstekamer.nl/behandeling/20061024/publicatie_wet_14/document3/f=w29743st.pdf

³⁴ Didier Bigo, Sergio Carrera, Nicholas Hernanz, Amandine Scherrer "National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges, *European Parliament*, Directorate-General of Policy Affairs" 2014, p.10

³⁵ Ibid., p.25

³⁶ Jonathan M Freedman "Intelligence Agencies, Law Enforcement and Prosecution Team" *Yale Law and Policy Review*, Vol. 16, No. 2, 1998, p.337

³⁷ European Union Agency for Fundamental Rights "FRA project on national intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies" Background paper for the inter-parliamentary conference on democratic oversight of intelligence services in the European Union, 2015, p.14

In 1999, the Parliamentary Assembly of the Council of Europe (PACE) stated that “[I]nternal security services should not be authorised to carry out law enforcement tasks such as criminal investigations, arrests, or detention. Due to the high risk of abuse of these powers, and to avoid duplication of traditional police activities, such powers should be exclusive to other law enforcement agencies”.³⁸ In Germany, for example, the Act on the Federal Intelligence Service (BND) prohibits the attachment of the Intelligence Service to any police authority. In addition, countries such as Sweden ensure that the functions of the security services are kept separate from the police. However, even where services are kept separate, the FRA points out that the sharing of information is not necessarily prohibited. Bigo et al. found that a number of countries, including Germany, Spain and Sweden, allowed indirect judicial practices, which allowed certain evidence to be hidden from parties during trial.³⁹ In Spain for example, since 2000, second hand classified information can be used in judicial proceedings.⁴⁰ In this regard, they point to the European Commissioner of Human Rights statement that any information sharing should take place within a ‘clear legal framework’.⁴¹

2. Non-Intelligence Actors and a Complex Web of Legislation

In most countries, the law bestows power upon Intelligence agencies and in turn defines the powers and mission of agencies. In addition, processes are defined and ascribed by law, providing an agency with clear guidelines and criteria with respect to ‘working procedures’⁴². Special powers granted to intelligence services are usually restricted and outline: Who they are permitted to investigate, what information they are permitted to collect, what measures they can use when collecting information, and when they can use special powers and how long they are permitted to do so.⁴³ Legislation gives special powers to intelligence agencies, which are not generally available to other government and non-government actors, although in some circumstances these powers may be extended to some police services and

³⁸ PACE (1999), p. 2 in *ibid*

³⁹ *Op. Cit.*, Didier Bigo et al., p.10

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Monica Den Boer, Claudia Hillebrand, Andreas Nolke “Legitimacy under Pressure: The European Web of Counter-Terrorism Networks” *JCMS*, Vol. 46, no.1, 2008 p 107

⁴³ Aidan Wills “Guidebook: Understanding Intelligence Oversight, Geneva Centre for Democratic Control” *DCAF*, 2010, p.18

members of the public.⁴⁴ The range of actors currently exercising 'special powers' reserved for national intelligence agencies is a somewhat worrying development. In democratic societies, special powers should be the exception rather than the rule.⁴⁵ In addition, it raises serious questions about how effectively they can carry out intelligence functions in accordance with the law. In addition, where Intelligence agencies are involved in activities which are not related to their core functions, in particular as they relate to criminal prosecutions, it raises even more serious questions with regard to the protection of human rights.

A UK parliamentary report found that the current legal framework in the UK was overly complicated and difficult to understand and recommended that new legislation which would allow authorisations and safeguards to be applied consistently and transparently be introduced. They also recommended that existing legislation governing intelligence services be consolidated in to one law.⁴⁶ States should provide a clear and precise legal framework for all of the actors involved in the intelligence process. Given the absence of a single legal framework governing Intelligence activities⁴⁷, it is likely that questions will continue to abound with respect to the legitimacy of non-intelligence actors carrying out intelligence functions in the midst of a confusing web of legislation.

3. Intelligence Function and Structure: Legislating for the Intelligence System as a Whole

Steele argues that it is impossible for a single intelligence organisation to deal with current challenges associated with '24/7 coverage'.⁴⁸ Whilst it is necessary that intelligence agencies transform with respect to both their form and function in order to effectively combat the changing nature of threats, this transformation must be accompanied by appropriate legislation, which acknowledges this transformation and recognises the various actors involved in the process, not only in the interests of protecting human rights, but also to maintain effectiveness. The range of actors, both State and non-State, who are not part of the official intelligence structure, but carry out

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Intelligence and Security Committee of Parliament "Privacy and Security: A Modern Transparent Legal Framework" *House of Commons*. 2015, p. 103

⁴⁷ Op. Cit., Peter Roudick

⁴⁸ Robert David Steele "Information peacekeeping and the future of intelligence" 2003, in Op. Cit. Bob Hoozeboom, p.379

a range of functions which are central to the process, is clearly problematic, which raises the question whether the current trend towards integration in intelligence and 'across communities' has resulted in less effectiveness and more fragmentation.⁴⁹

According to Walsh, establishing whether the intelligence sector is working effectively requires both a functional and structural approach.⁵⁰ Barger argues that in an ideal structure, the form an organisation should take should follow its function. It is therefore necessary when speaking about restructuring intelligence that this is preceded with a clear understanding of functions. These should be provided for clearly in the law. Barger also points out that the current size of the intelligence community requires treating intelligence in its entirety as a functional system and not 'merely as a blanket' covering a number of agencies and offices. She recommends a systemic view of the intelligence community, which would ensure that intelligence functions carried out by a range of actors are not coming in to conflict or replicating one another.⁵¹ Taking a more holistic approach to intelligence, Canada has recently introduced legislation which will lead to the creation of a new oversight mechanism that will be responsible for overseeing the activities of all state actors involved in the Intelligence process, allowing a newly created National Security and Intelligence Committee of Parliamentarians to follow the entire process of intelligence carried out by any government department which has a national security function. Whilst this is a move in the right direction with respect to Intelligence oversight, it notably does not include oversight for non-state actors.⁵²

Conclusion

With so many State and non-State actors now involved in intelligence activities, the legal framework governing Intelligence is becoming overly complex and fragmented, with a range of different laws regulating the behaviour of different actors in the intelligence process.

⁴⁹ Op. Cit., Patrick F Walsh, p. 123

⁵⁰ Patrick F Walsh "Building Better Intelligence Frameworks Through Effective Governance" *International Journal of Intelligence and Counter Intelligence*, Vol. 28, No.1, 2015, p. 125

⁵¹ Ibid., p.43

⁵² Craig Forsece, Kent Roach " A Report Card on the National Security Bill" *Institute of Public Policy Research*, 22 June 2017 @ <http://policyoptions.irpp.org/magazines/june-2017/a-report-card-on-the-national-security-bill/>

Within this complex web of legislation, it has become clear that some practices are not regulated appropriately, whilst others are not regulated at all. Adding to this, compliance is often weak, depending on what national oversight mechanisms, if any, a particular actor is subject to. Needless to say, the complexities and fragmentation, which exist within national legal frameworks, can be attributed to some extent to the reactionary and declaratory manner in which legislation is often enacted, with legislation being enacted without a thorough investigation into how such legislation will be implemented or if it will be effective. However, inherent problems with the system can also be attributed to the current disconnect which exists between intelligence as an organisational structure and intelligence as a process within the law. If legislators continue to ignore the intelligence system as a whole, both in terms of its structure and processes, laws are in danger of becoming ineffective or worse promoting ineffectiveness within the intelligence system.⁵³

⁵³ Office of the Parliamentary Counsel "When Laws Become Too Complex" 16 April 2013 @ <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex>

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