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Annexure 7

India Buries Intelligence Reform Interns Democratic Accountability in the Process

The Supreme Court of India did little for democracy on 23 February 2016 when in a terse order it stated, “We find no merit in the writ petition as well as in the transferred case. The writ petition and the transferred case are dismissed accordingly” (Writ Petition (Civil) No. 505 of 2012).

The writ petition filed by the Center for Public Interest Litigation had sought Parliamentary control of Intelligence Agencies and fiscal oversight through the Comptroller and Auditor General of India (CAG). Under Section 14 of the CAG Act, all entities that draw monies from the Consolidated Fund of India are to be audited by the CAG.

No reasoning, no analysis. This decision will be remembered in history books as a turning point in India’s hurtling towards an authoritarian order. When historians revisit this period the case will rank with the habeas corpus case of the emergency period.

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The judiciary plays an important role in ensuring the accountability of intelligence agencies. Its core tasks are to determine whether intelligence activities conform to constitutional and statutory law and to compensate individuals for inappropriate infringements on civil liberties. Judicial oversight is crucial in maintaining the appropriate balance between security and civil liberties, "Such judicial scrutiny has two clear strengths: first, judges are perceived to be independent of government, while, second, the traditional role of the courts is to protect individual rights. Therefore, they are well-suited to oversight tasks in areas such as the surveillance of individuals" (Hannah, O'Brien, Rathmell 2005: 13).

A system of checks and balances on the powers of each branch of government is fundamental in any democracy, and more so, in sensitive matters such as national security.

India's Executive midwifed the intelligence community into existence and is wholly responsible for its oversight. This situation has led to an ineffective and unaccountable intelligence community that resorts to increasingly intrusive tactics, often based on little more than a political whim, and without regard for fundamental rights and constitutional niceties.

While many countries have legislated safeguards against a Praetorian guard that lives in the delusion of making and unmaking Caesars, others have taken a stance in the judiciary. India must follow suit.

For example, in October 2002, the Supreme Court of Pakistan ordered intelligence agencies and the presidency to refrain from interfering in politics. The court also ordered criminal investigations to explore how politicians in the 1990s received government funds from military officers to manipulate elections.

In South Africa, despite legislation governing intelligence activity evidence surfaced in 2012 that, "senior intelligence officers were meddling in politics, spying on politicians and hatching or fabricating conspiracies in order to influence the factional battles within the ANC. These subversive activities have bedeviled the political arena for over a decade, doing serious damage to the democratic system and the legitimacy of the intelligence services" (Nathan 2012).

In 2013, South Korea was agog with news of how the National Intelligence Service was actively seeking to influence South Korean politics. One official investigation found that, "Spy agents systemically intervened in domestic politics by writing around 1, 900 postings on politics in cyberspace through hundreds of different user IDs. Among them were 73 online posts, which directly tampered with last year's presidential election" (Xinhua 2013). A list of similar scandals could continue endlessly.

Mr. Morarji Desai's downfall as Prime Minister was in no small measure linked to his healthy suspicion of the spooks' activities and the major budgetary cuts he imposed on them. And was it mere happenstance that the VP Singh Government fell shortly after he appointed Mr. Jaswant Singh of the BJP to head a committee to investigate possible parliamentary control of the intelligence agencies?

In a 2010 lecture before the Research & Analysis Wing, Vice President, Mr. Hamid Ansari, called for a parliamentary intelligence committee to establish independent oversight and

accountability and to address executive domination over and "misuse" of the intelligence agencies. While Mr. Ansari was speaking about intelligence agencies generally, the implication was the concern of domestic agencies in India (Ansari 2010). Mr. Shashi Tharoor, then Minister of State for the Ministry of External Affairs, similarly called for independent oversight of Indian intelligence agencies in a 2007 speech before the R&AW (Tharoor 2007). Oversight and Parliamentary Accountability is essential to a democratic polity.

The Intelligence Community in India

India's intelligence community is principally made up of the Intelligence Bureau (IB) responsible for internal intelligence, the Research and Analysis Wing (RAW) responsible for external intelligence, a military intelligence wing, and the National Technical Research Organisation (NTRO) responsible for technological intelligence gathering. The intelligence community is empowered with nearly unmitigated operational discretion, which it uses regularly at the expense of constitutionally guaranteed human rights. Yet, even with these broad powers, the intelligence community has repeatedly failed to gather any information on, much less prevent, numerous terrorist attacks. The agencies lack of coordination has been blamed for horrific blunders such as failing to prevent Rajiv Gandhi's assassination. Perhaps most damning, critics believe that intelligence failures result directly from the diversion of intelligence resources from counterterrorism to efforts to collect intelligence against political opponents and the lack of inter-agency coordination on a turf war between political appointees seeking executive favor.

Balancing Interests: National Security versus Civil Liberties

The two prominent issues related to intelligence regulations are: (1) how to deal with the sometimes conflicting needs of national security and civil liberties; and (2) how to achieve democratic oversight without compromising intelligence efficacy.

Democratic nations regularly struggle to protect their citizenry and the state against external and internal threats while simultaneously fighting to preserve fundamental democratic civil rights and liberties. A delicate balance between these competing needs is difficult, especially when protection against terrorism, hostility, and physical attacks often demand limiting the guarantees of privacy and liberty that are at the heart of democratic rights. Secrecy and operational discretion are necessary for the government to respond to potential security threats while transparency and curbing civil liberties abuses are essential to a thriving democracy (Hans and Leigh 2011).

Complicating the balance between security and civil liberties is that, in times of great danger, the public is more willing to exchange their rights for perceived greater safety. Historical evidence shows, however, that once governments are given greater security powers, including the power to gather intelligence against their citizens, these powers are readily abused for political purposes and there is no real gain in security (Electronic Frontier Education 2011). The right most often restricted in the process of intelligence gathering is the right to privacy. India does not expressly protect this right.

Even in democracies, the executive branch of the government seeks total control over its intelligence communities, justifying this on the grounds that security needs override the

democratic principles of the separation of powers, accountability, and transparency. Democracies, however, by definition cannot permit unfettered executive control over intelligence agencies without endangering the democratic principles that the government is entrusted to uphold. Each of the three branches of government has an important role to play in ensuring that intelligence powers are used to protect the people rather than used against them and that intelligence activities stay within the bounds of the law.

Ex Ante Accountability

Intelligence gathering activities that affect human rights should be subject to an authorisation process that strictly limits collection and surveillance to that which is necessary for the protection of national security (Scheinin 2010).

An independent authority should be responsible for issuing warrants to start investigations. Legislation should establish an authority (“the Designated Authority”), which would be a member of the judiciary, to issue these warrants. A judicial officer will have appropriate knowledge of constitutional and statutory law requirements, which enhances independent oversight of the agencies and offers better protection for civil liberties. Such judicial scrutiny can be found in Canada, where the Federal Court of Canada exerts oversight over the intelligence community. For example, in Canada, to obtain a warrant to intercept telephone communications there is a rigorous process where internal approval is initially sought from senior members of the agency and final approval must be given by the judiciary (Chalk, Rosenau 2004). This regime is preferable as it allows a number of checks and balances, including a degree of judicial control, before a warrant is approved.

Given the invasive nature of intelligence monitoring and its interference with fundamental rights, particularly privacy, (UNHCR 2008) monitoring activities should be carried out only when absolutely necessary and when attended by effective safeguards against abuse. The Regulation of Investigatory Powers Act 2000 (RIPA) restricts British intelligence agencies from intercepting communications without authorisation. RIPA expressly requires a warrant for interception, which encompasses monitoring. Warrants are required for all interceptions, under RIPA, except if either party sending or receiving the communication consents, there is other authorization, or in very limited circumstances as defined by the Act (RIPA Article 3). New Zealand requires a warrant for all interceptions, providing even greater protection for civil liberties (SISA Article 4A). Such requirements will go some way towards protecting against arbitrary and overly inclusive intelligence gathering (Scheinin 2009), and towards the adherence of international human rights norms (EctHR 1978).

Require Authorisation for Surveillance

Surveillance activities violate an individual's privacy rights every bit as much as property searches and the interception of physical communications. For this reason, a legislative framework is needed to strictly regulate surveillance activities. A legal framework must define what is meant by surveillance, establish an application process for permission to undertake such activity, and develop a standard for determining when surveillance is appropriate. The British RIPA and the US Foreign Intelligence Surveillance Act provide two models for such regulation.

Require Authorisation for Covert Activities

Covert activities not only violate individual civil liberties, but also pose a grave risk to the operation of international relations, which means the legislation must strictly regulate all covert conduct. Again, RIPA and the US National Security Act provide two models for such regulation.

Permit warrants and authorisations are currently only utilized for acts or persons outside the country. Legislation must avoid any expansion of intelligence power into the law enforcement arena by refusing to require warrants or authorisations for intelligence activity against residents and citizens. Intelligence agencies must never be permitted to have independent law enforcement power and instead must work through the police and criminal justice system to obtain information. An explicit limitation on the subjects of warrants would offer better protection for constitutional rights. Alternatively, to the extent Parliament considers it necessary to expand the intelligence agencies' powers, all applications for authorisations and warrants should be reviewed by a judge to ensure that they do not violate any constitutionally guaranteed human rights.

For example, RIPA requires:

Article 5(2): The Secretary of State shall not issue an interception warrant unless he believes – (a) that the warrant is necessary on grounds falling within subsection (3); and (b) that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct. (3) Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary – (a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; (c) for the purpose of safeguarding the economic well-being of the United Kingdom; or (d) for the purpose, in circumstances appearing to the Secretary of State to be equivalent to those in which he would issue a warrant by virtue of paragraph (b), of giving effect to the provisions of any international mutual assistance agreement. (4) The matters to be taken into account in considering whether the requirements of subsection (2) are satisfied in the case of any warrant shall include whether the information which it is thought necessary to obtain under the warrant could reasonably be obtained by other means.

Article 5(2) relies upon clear and unambiguous definitions of all substantive terms, including, 'national security', 'serious crime' and 'economic well-being'.

Legislation must avoid an immunity clause for unauthorised illegal activity by intelligence agents or employees (ex. Australian Intelligence Services Act 2001). Immunity undermines the rule of law as it permits impunity for its violation. The best practice places an enforceable duty on intelligence agencies to act within the scope of the law and to adhere to international human rights obligations.

Section 4AAA of the New Zealand Act requires its Security Intelligence Service to perform its functions (inter alia): in accordance with New Zealand law and all human rights standards recognised by New Zealand law, except to the extent that they are, in relation to national security.

Criminalise Illegal Property Searches and Interceptions of Communication

In addition to a broad prohibition of unauthorised searches and interceptions of communication, the legislation should establish criminal sanctions to serve as disincentives for illegal activities that violate civil liberties. RIPA (Article 1) expressly punishes any person who “intentionally and without lawful authority” intercepts communications.

Prohibit the Use of Illegally Obtained Information

The legislation also needs to contain a provision refusing the admission of any evidence obtained as a result of an illegal property search or interception of communication, or that was derived from information obtained from such illegal activity. This provision would serve to further disincentivize illegal intelligence activities that violate civil liberties and any exceptions to the prohibition would incentivise breaching it. As illustrated in the U.S., the U.S. rules of procedure refuse admission into evidence any illegally obtained information or any information from the “fruit of the poisonous tree,” meaning information derived from illegally obtained information (Legal Information Institute 2016).

Parliamentary Oversight

Participation of the legislature is arguably the most crucial element of a regulatory regime that aims to ensure effective accountability of intelligence agencies to the public they are enlisted to serve (Lepri 2007). In a number of countries, parliamentary oversight involves committees made up of non-parliamentary members who review the activities of intelligence agencies and subsequently report to the legislature (Security Intelligence Review Committee 1984). The main argument in favour of this model is that it seeks to minimize the political conflict involved in a multi-party parliamentary committee (Johnson 2007: 74). However, in doing so it deprives the oversight mechanism of full democratic legitimacy as unaccountable agents, individuals not elected by the public, filter information before it reaches members of parliament. As such, to ensure that any intelligence activities that curtail civil liberties stand up to the scrutiny of a body directly responsible to the people, the best course of action is parliamentary oversight that directly involves parliamentarians.

Provided that sufficient safeguards are put in place to protect sensitive information, operational oversight is an important aspect of parliamentary oversight as it inhibits the scope of agencies to undertake activities that only serve narrow political interests (European Commission for Democracy through Law 2007). Moreover, fiscal oversight of intelligence agencies, by the Comptroller and Auditor General is the best way to ensure the appropriate expenditure of public funds and accountability for those expenditures (European Commission for Democracy through Law 2007).

Judicial Oversight

The role of the judiciary in intelligence oversight complements parliamentary oversight. As the protector of individual rights in democratic systems the judiciary acts as an independent check on intelligence activities that may infringe civil rights. As guardians of the rule of law, the judiciary must determine whether the conduct of intelligence agencies complies with constitutional, statutory and international law.

Judicial oversight is not without its dangers. Bestowing too much control upon the judiciary can blur the separation of power, as an oversight role forces the judiciary to make decisions encroaching on areas of policy, areas typically left to the other branches (Johnson 2007). For judges, the policy obstacle is omnipresent when it comes to issues of national security (European Commission for Democracy through Law 2007). These policy concerns have led some countries to restrict judicial oversight to prior consultation, in relation to the grant of warrants, and subsequent review. A number of countries allocate the task of reviewing public complaints to an independent investigative official (ex. New Zealand, South Africa) or committee that is subject to parliamentary scrutiny (ex. Canada). With significant individual rights at stake, the judiciary offers “the best guarantees of independence, impartiality and a proper procedure,” (EctHR 1978) for checking executive interference with individual rights and the agencies' adherence to the rule of law. Judicial oversight should then be supplemented with a specialised body, such as an intelligence ombudsman, that reviews matters straying into areas of policy that have no place in judicial review (ex. Australia, UK).

In order to properly fulfill its functions, the intelligence ombudsman must be fully independent from the intelligence agencies as well as the executive. This requires the legislation to ensure that the intelligence ombudsman is not a political appointee of the Prime Minister. Further, in the interests of independence, no one who has held office in any of the intelligence agencies should be able to hold the position of ombudsman.

An important aspect of defining national security and threats to it is the recognition that wholly legal behaviour cannot be treated as a national security threat (Scheinin 2010). The proposed legislation must be careful to delineate between legal and illegal behaviour to ensure intelligence gathering is not being used to target the former.

Conclusion

There is a dire need for a statutory framework to regulate Indian intelligence agencies. Transparency and curbing civil liberties abuses are essential to a thriving democracy and are currently absent from the hugely powerful, publicly funded intelligence services (Hans and Leigh 2011). Secrecy and operational discretion are necessary for any government to respond to potential security threats, however, they must be regulated by clear procedures that consider human rights in every decision and they must be subject to oversight and accountability from publicly accountable, independent bodies.

Intelligence agencies should be politically neutral and prohibited from participating in political or discriminatory intelligence gathering activities. Oversight institutions should cover every aspect of intelligence functions, operations, administration and financing. Independent complaint mechanisms should be established for both the employees and officers of the agencies as well as any person affected by their activities. Each and every key term in the legislation should be clearly defined. Fundamentally, it should be remembered that whilst national security is a highly important public interest, it is only one of many competing interests to be balanced for effective governance (Miller 2010: 369).

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