COVERT SURVEILLANCE: INTELLIGENCE AGENCIES

The Need for Judicial Authority for Covert Surveillance Intrusion

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The public's dissatisfaction with the covert, intrusive powers of the UK intelligence and law enforcement agencies is higher than at any other time.

Whether this is based on perception or reality doesn't really matter.

As long as government Ministers continue to authorise the agencies' eavesdropping, telephone and electronic surveillance, and informant approval the public will believe that there is an unhealthy seamless relationship between them.

And that scepticism is made worse by the Communications Data Bill's proposal that the agencies themselves control their mining of communications data; the who, when and where of electronic communications.

In my view, and I have expressed this on a number of occasions, the government or, if you like, the executive, must step out of the equation and leave the authorisation of these highly intrusive methods to the judiciary (see my evidence to the House of Commons Home Affairs Select Committees based on my paper of 19 January 1999 attached, which predicted the current crisis and offered preventative solutions).

That means that application must be made by the agencies direct to the judiciary for authority to eavesdrop, intercept telephone and electronic communications, mine communications data and employ informants.

Not only does this procedure reduce the risk or perception of collusion but, by removing the executive from these decisions, also limits the room for accusations of political interference.

Government may argue that all this is unnecessary as there is adequate oversight of the agencies. There is oversight for law enforcement and also for the intelligence agencies now that Parliament itself is in charge of overseeing them.

However, that oversight is ex post facto and, on any argument, can not substitute for independent judicial authority at the coal face.

Government may also point to the United States where the judges of FISA Courts approve covert surveillance, yet the same public unease about the extent of covert surveillance has manifested itself. This ignores the fact that President Bush by-passed the FISA Courts in the war on terrorism and the FISA Amendment Act 2008 greatly reduced the powers of the FISA Courts by giving authority back to the executive. Prior to that FISA operated successfully.

Moreover, if judicial authority were given for telephone and electronic intercept, the current refusal of the British Government to use this intercept as evidence would look even more unwise.

This concept of judicial authority for intrusive covert surveillance is not new. Many jurisdictions successfully adhere to it.

This weakness in the UK political position is re-enforced by the European Convention on Human Rights and decisions of its Courts which lead to the conclusion that the present UK regime will be found wanting if judicial authorisation is absent.

The essence of the balance between the State and the individual in intelligence matters is contained in the European Convention on Human Rights case of Leander v Sweden. There the Court recognised the difficulties of balancing the right of privacy against the need for intelligence agencies to collect information by covert intrusive means.

The standard set by the Court demanded legislation to establish the existence and basis of the agencies' work, the need for the necessity of any agency operation, the proper proportionality of that operation to the risk posed against national security and/or economic well being and, finally, independent, effective oversight of the whole.

Thus, Leander provided a balance that allows intelligence agencies to do their work while limiting the margins for abuse.

The UK powers governing intrusive surveillance are regulated by legislation, namely the Regulation of Investigatory Powers Act 2000 and its Code of Conduct, which provide for executive non-judicial authorisation for covert surveillance of the most intrusive kind.

In 2010 the European Commission on Human Rights found that the provisions of that legislation complied with the Convention in the case of Kennedy v UK but only on the ground of the extensive jurisdiction of the Investigatory Powers Tribunal to hear ex post facto complaints of unlawful interception.

The Kennedy decision flowed from the seminal ECHR case of Klass v Germany in 1978 where the Court determined that judicial authority for covert surveillance was the best balancing test but concluded, reluctantly, that the German system of ex post facto oversight exercised effective and continuous control.

The main thrust of the Klass decision is important -

'The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.'

In the days of Klass and Kennedy the complaints related to the old style single authorization for a telephone tap. And the UK legislation was, and still is, geared to that.

The problem is that since Leander and Klass, and indeed in ever faster developments since Kennedy in 2010, we have seen not only the massive development of the World Wide Web but also the high speed advance of electronic communication using the most sophisticated encryption, for instance the dark web.

Terrorists and international organised criminals have access to these communications and use them to circumvent the investigations of the agencies so as to attack society and undermine its common values.

The agencies have, of necessity and rightly, expanded their covert surveillance to combat this danger. Thus has ensued a spiral of the covert use of, and investigation into, electronic communications.

In a sense it is a repeat of the Cold War arms race but with different protagonists. The outcome, if the agencies lose this race, is not only the expansion of terrorism but also of international organized crime.

Even so, I am of the opinion that none of these technological and conflict developments affect the standard of the balance of rights set by Leander. That standard set a balance of rights between the State and the public that particularly recognized the difficulties presented to intelligence agencies by complex procedures.

Thus, root and branch reform of intelligence laws or the creation of new national or international oversight agencies, which have been suggested by Civil Rights Agencies and not a few European governments, do not sit with the demands of Leander.

What Leander requires in the New Information Age is to continue to allow the agencies to do their work but with a clearer recognition in national laws of the need for extensive covert electronic surveillance together with coal face supervision of the agencies activities and backup Parliamentary oversight to limit abuse.

That does not mean that the decision in Kennedy is appropriate today. Far from it. At the time of the Klass case, 1978, the number of cases of covert surveillance was not high. Moreover, the Kennedy case considered one allegation of telephone tapping by an individual convicted of murder.

The Court's reluctant acceptance of executive authority for covert surveillance in single phone tapping is not sustainable today when intelligence agency covert surveillance, including data mining and profiling, takes place on a far, far larger scale in those circumstances of combatting international terrorism and organised crime I have outlined.

The preferred option of judicial authorization determined by Klass v Germany can no longer be ignored by the use of ex post facto oversight. Klass now instructs us

that coalface supervision, that is pre action authorization, should be conducted by the judiciary.

I must emphasise this because the public has been given a clear understanding of the basic tenets of the balance of rights beween them and the State as expressed in Klass , namely that –

'Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.'

In the current climate of increasingly extensive covert surveillance to combat terrorism and organised crime, as long as government Ministers continue to authorise the agencies' eavesdropping, telephone and electronic surveillance, and informant approval, the public innately sense that this contravenes the balance in Klass and, as a result, serious questions are being asked whether this regime is tolerable in a democracy.

And, as I have said, that scepticism was made worse and resulted in the Governments' humiliation by their proposal in the draft Communications Data Bill that the intelligence agencies themselves control their mining of communications data.

That is on one level. On another, counter terrorism operations are not solely within the remit of the intelligence agencies. Law enforcement, customs, immigration, and other agencies are involved and may authorise covert surveillance themselves and without judicial authority.

All these agencies are under pressure to keep the public safe and Ministers are aware of this and under pressure themselves.

It is within this pressure that Ministers not only make the policy for the extent of covert surveillance but also make the decisions on day to day intrusive surveillance for each target.

An application by any agency for covert surveillance is limited to that sole purpose. Yet covert surveillance is only part of operations conducted against suspected terrorists and organised criminals. Other information is being gathered by other means and some of it is so sensitive it is very tightly held, creating the dilemma of who can be told.

These accumulated pressures bear on the balances of necessity and proportionality made by the agencies when applying for authority and also on Ministers when they consider giving authority.

Ex post facto oversight does not, and cannot in a reasonable time frame, investigate every instance of covert surveillance. That failure which existed when independent oversight was instigated fifteen or so years ago is now overwhelming.

The extent of covert surveillance today and the pressures involved in its executive authorisation , particularly on the balances of necessity and proportionality, instruct us that the principle in Klass of judicial authorisation must now be applied.

The government or, if you like, the executive, must step out of the equation and leave the authorisation of these highly intrusive methods to the judiciary.

This view is re-enforced by President Obama's recent decision to give back to the FISA Courts the powers taken away by President Bush and to add technical advisers to the Courts to advise on the technical aspects of intrusive surveillance.

The UK could do well to follow suit.

However, in my opinion this procedure may well fall into the trap that Leander specifically set out to avoid, namely over complication and delay.

The most beneficial system is to insert Judges into the daily operations of the agencies so as to authorise all covert operations on the spot, having first balanced the rights of the State against those of the intended targets in the light of the latest technology available.

This would take Ministers out of the firing line, satisfy the public and Civil Rights Organisations and comply with Leander and Klass,

At first sight, this proposal may seem a little dramatic. But it follows exactly what the Agencies' Legal Advisers currently do every day. And with the benefit that, whereas the Legal Advisers are confined to attempting to minimise the risk of abuse, judicial certainty is available at the coal face in circumstances where the judiciary are aware of the whole of the operation and of the target and of the technological parameters.

We should not forget that the Judiciary in the UK are already in the position of reading all the files belonging to covert operations and determining whether the balance of rights have been observed when conducting terrorist and organised crime trials. The difference between the task of ex post facto decision and authorisation pre facto is one of timing only.

I preface my next remarks with an acknowledgment of Britain's reluctance to abandon any principles of Common Law and of the shudder that follows any compliment to the French Napoleonic Code.

In the French legal system, an examining judge supervises the French agencies' covert targeted operations and determines the day to day legal and civil rights balances involved. This includes covert surveillance and, in this regard, Decision No 2005-532 DC of 19 January 2006 concerning data mining, is instructive.

The examining judge sees the whole operation and makes decisions with the complete background in mind. The pressures that apply to Ministers do not exist for the examining judge. He or she holds the balance of necessity and proportionality without the political responsibility of protecting the public.

Another extremely important asset attaching to the examining judge system is that, unlike the UK, the evidential uncertainties are dealt with as the operation proceeds. This reduces the risk of mistakes being exposed at trial resulting in unnecessary acquittals.

I have worked under this system, and I was relieved not only to have those balances ascertained judicially as operations proceeded, but also at trial when any evidential uncertainties had already been minimised.

The system also shows that the proposal I have made above is not dramatic at all, but presents an effective and swift answer to the problems of balance discussed above.

The public would be assured of independent judicial coal face supervision and trials would be much better conducted when the evidential issues had already been examined and determined by a judge.

It is a system I would wish to see in all the UK agencies' covert targeted operations, including those, which protect our economic wellbeing.

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