

Research Proposal

Working title

Parliamentary Oversight of Domestic Intelligence Agencies in Comparative Perspective

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1. Problem Statement

Intelligence agencies both fascinate and frighten the public. As key providers of information relevant to national security threats, they are essential components of every state security system. On the other hand, history and political events have shown that the intelligence agencies are also prone to controversies: in 2010 the UK Court of Appeal found that several former Guantanamo Bay detainees had been subjected to torture by the CIA, in which the British intelligence agencies, Security Service (MI5) and Secret Intelligence Service (MI6) had been complicit;¹ in March 2018 the German Higher Administrative Court of Nordrhein-Westfalen confirmed the unconstitutionality of the 38-year-long surveillance of the lawyer Rolf Gössner by the German Federal Office for the Protection of the Constitution (BfV);² and, most recently, the Austrian parliament set up a committee of inquiry in order to investigate allegations of misconduct in the course of the controversial house search of the Austrian Federal Office for the Protection of the Constitution and Counterterrorism (BVT) by the Federal Ministry of Interior (BMI).³ This list could go on, yet these examples are sufficient to affirm that intelligence agencies, despite their indispensability for national security systems, at times act beyond the law. The finding is insofar not unusual since government agencies in general occasionally overstep their legal boundaries. Yet, while most of the unlawful government conduct is subject to extensive political and legal control, intelligence agencies are both by the virtue of special legal regimes and their unique *modus operandi* often exempted from the public scrutiny.

By the end of the last century, many liberal democracies acknowledged this problem and established special external oversight mechanisms in the light of the increased revelations of intelligence agencies' unlawful practices.⁴ Contemporary discussions of this issue shift the focus even further: the question is no longer why the intelligence agencies should be exempted from the democratic oversight, but it is rather the exemption itself that requires justification.⁵ Accordingly, democratic oversight is increasingly perceived as a necessary safeguard from potential abuses of human rights as well as from the political misuse of potential unlawful information gathering on political opponents. Moreover, oversight is supposed to compensate for the lack of public accountability of the intelligence agencies and

¹ *R (on the application of Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth* [2010] EWCA Civ 65.

² OVG NRW 13.3.2018 - 16 A 906/11; VG Köln, 20.1.2011 - 20 K 2331/08.

³ 3/US 18.4.2018 XXVI GP.

⁴ See Krieger 'Die historische Entwicklung der Kontrolle von Geheimdiensten' in Schmidt et al (eds) *Geheimhaltung und Transparenz. Demokratische Kontrolle der Geheimdienste im internationalen Vergleich* (Lit Verlag Berlin 2007) 13.

⁵ Gusy, 'Parlamentarische Kontrolle der Nachrichtendienste im demokratischen Rechtsstaat' (2008) ZRP 36.

ensure the effectiveness of their mandate. Finally, it is there to ensure that the public money accorded to intelligence agencies is spent lawfully and effectively.⁶

However, parliaments face severe barriers resulting from intelligence agencies' inherent need for secrecy, since access to classified information is often subject to restrictions and executive discretion. As a basic condition of intelligence activity, secrecy presents a serious challenge to democratic values such as transparency and the rule of law.⁷ Yet, without secrecy, the effectiveness of intelligence operations, their sources as well as their methods would be endangered. Thus, liberal democracies are confronted with a seemingly paradoxical question of how to reconcile the need for secrecy of intelligence services with the demand for their democratic transparency and accountability.⁸

In the wake of the recent series of terrorist attacks and growing security concerns there has been a wave of new security regulation aimed at expanding intelligence powers across Europe.⁹ Especially the preventive investigative powers of domestic intelligence agencies have been expended with regards to the interception of communication, public surveillance, data gathering and covert action. Almost at the same time, allegations emerged about both mass foreign and domestic surveillance,¹⁰ which raised serious public concerns and even led to several lawsuits against state actors.¹¹ These events bring domestic intelligence agencies to the fore and lead to the question whether the growth of their powers is accompanied by sufficiently independent and competent oversight mechanisms.

⁶ A. Wills and M. Vermuelen, *Parliamentary Oversight of Security and Intelligence Agencies in the European Union* (European Parliament 2011) 85.

⁷ Hillebrand, 'Intelligence Oversight and Accountability' in: R. Dover et al (eds), *Routledge Companion to Intelligence Studies* (Routledge 2014) 306.

⁸ 'A transparent intelligence agency would contradict itself', Gusy (n 8) 38.

⁹ AT: Police State Security Act 2016 (*Polizeiliches Staatsschutzgesetz* [PStSG], atBGBl I 5/2016; GER: Improved Cooperation Constitutional Protection Act 2015 (*Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes* [VerfSchZVerbG] deBGBl I 2015, 1938) and Foreign-Foreign Communications Intelligence Act 2016 (*Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes* [BNDAAFAufklG] deBGBl I 2016, 3346); UK: Investigatory Powers Act 2016 (IPA 2016). For more examples, see Asaf Lubin, 'A New Era of Mass Surveillance is Emerging Across Europe' (JustSecurity, 9.1.2017) <https://www.justsecurity.org/36098/era-mass-surveillance-emerging-europe/> accessed 19.5.2018.

¹⁰ Most notable are the revelations made by former NSA contractor Edward Snowden on Five Eyes surveillance programs in 2013. See for reactions Parliamentary Assembly of Council of Europe (PACE), Resolution on mass surveillance (Resolution 2045) [2015]; D. Wright and R. Kreissl, 'European Responses to the Snowden revelations' in D. Wright and R. Kreissl (eds), *Surveillance in Europe* (Routledge 2015).

¹¹ In C-698/15 *Secretary of State for Home Department v Tom Watson and Others* [2016] CJEU found the IPA 2016 to be incompatible with the EU Charter of Fundamental Rights and UK High Court found in *Liberty v. Secretary of State for the Home Department and others* [2018] EWHC 975 (Admin) Part 4 of IPA 2016 incompatible with fundamental rights. Pending before the ECtHR at the moment: *Big Brothers Watch and Others v. UK* (no 58170/13); *Bureau of Investigative Journalism and Alice Rose v. UK* (no 62322/14); *10 Human Rights Organizations and Others v. UK* (no. 24960/15).

2. Aim of Research and Contribution to the Field

The aim of this research is to examine and compare different models of institutional approaches to the parliamentary oversight of domestic intelligence agencies. Therefore, it provides a comparative legal assessment of the institutions involved in parliamentary oversight of domestic intelligence agencies in three Western European parliamentary democracies: Austria, Germany and the United Kingdom (UK). The underlying question is how the functionally similar institutions are constructed in different constitutional settings. The main objective is to elaborate legal models, rather than discuss solutions favorable for blanket legal transplantation or express harmonization intentions of any kind. It has already been rightly noted that an ideal oversight system, just like an ideal model of democracy in general, does not exist, and that detailed structures of these systems rest upon sovereign decisions of each state and are dependent on specific constitutional presets. Similarly, this research consents that a proper balance between the demands of secrecy and the need for scrutiny is not unequivocally required or even attainable and, instead, recognizes a certain legislative discretion in this field.¹² Nevertheless, as national legal frameworks are not viewed exclusively through national glasses, the comparative perspective doubtlessly provides a better insight into the shortcomings of each oversight system and offers solutions inspired by the practices derived from the comparative analysis. Conclusively, the contrasts and convergences are identified and development prospects are outlined.

Apart from the doctrinal contribution to the parliamentary law in the specific context of intelligence oversight, this research may provide valuable insights for any possible further political reforms of the intelligence sector.¹³ In general, it belongs to the research in the field of comparative constitutional¹⁴ and comparative administrative law.¹⁵ On a more specific level it contributes to the field of the national security law and, in particular, the emerging sub-discipline of surveillance law.¹⁶

¹² Schmidt, 'Systeme parlamentarischer Kontrolle von Geheimdiensten – Versuch eines Vergleichs' in Schmidt et al (n 7) 235.

¹³ Comparative contributions to policy-making: Bundestag, 'Überblick zur Struktur und Organisation verschiedener europäischer Geheimdienste' WD 3-300-303/10 [2010]; Bundestag, 'Parlamentarische Kontrolle der Nachrichtendienste in ausgewählten Staaten' WD 3-3000-016/17 [2017]; Center for Security Studies (CSS), 'Zivile Nachrichtendienstsystem im europäischen Umfeld der Schweiz', (ETH Zurich 2011).

¹⁴ Tushnet, 'Comparative Constitutional Law' in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 1225;

¹⁵ Bell, 'Comparative Administrative Law' in M. Reimann and R. Zimmermann (n 18) 1259.

¹⁶ Rusteberg, 'Wandel durch Annäherung? Zum 2. Symposium über das Recht der Nachrichtendienste in Berlin' (Verfassungsblog, 21.3.2018) <https://verfassungsblog.de/wandel-durch-annaeherung-zum-2-symposium-ueber-das-recht-der-nachrichtendienste-in-berlin/> accessed 25.5.2018.

3. Choice of Legal Orders and Methodology

3. 1. Choice of the Legal Orders

Austria, Germany and the UK are chosen for this research based on the substantial similarities, but also notable differences regarding their intelligence oversight. Since all three countries are well-established parliamentary democracies, the research will benefit from the nuances of the parliamentary oversight models in a broadly similar system, rather than disparities of several absolutely contrasting systems.¹⁷ Certainly, each intelligence oversight system has originated from an indisputably different constitutional tradition, parliamentary background, and historical trust or distrust in the intelligence services. Yet, all three countries have had longstanding intelligence agencies and at least at the moment, all of them institutionally differentiate between domestic and foreign intelligence agencies, which makes the comparison more feasible.¹⁸ Moreover, all three countries introduced intelligence reforms within the last few years, with a joint trend towards the expansion of intelligence powers and mandates.¹⁹ Therefore, they are confronted with the similar challenge of establishing appropriate intelligence oversight.

With regards to the organization of intelligence agencies and, in particular, to their relationship with law enforcement services, Germany and Austria follow the most distinct approach: whereas Germany postulates an obligatory separation between the police forces and intelligence services (*Trennungsgebot*),²⁰ Austrian domestic intelligence agency, the BVT, is an organizational unit within the general law enforcement.²¹ The UK stands somewhere in between in this respect, since MI5 is an independent authority, which works closely with law enforcement agencies.²²

While the parliamentary traditions considerably differ, the parliamentary oversight of domestic intelligence agencies itself is structured rather similarly both in the general and specialized parliamentary committees. All three countries are familiar with general parliamentary oversight mechanisms such as parliamentary questions and powers to summon officials, even though their specific configuration might vary. Yet, a presumable difference

¹⁷ By contrast, divergences are much deeper between intelligence oversight in a presidential (USA) or semi-presidential (France) system and those in parliamentary democracies, or even more between the intelligence oversight in Western democracies and authoritarian regimes. See to this Schmidt (n 15) 246.

¹⁸ As opposed to the 'fused' intelligence agencies which consolidate the domestic and foreign intelligence into one authority, see CSS (n 17).

¹⁹ AT: Police State Protection Act 2016 (PStSG); GER: Improved Cooperation Constitutional Protection Act 2015 (VerfSchZVerbG); UK: Investigatory Powers Act 2016 (IPA 2016).

²⁰ Nehm, 'Das nachrichtendienstrechtliche Trennungsgebot und die neue Sicherheitsarchitektur' (2004) NJW 3289; BVerfG 24.04.2013 - 1 BvR 1215/07.

²¹ Section 6 (1) Security Police Act (*Sicherheitspolizeigesetz* [SPG]).

²² A. Bradley and K. Ewing, *Constitutional and Administrative Law* (Pearson Education Limited 2007) 601.

might indeed exist concerning the understanding of the role of the parliamentary oversight in each country: it varies from parliament as a watchdog (UK)²³ to a parliament as a participant in executive tasks (AT).²⁴ All three countries have standing specialized parliamentary committees for intelligence oversight with rather similar mandates and powers. These are primarily focused on *a posteriori* political and legal oversight of individual intelligence activities and are generally not involved in oversight or determination of ongoing operations. Some slight differences might persist particularly concerning the appointment procedures of the members of these committees and their access to confidential information. The UK seems to be the most contrasting in this regard, particularly due to the noticeable influence of the executive both in general and specialized parliamentary oversight. First, *ad-hoc* inquiries can generally only be initiated by the Government and are mostly conducted by independent experts and not parliamentary committees. Second, the members of the specialized parliamentary committee for intelligence oversight are nominated by the Prime Minister.²⁵

The greatest difference among the three countries can be noted in the structure of the oversight by the specialized expert bodies responsible for the intelligence authorization. These are scattered along all the three branches: in the UK, the Investigatory Powers Commission (IPC) is composed of judicial commissioners, in Germany, the G-10 Commission is an independent body situated in the parliament, and in Austria, the Legal Protection Commissioner [*Rechtsschutzbeauftragte*] is an independent body arguably most close to the executive. It is in this aspect that the uniqueness of each system becomes most apparent. The UK seems to rely more on specialized expert bodies than on the specialized parliamentary committees and, due to the importance of Legal Protection Commissioner for individual protection, Austria follows this trend to some extent as well. Germany seems to put more emphasis on the parliamentary oversight, as even the specialized body itself is close to the Bundestag. Likewise, the oversight systems vary with regard to the powers of the data protection authorities in relation to the intelligence oversight: whereas Austria does not provide for an explicit exemption of the BVT from their scrutiny, Germany limits the BfV's

²³ Leyland, (n 23) 140.

²⁴ H. Mayer, G. Kucsko-Stadlmayer and K. Stöger, Grundriss des österreichischen Bundesverfassungsrechts (Manz 2015) 254.

²⁵ Significant reforms were made by the Justice and Security Act 2013, which revalued the Intelligence and Security Committee (ISC) towards a committee of the Parliament. S. McKay and C. Walker, 'Legal regulation of intelligence services in the United Kingdom' in J. Dietrich and S. Eiffler (eds), *Handbuch des Rechts der Nachrichtendienste* (Boorberg 2017) IX § 2 para 202.

duty to provide information especially regarding its origin,²⁶ and the UK provides for broad executive discretion concerning the MI5's compliance with data provisions.²⁷

3.2. Methodology

The comparative study adopts a functional approach²⁸ and compares institutions in Austria, Germany and the UK, which are involved in parliamentary oversight of the relevant domestic intelligence agencies. The attention is primarily given to rules and regulations governing their organization, mandate and competences. This includes the legal analysis of constitutional frameworks, statutory provisions, as well as parliamentary reports²⁹ and practices, and the relevant jurisprudence of the European Court of Human Rights (ECtHR) and national jurisprudence. Furthermore, existing literature is critically evaluated and international soft law recommendations are taken into consideration.

The study is guided by the jurisprudential approach and explores the outlined materials mainly from a positivistic legal perspective. Yet, as norms and accompanying case-law are part of certain historical and political contexts, these too will be reflected upon, where appropriate. Due to the relative sensitivity of the research subject, the study might encounter certain limitations due to unavailable or controversial data and, consequently, refrains from any empirical considerations of intelligence activity itself.

4. State of Research

Intelligence oversight has been receiving growing attention from the legal scholarship in the recent years, but despite its relevance, the issue is still rather uninvestigated. There is a noteworthy amount of literature on this topic in the field of political sciences,³⁰ as well as some highly valued policy papers³¹ and thinktank publications.³² However, there are marked

²⁶ § 15 Federal State Protection Act (*Bundesverfassungsschutzgesetz* [BVerfSchG] dBGBI I 1990, 2954, 2970 idF dBGBI I 2017, 2097).

²⁷ Section 42 Data Protection Act 1998 (DPA 1998).

²⁸ Samuel, *An Introduction to Comparative Law Theory and Method* (Hart 2014) 65.

²⁹ At the moment, only Germany and the UK publish reports of the standing special committees. In this respect, a transparency deficiency can be identified to Austria, which unfortunately leads to somewhat limited results.

³⁰ For example Ball K., D. Haggerty K. and Lyon D. (eds), *Routledge Handbook of Surveillance Studies* (Routledge 2012); Dover R., Goodman M. and Hilebrand C. (eds), *Routledge Companion to Intelligence Studies* (Routledge 2014); Johnson (ed), *The Oxford Handbook of National Security Intelligence* (Oxford Press 2010); Jäger T. and Daun A., *Geheimdienste in Europa. Transformation, Kooperation und Kontrolle* (VS 2009).

³¹ Wills A. and Vermuelen M., *Parliamentary Oversight of Security and Intelligence Agencies in the European Union* (European Parliament 2011), Council of Europe, *Who is watching the watchers* (Council of Europe Publishing 2016); Council of Europe, *Democratic and effective oversight of national security services* (Council of Europe 2015); FRA, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (Publication Office of the EU 2015)

³² Born H and Caparini M. (eds), *Democratic Control of Intelligence Services. Containing Rogue Elephants* (Routledge 2nd edn 2016); Born H., Johnson L. and Leigh I., *Who's watching the Spies? Establishing Intelligence Service Accountability* (Potomac Books, Inc. 2005), Born H. and Leigh I., *Making Intelligence Accountable. Legal Standards and Best Practices for Oversight of Intelligence Agencies* (Publishing House of

differences in the geographical representation of the topic. With regards to Austria, there is very little research done on the local and almost none at the international level.³³ So far, parliamentary oversight was considered almost only sporadically in the 90s,³⁴ before the establishment of BVT in its current form and therefore, deserves both an update and an upgrade. The UK intelligence oversight has regularly been presented in papers in international thematic volumes³⁵ and a number of journal articles,³⁶ but a comprehensive, monographic legal study of the outlined problem is missing. In Germany, the issue of intelligence oversight has indeed been a popular topic in a couple of volumes,³⁷ articles³⁸ and even some dissertations,³⁹ however even here, comparative insights are evidently lacking. Doubtlessly, the existing literature provides a valuable basis for this study, as it may primarily facilitate the preparation of the so-called “country reports”. This enables the study to focus more on a comprehensive comparative analysis of the national legal frameworks, rather than a mere descriptive account. The possible significance of such a comparative research has already been noticed.⁴⁰ Thus, this study aims to fill a gap in the comparative perspective as the parliamentary systems of Austria, Germany and UK have not yet been comparatively analyzed with specific focus on intelligence oversight. Moreover, none of the previous research focuses solely on the domestic intelligence agencies, but examines all types of intelligence agencies (foreign, domestic and military) jointly. Here it is argued that the

the Parliament of Norway 2005), Born H. and Wills A., *Overseeing Intelligence Services. A Toolkit* (DCAF 2012).

³³ Klaushofer’s considerations of the parliamentary oversight being the only evident example so far. See Klaushofer, 'Das Recht der Nachrichtendienste Österreich' in J. Dietrich and S. Eiffler (n 24) IX § 1 para 153-163.

³⁴ Handstanger, 'Art 52a B-VG' in K. Korinek and M. Holoubek, *Österreichisches Bundesverfassungsrecht, Textsammlung und Kommentar* (Springer 3. Lfg 2000); Widder, 'Die parlamentarische Kontrolle von Staatspolizei und militärischen Nachrichtendiensten in Österreich' in Hengstschlager et al, *Für Staat und Recht. Festschrift für Herbert Schambeck* (Duncker & Humbolt 1994) 647.

³⁵ For example Phythian 'A Very British Institution: The Intelligence Security Committee and Intelligence Accountability in the United Kingdom' in Johnson (ed) (n 30); J. Moran and Walker C. 'Intelligence Powers and Accountability in the UK', in Z. Goldman and S. Rascoff (eds), *Global Intelligence Oversight* (Oxford University Press 2016) 289.

³⁶ For example H. Bochel et al, 'New Mechanisms of Independent Accountability': Select Committees and Parliamentary Scrutiny of the Intelligence Services' (2015) 68 *Parliamentary Affairs* 314; Defty 'Educating Parliamentarians about Intelligence: The Role of the British Intelligence and Security Committee' (2008) 64 *Parliamentary Affairs* 621.

³⁷ For example Dietrich J. and Eiffler S. (n 27); BfV (ed), *Verfassungsschutz in der Demokratie. Beiträge aus Wissenschaft und Praxis* (Carl Heymann 1990); Singer J. *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes* (Springer 2016).

³⁸ For example Brissa, 'Aktuelle Entwicklungen der parlamentarischen Kontrolle nachrichtendienstlicher Tätigkeit des Bundes' (2017) DÖV 765; Holzner 'Parlamentarische Informationsansprüche im Spannungsfeld zwischen demokratischer Kontrolle und Staatswohlinteressen' (2016) DÖV 668; Bull, 'Sind Nachrichtendienste unkontrollierbar?' (2008) DÖV 751.

³⁹ T. Kumpf, *Die Kontrolle der Nachrichtendienste des Bundes* (Verlag Dr. Kovač 2014); Baier, *Die parlamentarische Kontrolle der Nachrichtendienste und deren Reform* (Verlag Dr. Kovač 2009).

⁴⁰ Krieger, 'Oversight of Intelligence: A Comparative Approach' in G. Treverton and W. Agrell, *National Intelligence Systems. Current Research and Future Prospects* (Cambridge University Press 2009) 210.

exclusive focus on domestic intelligence will provide a better perspective on their specific problems such as, for example, the relationship between the intelligence and law enforcement services, as well as the oversight of the domestic surveillance.

5. Delimitation

The research has several limitations. First, due to the sensitivity of the issue and the lack of legal material, military intelligence agencies are not included in the scope of the study. Similarly, the foreign intelligence agencies are also left out, since the joint analysis of both foreign and domestic intelligence agencies might oversimplify some premises and results, and undermine the comprehensive analysis of individual, specific problems. Consequently, the oversight of extraterritorial intelligence activity is not dealt with. Since the research mainly focuses on oversight institutions and mechanisms and not on the intelligence agencies themselves, the specific intelligence powers are only briefly considered rather than comprehensively compared. Also, the research makes some limitations regarding the oversight institutions themselves and therefore delimitates the executive and judicial oversight from its scope due to their rather different oversight purposes.⁴¹ Moreover, the public oversight (for example the media, NGOs and whistleblowers) is not included, since these oversight actors are not directly determined by the state. On the other hand, the research deals rather comprehensively with autonomous external oversight bodies. However, these are only considered concerning the question of a probable intersection of some aspects of their mandates with the parliamentary oversight, or, more specifically, the question of the possible compensation of some parliamentary shortcomings by autonomous external oversight.

6. Structure of the Research

Alongside the introductory and the concluding chapters, this research is structured into three main parts. The first part introduces the general rationale behind the parliamentary oversight of intelligence agencies: why should the intelligence agencies be overseen and why should this oversight follow a specific regime? The second part introduces the organizational framework for domestic intelligence agencies in each country and analysis the concrete legal techniques deployed by the national legislators, in order to reconcile the dichotomy between the need for secrecy and the one for transparency. Since the effectiveness of one oversight mechanism cannot be evaluated as detached from the others, the third part examines the

⁴¹ Executive oversight is primarily focused on specifying the intelligence strategic policies and priorities, internal management, cooperation with other intelligence agencies and the effectiveness of the intelligence operations. On the other hand, the main purpose of the judicial oversight is to provide an individual with an adequate remedy if the alleged violation of their rights is found to be true.

relationship between the parliamentary oversight and those oversight actors primarily responsible for external intelligence authorization, and correspondingly, individual legal protection: the autonomous commissioners or committees. Depending on their similarities and differences, the relevant elements will be analyzed either separately for each country⁴² or jointly⁴³ due to the minimal variations between the specific elements.

A. Rationale behind the parliamentary oversight of intelligence agencies

At the outset of the first part, the main political arguments and historical experiences supportive of the need for parliamentary oversight of intelligence agencies are briefly outlined as the basic background of the problem. Correspondingly, some practical aspects of the intelligence activity are shortly drawn out, in order to illuminate the need for their confidentiality and therefore, special oversight arrangements. Most notably, the risks of the undermined national security through absolute transparency as well as the state positive obligations towards the covert agents are discussed.

The core of the first part, however, builds the evaluation of international standards and national constitutional frameworks with regards to the legal necessity of the parliamentary oversight of intelligence agencies. Due to the comparative nature of this research, the ECtHR's case-law and international soft-law documents are scrutinized first, in order to establish common parameters for all three countries. The ECtHR's case-law concerning domestic surveillance is not analyzed exhaustively, as the study focuses only on the judgments containing specific criteria for external intelligence oversight systems as a compensation for the lack of or restricted judicial scrutiny. In principle, the ECtHR accepted the legislation authorizing secret (domestic) surveillance in the interest of national security despite its interference with Article 8 ECHR, but it regularly emphasized the need for adequate and effective guarantees against the potential abuse.⁴⁴ Apart from a transparent and precise legal basis, the national law must especially provide for certain procedural and organizational safeguards against surveillance, in order for the interference permitted by such law to be in line with the limitations pursuant to Article 8 ECHR. Although a continuous judicial control has been regarded as the most desirable by the ECtHR, it nevertheless accepts in principle the control by parliamentary committees or other organs based on a case-by-case review of the contested national legislation.⁴⁵ Moreover, it seems that under the ECtHR's

⁴² Presumably, see preliminary outline: 2 A., 2 B., 2 D., 3 A.

⁴³ Presumably, see preliminary outline: 2 C, 3 B.

⁴⁴ Cameron, *National Security and the European Convention on Human Rights* (Kluwer 2000).

⁴⁵ *Klass v Germany* App no 5029/71 (1978) paras 56-57; *Weber and Saravia v Germany* App no 54934/00 (2006), *Szabo and Vissy v Hungary* App 37138/14 (2016).

current case-law an effective oversight system can compensate for inadequate individual remedies. While the ECtHR case-law primarily sets its requirements against the background of possible human rights violations, soft-law documents issued by the Venice Commission⁴⁶ and the UN Human Rights Council⁴⁷ emphasize the need for democratic oversight of intelligence agencies in general and outline several recommendations for this based on the evaluation of national legal frameworks and practices.

Second, the constitutional specifics of each selected country are observed. In particular, the national interpretations of the rule of law principle and the separation of powers are considered, in order to derive conclusions for the parliamentary oversight of the domestic intelligence agencies. Insofar as they differ from the joint arguments above, additional national legal arguments concerning the rationale behind the parliaments' oversight functions are discussed. Among other things, the question is raised whether the relevant constitutional provisions and principles constitute *an oversight obligation* or rather *an oversight possibility* for the parliament.

B. Configuration of the parliamentary oversight of domestic intelligence agencies

Whereas the first chapter deals with the question *whether* the parliamentary oversight of domestic intelligence agencies is constitutionally required, the second chapter devotes its attention to the question of *how* this is structured in Austria, Germany and the UK. Therefore, this chapter introduces the controlled and the controllers in each of the compared countries.

Domestic Intelligence Agencies

The following domestic intelligence agencies are primarily dealt with: BVT in Austria,⁴⁸ BfV in Germany⁴⁹, and MI5 in the UK.⁵⁰ With regards to the UK, some aspects of the signals intelligence agency, the Government Communications Headquarters (GCHQ)⁵¹ are considered, insofar as they are relevant for domestic intelligence purposes. Country by country, organizational structure of each domestic intelligence agency is examined first, followed by an outline of their mandate and a brief reflection on their powers, especially those accorded by the recent security laws. Subsequently, the relationship between the domestic intelligence agency and law enforcement services is extensively analyzed. A question arises in all three countries whether there is still a significant difference between the law enforcement

⁴⁶ Venice Commission, 'Report on the democratic oversight of security services' [2015] CDL-AD (2015)010.

⁴⁷ UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism by Martin Scheinin' [2010] A/HRC/14/46.

⁴⁸ PStSG.

⁴⁹ BfV SchG.

⁵⁰ Security Service Act 1989; Security Service Act 1996.

⁵¹ Intelligence Services Act 1994.

services and domestic intelligence agencies considering the growing expansion of the police preventive investigatory powers. Similarly, due to this tendency, there is also an issue of a possible competences collisions and/or conflicts between them. Yet, notwithstanding the growing similarities, the structural difference has important consequences for the parliamentary oversight: while the law enforcement services are, just like the rest of the executive branch, abundantly subject to the general parliamentary oversight, intelligence services mostly underlie a specific oversight regime.

General Parliamentary Oversight

In the second part of this chapter different forms of parliamentary oversight are analyzed, with the primary focus on two aspects: formal, organizational independence of the oversight bodies, and the substantive reach of their competences. All three countries are familiar with a general system of legislative oversight over executive action and provide for some sorts of opportunities for parliamentary question and powers to summon executive officials.⁵² With regards to this, the study examines whether these general parliamentary oversight mechanisms may be used for the specific purpose of domestic intelligence oversight and what kind of restrictions they might face in the course of this. In addition to this, the possibility of *ad-hoc* committees of inquiry⁵³ in Austria and Germany appears to be rather valuable in the context of intelligence oversight, since several intelligence scandals have been investigated by such committees.⁵⁴ In the UK, there is no explicit form of such procedure, however there are *ad-hoc* inquiries initiated by the Prime Minister and agreed upon by the House of Commons.⁵⁵ Also, the specialized parliamentary committee, the Intelligence and Security Committee (ISC) occasionally conducts reports on special issues, sometimes triggered by the allegations of specific intelligence misconduct.⁵⁶ The analysis of these reports may particularly disclose some insights into deficiencies of the oversight by the standing oversight bodies.

Specialized Parliamentary Oversight

Moreover, all three of the compared countries have established specialized standing committees to oversee their intelligence agencies: in Austria, it is the standing sub-committee

⁵² Section 52 Federal Constitutional Law (*Bundes-Verfassungsgesetz* [B-VG]); Section 44 Basic Law (*Grundgesetz* [GG]); Leyland, *The Constitution of the United Kingdom. A Contextual Analysis* (Hart Publishing 2016) 140.

⁵³ Section 53 B-VG; Section 44 GG.

⁵⁴ AT: 3/US 18.4.2018 XXVI GP (BVT Committee of Inquiry); AB 1000 BlgNr 17. GP (Noricum Committee of Inquiry); AB 1235 BlgNr 17. GP (Lucona Committee of Inquiry) GER: AB 23.6.2017 18/12950(NSA Committee of Inquiry)

⁵⁵ Committee of Privy Counsellors, *The Report on the Iraq Inquiry* (House of Commons Papers 2016); Gibson P, *The Report of the Detainee Inquiry* (Cabinet Office 2013).

⁵⁶ ISC, *Inquiry into Intelligence. Report into the London Terrorist Attacks on 7 July 2005* (Cm 6785 2005) and Government Reply (Cm 6786 2006); ISC, *Report on the intelligence relating to the murder of Fusilier Lee Rigby* (2014-15 HC 795).

pursuant to Art. 52a B-VG (in the following: Art 52a – Sub-Committee); in Germany, it is the Parliamentary Control Panel (PKGr)⁵⁷ and in the UK, it is the already mentioned ISC.⁵⁸ The analysis of the organization, tasks and competences of these committees forms the main part of the research, since they are assumedly the parliamentary bodies responsible for the constant and most extensive intelligence oversight. First, the rules governing the composition and the appointment are scrutinized especially with regards to the extent of the organizational independence from the executive. In particular, the participation and role of the opposition is considered as well as the role of the executive branch in the appointment procedure of these committees. Additionally, it is examined which areas of domestic intelligence agency's work are overseen ('subject of oversight'), whether it is only the legality of the intelligence activity or also its effectiveness that are being scrutinized ('oversight criteria'), and whether the oversight is solely *ex post* review or it also includes an *ex ante* control and/ or ongoing monitoring of the intelligence activity ('temporal dimension'). This inevitably raises the overall question whether and, if yes, to what extent these committees may influence the intelligence decisions in a sense of a certain intertwining of powers between the legislative and executive.

Since access to information is crucial for an effective oversight, the powers of parliamentary committees are also analyzed in this context. Notably, there is a distinction between the access of information between the general and specialized parliamentary committees, since the latter are established for the sole purpose of intelligence oversight and are thus granted wider access. Nevertheless, the right of these committees to request information regarding intelligence agencies and the consequential obligation of the executive to comply with such request are subject to limitations and therefore deserve a close examination. Particularly interesting in this regard seem to be the confidentiality provisions and their interpretation, as well as the possible enforcement mechanisms or conflict resolutions in cases of supposed unlawful denial of information. Correspondingly, statutory arrangements for protection of the information received by the oversight body are examined, since any sort of disclosure might have significant consequences.

Budget Control

Last but not the least, the issue of financial oversight of intelligence is raised. In this respect, all three countries seem to follow a different approach: Austria does not provide for any exemptions concerning the BVT's financial supervision and consequently, this is

⁵⁷ Parliamentary Oversight of Intelligence and Security Services Act (*Kontrollgremiumsgesetz* [PKGrG]).

⁵⁸ Section 1 – 4 Justice and Security Act 2013.

conducted by the Court of Auditors in its standard procedure;⁵⁹ Germany establishes a separate specialized parliamentary committee (*Vertrauensgremium*) for the financial oversight of intelligence agencies⁶⁰ and in the UK the financial oversight falls within the oversight mandate of the IPC.⁶¹ The assessment of the role of the parliaments and other audit bodies hereof might reflect the financial autonomy of domestic intelligence agencies in each country as a result of sovereign decisions of the national legislators.

C. Relationship with other external specialized oversight bodies

Apart from the parliament, the democratic oversight of intelligence agencies often relies on different specialized expert bodies, such as autonomous commissioners or committees. These oversight bodies are particularly important with regards to subjective protection of individuals against potential human rights abuses, but in a broader perspective they also significantly complement the objective intelligence oversight system.⁶² What is more, some countries seem to rely more on autonomous expert bodies for the intelligence oversight, rather than the specialized parliamentary committees.⁶³ Consequently, the analysis of the intelligence oversight would be incomplete without including them in the scope of the research, and therefore, the third chapter examines the relationship between the parliamentary oversight committees and these other external oversight bodies in all three countries. Here, the emphasis is placed on autonomous expert bodies (the UK: Investigatory Powers Commissioner [IPC],⁶⁴ Austria: Legal Protection Commissioner [*Rechtsschutzbeauftragte*],⁶⁵ Germany: G-10 Commission)⁶⁶ specifically in charge with the intelligence authorization, rather than the data protection authorities.

Related to this, two aspects stand out. On the one hand, autonomous commissioners or committees face various information obligations towards specialized parliamentary committees. Thus, the question arises about the extent of these obligations and more unconventionally, whether this exchange of information may serve as an alternative information channel for the oversight purposes apart from the information provided by the intelligence agencies themselves. On the other hand, even though the autonomous commissioners or committees are mainly responsible for intelligence authorization in

⁵⁹ Art 121ff B-VG.

⁶⁰ § 10a Federal Budget Code (Bundeshaushaltsordnung [BHO])

⁶¹ Section 2 of the Justice and Security Act 2013.

⁶² Klaushofer, *Strukturfragen der Rechtsschutzbeauftragten* (Verlag Österreich 2012) 353.

⁶³ UK has a tradition of oversight through different commissioners, see S. McKay and C. Walker (n 24) 1915. Also in Austria *Rechtsschutzbeauftragte* plays a central role in the intelligence oversight, see Klaushofer (n 61).

⁶⁴ Section 227 – 240 Investigatory Powers Act 2016.

⁶⁵ Section 14 – 17 PStSG.

⁶⁶ G-10 Act (*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses* [Artikel 10-Gesetz]).

individual cases and pursue different objectives, their mandate and/or powers may nevertheless overlap with the specialized parliamentary oversight in certain aspects. Therefore, the research examines to what extent is this the case and what are the consequences. Furthermore, with reference to the second chapter, it is questioned whether the identified shortcomings of the parliamentary oversight may be compensated by the autonomous commissioners or committees. Finally, due to the importance of data gathering for the intelligence activity, the role of the data protection authorities in the intelligence oversight is analyzed.⁶⁷

7. Research Questions

In summary, the main research questions are:

1. Are the selected parliamentary democracies legally obliged to establish parliamentary oversight for their domestic intelligence agencies and, if yes, to what extent?
2. How do the compared countries organize their domestic intelligence agencies and their parliamentary oversight? To what extent, under which criteria and by which methods do the parliamentary bodies in Austria, Germany and UK oversee the domestic intelligence agencies?
3. What is the relationship between the specialized parliamentary oversight committees to other specialized oversight bodies? Can certain shortcomings of the parliamentary oversight be compensated by the bodies responsible for the external intelligence authorization?

⁶⁷ Weichert, 'Geheimhaltung und Transparenz aus Sicht eines Datenschützers' in Schmidt et al (n 4).

8. Preliminary Outline

INTRODUCTION	<ul style="list-style-type: none">A. Problem StatementB. Structure of the Thesis and Research Question(s)C. MethodologyD. Terminology
PART 1	<ul style="list-style-type: none">Rationale behind the oversight of intelligence agencies<ul style="list-style-type: none">A. Historical and Political Arguments<ul style="list-style-type: none">1) The need for oversight2) The need for confidentialityB. Legal Arguments<ul style="list-style-type: none">1) International Expectations<ul style="list-style-type: none">a) ECtHR case-lawb) Soft-law recommendations2) National Constitutional Specifics
PART 2	<ul style="list-style-type: none">Configuration of the parliamentary oversight of domestic intelligence agencies<ul style="list-style-type: none">A. Domestic Intelligence Agencies<ul style="list-style-type: none">1) Organizational structure2) Mandate and powers3) Relationship with the law enforcementB. General Parliamentary Oversight<ul style="list-style-type: none">1) Regular oversight methods2) Committees of inquiryC. Specialized Parliamentary Oversight<ul style="list-style-type: none">1) Organizational structure2) Subject of oversight3) Oversight criteria4) Temporal dimension5) Access to classified information6) Protection of classified informationD. Budget ControlE. Comparative Conclusions
PART 3	<ul style="list-style-type: none">Relationship with other external oversight bodies<ul style="list-style-type: none">A. Autonomous Committees and Commissioners<ul style="list-style-type: none">1) Information obligations2) Overlapping mandates and/or powersB. Data Protection AuthoritiesC. Comparative Conclusions
CONCLUSION	<ul style="list-style-type: none">A. ModelsB. ConvergencesC. Prospective developments

9. Time framework

June 2018 (current state of the project)	Choice of the PhD topic; Literature research and review of the existing parliamentary materials, overview of the relevant theories and methodologies Mandatory courses and seminars
July 2018 – June 2019	Part II – Configuration of the parliamentary oversight of domestic intelligence agencies
July 2019 – December 2019	Part I – Rationale behind the parliamentary oversight of intelligence agencies
January 2020 – July 2020	Part III – Relationship with other external specialized oversight bodies
August 2020 – February 2021	Revision of the draft version
March 2021	Defensio

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