

# Legislating the National Intelligence Services in Sri Lanka: A Comparative Analysis

W D S Rodrigo<sup>#1</sup>, H S D Mendis<sup>2</sup> and K A A N Thilakarathna<sup>3</sup>

<sup>1</sup>Sri Lanka Law College, Colombo 12, Sri Lanka

<sup>2</sup>Sri Lanka Army, Colombo, Sri Lanka and

<sup>3</sup>Faculty of Law, University of Colombo<sup>3</sup>.

<sup>1</sup>#<wdsrodda@yahoo.com > <sup>2</sup><shiran.mendis@kdu.ac.lk> <KAAN Thilakarathna<sup>3</sup>>

**Abstract** - *National Intelligence Services Act is a long overdue legislation. Separate legislation for national intelligence is a paramount import to mount intelligence operations that empower and enhance high-grade and high-quality intelligence. Accordingly, a reasonable query arises about the anatomy of such legislation. This study committed to finding viable connotations and considerations of the prospective National Intelligence Services Act of Sri Lanka compared to the similar legislations of other jurisdictions. This study is qualitative. It instigates with the doctrinal legal research methodology (black letter approach) apprehending existing legal regimes and concludes with a comparative study with similar laws of the selected jurisdictions. The researcher has referred to structured interviews and black letter instruments with legal binding as its primary sources, while research journal articles, committee reports, and special reports as secondary resources. This study recommends governing legal principles of Sri Lanka in formulating the national intelligence Legislation. Further, it proposes connotations and considerations for the legislation, the establishment of national intelligence institutions with their power, functions, and administration, authorized acts in the intelligence operation which includes intelligence cycle and counterintelligence of overt and covert operations, and the introduction of the intelligence warrants and their mandates, intelligence oversight measures, and intelligence tribunal for complaint handling and interpretation of terms that facilitate the smooth application of such legislation in Sri Lanka. Finally, the study stresses two aspects - the legal protection of the intelligence community and individual liberty as the foremost principles in formulating the prospective National Intelligence Services Act of Sri Lanka.*

**Key Words:** *Intelligence Legislations, Intelligence Warrants, Intelligence Tribunal*

## I.INTRODUCTION

The State Intelligence Service is one of the oldest professions. It is considered to be a matter of executive almost in all democracies. Legislature and judiciary had limited influence over its intelligence services despite the legal concept of separation of power being well established within the democratic state. The state must progress with positive legislative development in the international system respecting the principle of personal liberty and democracy. However, Sri Lanka has not been able to formulate a dedicated act for its State Intelligence Service although Sri Lanka has employed a state intelligence community since the early 1980s. Since then, intelligence agencies of Sri Lanka has extended its service towards the national security of Sri Lanka although National Intelligence Services Act is a long-overdue legislation. The states that encountered a conundrum of having dedicated legislation for intelligence services recognized the necessity of the legal accountability of the executive actions through intelligence operations that ensures political, financial, and legal accountability. Therefore, the specific area of this study the National Intelligence Services Act. Accordingly, this study will be deriving the scope of the intended National Intelligence Services Act considering the comparative analysis done with the existing legislations of other legal systems. Intelligence agencies are responsible for maintaining both the internal and external security of a state.

This study was based on the allegation made against the state intelligence services and several bits of intelligence operations-related cases filed before the courts. National Intelligence act is paramount important to increasing intelligence operations. The intelligence operations have to have legal coverage to execute such operations such as to collect information, process and to analyse within and other agencies. The state has to protect the members of the intelligence community. They mount the operations on behalf of the state of sensitivity in nature. On the other hand, the state must be legally accountable for every act of their conduct respecting the rule of law. Therefore, Sri Lankan intelligence organizations need legal protection as the

current intelligence legal regime of the Police Ordinance or Military Service Acts would not fulfil this purpose.

## II. METHODOLOGY

This research is a qualitative study comprised of both doctrinal and comparative approaches. The study relied upon both primary and secondary data in conducting the research process. It has used structured interviews with the expertise of both legal and security sector governance, international conventions and treaties, National Intelligence statutory laws, and similar legal instruments as its primary sources. Further, the study referred to research papers/articles, books, journal articles, committee reports, special reports, backgrounders, and official statements made by the governments as its secondary resources. In research design, this study is a multi-disciplinary qualitative and legal doctrinal research that has looked at the existing security intelligence legal regime of Sri Lanka. It gets legalism of the state intelligence affairs one had while paying attention to legislating the intelligence operations respecting democratic good governance of the state affairs on the other hand. The study commences with a doctrinal approach and concludes with a comparative approach deriving its findings.

## III. DISCUSSION

This paper discusses first existing legal regime in Sri Lanka with regard to national intelligence services and it analyses the adequacy of the existing legal regime paying attention to the protection of the members of the intelligence community as well as the protection of the individual liberty of the people at large. The discussion further commits to find conceivable purpose, scope, and function for the prospective National Intelligence Legislation paying its consideration to the selected legislations of the other jurisdictions and it suggests the imperatives of forming a separate law to govern the National Intelligence Services in Sri Lanka.

### *A. The Existing Legal Regime of National Intelligence Services in Sri Lanka.*

The State intelligence agencies are the institutions that represent the executive branch of government. It comes under the purview of national security the legal regime of the National Intelligence Services consists of the constitutional provisions, statutory provisions, departmental orders, and circulars of the intelligence agencies. The existing legal regime of the intelligence services are governed by the constitution, Police Ordinance, Prevention of Terrorism Act, Army, Navy, and Air Force Act as well as the other existing statutes such as the Penal code, criminal Procedure code and the evidence ordinance of Sri Lanka. However, there is no separate statute for national intelligence services in Sri Lanka.

### *B. Conceivable Purpose and Application of the National Intelligence Legislation.*

The purpose of the legislation set out the statutory purpose from the legislative intent. The purpose of the statute, therefore, plays an important role in the interpretation of the legislation. According to the Canadian law, security intelligence is a part of national security and is considered to be the fundamental duty of the government. The UK act proposes establishing the Secret Intelligence Service and Government Communication Headquarters (GCHQ) authorizing intelligence operations carried out for the national security of the UK. The New Zealand Intelligence Act first specifies the outcome of the act to have a free, open, and democratic society. The Indian bill formulated to regulate the power and function of the intelligence agencies both domestically and overseas and to provide legal provisions for intelligence oversight. National Intelligence Act gives abstract legal guidance and a wide mandate in carrying out intelligence operations. However, such application is confined to guiding legal principles of the act. In application, the common feature of all acts is that, it establishes the different institutions for the purpose and set out their mandate separately. The acts further set out the legal authority for both overt and covert intelligence acts in the intelligence circle. Further, it states the Intelligence oversight mechanism is both institutional and democratic.

### *C. The Need for Intelligence Accountability and Oversight.*

The intelligence warrant plays a major role in intelligence accountability and oversight. Accountability ensures the legality of the intelligence operations while oversight ensures the effective and efficient functional progress of the intelligence agencies of the state. According to the Intelligence and Security Act of New Zealand, the Chief Commissioner of Intelligence is the competent authority to issue a such warrant. However, in the case of Canadian jurisdiction, it is the court of law that is empowered to issue an intelligence warrant which is quite similar to what is practiced by the civil police in criminal litigation. It is a common factor that the intelligence warrant is only made in writing by the competent authority and it must contain the subject matter of the intelligence warrant. It then must state the type of intelligence warrant and it must state to whom the warrant has been issued. It can be observed that certain sections are dedicated to intelligence oversight. Therefore, the intelligence stature must

facilitate both democratic and institutional oversight of intelligence operations. It is evident that parliament and the public will have to take it in trust to a certain degree that information about intelligence operations is only available under the principle of 'need to know basis'. This need-to-know basis must be respected by the members of the intelligence community, members of the oversight committees, and the competent authorities who are involved in the intelligence operations of a state.

#### ***D. The Intelligence Tribunal and its Jurisdictions.***

Complaint handling is an integral part of most of the legal regimes that regulate intelligence operations. For this purpose, first, the intelligence legislation must provide the space for the complaint hearing mechanism at the departmental level. If such mechanism failed or if the such aggrieved party is not willing to get resolution by an internal inquiry, such aggrieved party must be able to find relief through an intelligence tribunal. Tribunal is a forum of justice and it is a specialist body that hears and determines disputes in a particular area of Law. Further, the intelligence tribunals are the judicial tribunals that come into action when a private aggrieved party brings their controversies to hear and determine.

Tribunals could be sitting in secret and the procedure is completely secretive. The intelligence act must specify the jurisdiction of the intelligence tribunal. Other than the restrictive and secretive nature of the proceedings, the jurisdiction must govern the principle of natural justice as its foremost governing principle. The jurisdiction of the intelligence tribunal needs a legal mandate to hear and determine the controversies which are related to the intelligence operations. Further, it must get the mandate for rule-making functions which limits the rules for its functions. It is also important to give mandate of right to initiative or investigation on national intelligence-related matters. Finally, the intelligence tribunal jurisdiction should contain freedom from judicial rules of evidence and procedure

#### ***E. The Imperatives of Forming a Dedicated law to Govern National Intelligence Services in Sri Lanka.***

The study was conducted with four main objectives to examine the prevailing law that governs intelligence operation in Sri Lanka, find legal

drawbacks in that legal regime and analyse the anatomy of the intelligence acts of the other jurisdictions to identify the connotations of intelligence legislation to find imperatives to formulate a separate national intelligence legislation to the intelligence community of Sri Lanka.

The study analysed certain criteria for the actions required to be defined. The purpose of the legislation is the legislative intent. Therefore, the purpose of the legislation is important for the application of the law and the determination of statutory interpretation. It also implies that the intelligence act needs to establish a national intelligence institution that governs intelligence agencies of different natures. Further, it needs to state the main role and task of such institutions that defines the power and factions of such institutions. Further, with regards to the intelligence operations at the national level, the act must state the authorized action of the intelligence operations in abstract forms. This will create a sound flat form to legalize intelligence operations. This study has highlighted the intelligence warrant in caring out the intelligence operations. There are different intelligence warrants – domestic intelligence, general and specific. The standard format and the compulsory information that should contain in the intelligence warrant can be decided at the discretion of the principal National Intelligence institution of the state.

### **RECOMMENDATIONS**

This study has focused in finding the answer to the research question. This study has highlighted the absence of a separate law to govern intelligence operations in Sri Lanka. Further, it has been found that the existing laws are not adequate to mandate and regulate intelligence operations. Accordingly, after referring to the laws of national intelligence of the USA, UK, Canada, New Zealand, and the intelligence bill of India this study presents the following recommendations

It is recommended to formulate a separate legislation to legalize and regulate the National Intelligence Community and Operations in Sri Lanka

It is recommended, certain legal principles such as rule of law, individual liberty, Human right, political neutrality, and interoperability (among intelligence agencies) to be integrated as governing principles of the prospective National Intelligence Legislations

It is recommended to introduce Intelligence Warrants to mandate intelligence operations and to protect the members of the intelligence community. This study

makes three recommendations on complaint handling aspect. First, it is recommended to empower the perspective Intelligence Legislation to conduct institutional inquiries about the complaint received and the CNI office itself to initiate inquiries without a complaint when there is a breach of the legal mandate by the members of the intelligence community. Second, it is recommended to have a separate intelligence tribunal that has the special power to hear and determine the cases related to National Intelligence Operations. It is also recommended to confer the legal power and authority to hear and determine the controversies, to rule make a rule for its functions, right to initiative or investigation, and freedom from judicial rules of evidence and procedure. Finally, it is recommended to amend Article 106 (2) (c) of the constitution of Sri Lanka to make the article mandatory when such matter is requested to hear in closed court at the request of the attorney general of Sri Lanka.

It is recommended to include some provisions with the perspective of national intelligence activities for institutional oversight as well as democratizing oversight by the parliamentary selected committee.

It is recommended to make provisions to coordinate and cooperate with other institutions such as other ministries, and Attorney General Departments for both substantial and procedural aspects of the law.

Finally, it is recommended to include an interpretation chapter in the legislation to define the terms that are subjective to interpretation or controversial in nature. This study suggests the above recommendations to be integrated when formulating the connotations and considerations of the prospective National Intelligence Services Act of Sri Lanka.

## CONCLUSION

This study exhibited that the National Intelligence Services Act is long-overdue legislation. The existing legal regime to govern intelligence operations does not give an adequate legal mandate to intelligence operations. Therefore, Sri Lanka needs to encounter such a conundrum by formulating separate legislation for intelligence services. This study has done a thorough analysis with the intention to find viable connotations and confirmation of such legislation. The study referred to similar legislation in the USA, UK, Canada, New Zealand, and Indian bills. Further, it has referred to the few incidents that challenged the adequacy of the intelligence law of the country before the court of law. Accordingly, this study presented its findings on the purpose, authorized act, the establishment of the national intelligence institutions, intelligence warrants, intelligence tribunals, and intelligence oversight as the mandatory components of the perspective National Intelligence Services Act. The recommendations which have been given can be integrated into the process of formulating the novel National Intelligence Services Act

of Sri Lanka in the future. The study has addressed each research question and made its findings and accommodations accordingly, therefore, had achieved the objectives of the study.

## ACKNOWLEDGEMENT

This study would not have been conceivable without the generous support given by numerous individuals throughout. We extend our thanks to every one of them for the kind support and assistance given to make this study a success.

## BIBLIOGRAPHY

Adams & Griffiths 2012 M. Adams & J. Griffiths, 'Against "Comparative Method": Explaining Similarities and Differences', in: M. Adams & J. Bombhoff, Practice and Theory in Comparative Law, Cambridge: Cambridge University Press 2012.

Army Act No: 17 of 1949.

Amrith Kharel, 'Doctrinal Legal Research' (2018, SSRN Electronic Journal) < <https://publication/323762486> > accessed 3 August 2022.

Air Force Act No:41 of 1949.

Berkowitz, B., and Goodman, A. (2000), *Best Truth: Intelligence in the Information Age*, Yale University Press, New Haven, and London.

Brajesh Mishra, IDSA Round Table, Aug 2010. Black's Law Dictionary.

Born, H. and Leigh I. (2005), *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, Publishing House of the Parliament of Norway, Oslo.

Boele-Woelki, Dethloff & Gephart 2014 K. Boele-Woelki, N. Dethloff & W. Gephart (eds.), *Family Law and Culture in Europe: Developments, Challenges, and Opportunities*, Morsel/Cambridge: Intersentia 2014.

Canadian National Security Act of 2017.

Canadian Security Intelligence Act of 1985.

Daniel Cayley Chung, 'Internal Security: Establishment of a Canadian Security Intelligence Service' (1985) Harvard International Journal.

Defence.lk. 2022. *State Intelligence Service Turns 80 - Ministry of Defence - Sri Lanka*. [online] Available at: <<https://www.defence.lk>> [Accessed 14 June 2022].

Fred Schreier, *Democratic Control of Intelligence Services: The Need of Efficient and Legitimate Intelligence* (1st edn, Ashgate Publishing Limited 2007).  
Flick, Uwe, *An Introduction to Qualitative Research*, 2006, SAGE Pub.

Greg Hannah, Kevin A. O'Brien and Andrew Rathmell, *'Intelligence and Security Legislation for Security Sector Reform'* (The RAND Corporation 2005).

Hans Born and Ian Leigh, *'Democratic Accountability of Intelligence Services'* (Geneva Centre for the Democratic Control of Armed Forces (DCAF) 2007) <[http://file:///E:/Semester%20Demoratic%](http://file:///E:/Semester%20Demoratic%20)> accessed 11 August 2022.

Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies* (Geneva: DCAF, University of Durham, and Parliament of Norway).

Hans Born and Ian Leigh, *Democratic Accountability of Intelligence Services*, Policy Paper No. 19 (Geneva: DCAF, 2006).

Herman, M. and Hennessy, P17., 2005. *Intelligence services in the information age*. London: Frank Cass.  
Born and Marina Caparini, *Democratic Control of Intelligence Services* (1st edn, Ashgate Publishing Limited 2007).

Hon. *Attorney General v Shammi Kumrathana* and others HC209/2019 (unreported High Court of Colombo Case).

Interview with Prof Rohan Gunarathna, Director General, Institute of National Security Studies (Colombo, 04 June 2022).

Interview with the representative of the Director General, State Intelligence Service Sri Lanka (Colombo, 08 August 2022).

Interview with Director Military Intelligence, Sri Lanka Army (Colombo, 18 August 2022).

Interview with Chief of National Intelligence, Ministry of Defence (Colombo, 16 September 2022).

Intelligence and Security Act 2017 of New Zealand.

Intelligence Services Act of 1994 oh United Kingdom.

James Burch, *A Domestic Intelligence Agency for the United States? A Comparative Analysis of Domestic Intelligence Agencies and their implications for.*

*Homeland Security*, Homeland Security Affairs, Vol. III, No. 2, June 2007.

Joint Chiefs of Staff, Joint Pub. 2-0, *Joint Intelligence* (22 Oct. 2013).

John Wadham, *The Intelligence Service Act 1994* (1994) 57, *The Modern Law Review*.

Kumarasiri, A., 2019. *Report of the Select Committee of Parliament to look into and report to Parliament on the Terrorist Attacks that took place in different places in Sri Lanka on 21st April 2019*. Parliamentary Series No. 183. Sri Jayawardenapura Kotte: Parliament of the Democratic Socialist Republic of Sri Lanka.

Lord Denning's Report, Command Paper 2151 (Her Majesty's Stationary Office: London, September 1963).

Manish Tiwari, "*Legally Empowering the Sentinels of the Nation*, Issue Brief #20, Observer Research Foundation, New Delhi, August 2009.

Margo Schlanger, *'Intelligence Legalism and the National Security Agency's Civil Liberties Gap'* (2015) 6 *Harvard National Security Journal*.

Michael J. Bulzomi, *'Foreign Intelligence Surveillance Act: Before and after the USA PATRIOT Act'* (2003) 72 *FBI L Enforcement Bull.*

Ministry of Defence, Sri Lanka, *'Annual Progress Report-2019*.

Murray Rankin, *'National Security: Information, Accountability, and the Canadian Security Intelligence Service'* (1986) 36 *U Toronto LJ*.

Merriam-Webster Dictionary.

Mett Henn, Mark Weeinsteinand Nick Foard, *'A Critical Introduction to Social Research'* (2nd edn, Sage Publications, 2006).

*Monongahela Bridge v United States*, 216 U. S. 177 (1910).