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"Norwegian Parliamentary Oversight: an 'effective remedy'?"

1. Background, characteristics and objective

I would like to start by giving you a short briefing on the oversight system in Norway. Our model is based on indirect and autonomous parliamentary control. The establishment and work of the Norwegian Parliamentary Intelligence Oversight Committee—the EOS Committee — is regulated by statutory law. The Committee is "parliamentary" in the sense that its members are appointed (elected) by Parliament, but as an entirely independent body.

The Committee oversees both domestic and foreign Norwegian intelligence services: the Norwegian Police Security Service, the National Intelligence Service, the National Security Authority and the Norwegian Defence Security Department. However, the Committee's oversight area is functionally defined in our law. This means that the Committee also conduct investigations in other parts of the public administration in order to check on their work and cooperation with the organised services, for instance the customs or the immigration authorities.

Another characteristic of the Norwegian model is that the Committee follow the principle of *ex post facto* oversight in order to avoid interference in management, yet we are informed about ongoing investigations.

The objective of the oversight is primarily to ensure the legal protection of the individual: to establish whether anyone is subject to unjust treatment and to prevent this from occurring. The Committee shall also ensure that the services do not make use of more intrusive methods than necessary and to ensure that the services keep their activities within their legal framework, including human rights provisions.

The Committee communicates with Parliament through an annual report. The report is public, and cannot contain classified information. The Committee may nevertheless make Parliament aware of classified information it should know of. If Parliament wants to see this material, it must contact the relevant ministry or service, and there are procedures for the handling of such cases. Additionally, if factors are revealed that should be made known to the Parliament, the Committee may also submit a special report.

2. Oversight in practice — handling of complaints

The Committee mainly performs its oversight in two ways: by means of inspection activities and by dealing with complaints and cases that it raises on its own initiative.

Anyone who believes that the EOS services may have committed injustice against him or her may lodge a complaint to the Committee. The threshold for investigation is quite low, and all complaints that fall under the area of supervision and that show a certain basis will in fact be investigated.

Investigation of complaints are carried out partly in writing, partly orally in the form of inspections and partly by checking archives and registers. If the investigation reveals grounds for criticism, this is indicated in a written statement to the service concerned.

Due to the Committee's strict duty of secrecy, the Committee can only state whether or not the complaint revealed grounds for criticism against the service, and thus cannot confirm — or not confirm — if the complainant has been subject to registration or surveillance. The Committee tries however to have a dialogue with the services regarding this matter.

I will illustrate this by an example from last year :

During the Committee's investigation of a complaint regarding unlawful surveillance lodged against the Police Security Service (PST), it emerged that the PST had retained information a bout the complainant beyond what was necessary for the purpose of the registration. This matter was not part of the original complaint. According to the PST, the retention of the information was caused by a technical system fault.

The PST replied that since the breach in question was not part of the complaint, there should be no reason to inform the complainant about it. The PST submitted the matter to the Ministry. In its reply to the PST, the Ministry stated that, by principle, it agreed with the Committee's assessment with respect to, inter alia, the nature of PST's activities means that individuals in practice have no basis for knowing what surveillance activities they may have been subject to, and therefore cannot be expected to include all such matters in the complaint.

After the Ministry's assessment, the Committee received a proposal from the PST for a more detailed reply to the complainant, in which the PST stated that the extended retention of the information was due to a fault in the system, and that the regrettable fault had been corrected.

3. The Norwegian oversight system — an effective remedy ?

Due to the lack of powers to make legally binding instructions, the question at hand is whether Norway fulfils its obligation to provide its citizens with an effective remedy in case of breach of the European Human Rights Convention (EHRC).

The reason we raise this question is thar the Norwegian oversight system has to date not been subject to scrutiny by the European Court of Human Rights.

The context of secret surveillance demands specific consideration. The European Court of Human Rights has stated that the requirement set forth in the convention's article 13 is not absolute, but "the context in which an alleged violation ... occurs may entail inherent limitations on the conceivable remedy" (cf. Case of Kudla vs. Poland para. 151).

To start with, the Court has in various cases stated that an "objective supervisory machinery may be sufficient as long as the measures remain secret" (cf. Case of Rotaru vs. Romania para. 69). Mostly the committee investigate matters on its own initiative, since the use of measures after all usually remains secret and is thus not known to the individual citizens. If we discover a breach, we contribute to erase illegally stored information and to stop any illegal activity. In this respect it is our opinion that the Norwegian system is in agreement with the Convention.

The Segerstedt-Wiberg judgement (Case of Segerstedt-Wiberg and others vs. Sweden) raised the question about effective remedy in cases where the storage of information had been disclosed to the individuals; in other words the measures had not remained secret. The Court has previously, in the Rotaru-judgement (para. 69), stated that "it is only once the measures have been divulged that legal remedies must become available to the individual". This is a somewhat cryptic statement which may, on the face of it, contradict a certain aspect of the rule of law, namely that a law to be legitimate must be known to the citizen. It is possible that the Court meant that *the use of the measures must be known, not their actual content.*

The protection offered by article 13 is not absolute. The Court has in the Klass judgement (Case of Klass and others vs. Germany para. 69) stated that an effective remedy "must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance".

Having this in mind, I will turn to some of the specific criterions laid down by the Court. First I would like to mention that our Committee is obligated by law to take such steps as are appropriate in relation to a complaint. In accordance with the Committee's practice, virtually all complaints will be subject to investigation. Our Committee comes to a decision with respect to both the facts of the case and the law.

Further, whether the remedy — in this case our Committee — is independent of the body — for example the services — which is accused of committing the breach of the Convention, is of significance when determining its effectiveness. Complaints concerning surveillance will in Norway usually be directed towards The Norwegian Police Security Service. Both by law and in practice the Committee performs investigations and draws conclusions independent of the service, and the ex post facto oversight assures that our assessment is not biased. It is our view that the requirement of independence is fulfilled with respect to the Norwegian system.

If the remedy has limited powers to "grant appropriate relief" it may be rendered ineffective. As mentioned, our Committee lacks the power to make a legally binding decision: the Committee cannot decide that information shall be corrected or erased, or give compensation to individuals who have been subject to illegal surveillance. In our view this is the most problematic aspect when assessing our Committee in the light of the Convention's requirements.

However, we can point out any illegal measures we may discover to the services, and check later whether they have complied with our recommendations — which they do in the great majority of cases, or even in practically all cases. The services must give us an adequate reason or justification if they do not follow our recommendation. In another case involving Sweden, namely the Leander case (Case of Leander vs. Sweden), the Court seems to accept that emphasis can be put on the fact that the remedy's recommendations "command by tradition great respect ... and in practice are usually followed" (cf. para 82).

It can be argued that the lack of legal recourse does not imply that we do not have any powers. The combination of the Committees' two main means of communication — through correspondence which is classified or in our open, unclassified annual report to Parliament — is *in* our view quite effective as the services usually follow the Committees' recommendations. Our unlimited access to records and archives results in recommendations based on all available facts, which in turn strengthens our influence.

To sum up: Our power has never been put to the test by the European Court, and, based on available practice from the Court, it cannot be concluded whether the Norwegian system satisfy the Convention's requirement for an effective remedy in cases where the individual is aware of the measures taken towards him or her.

There is by way of conclusion one indication that our Committee might "pass the test" at least partially so to speak, namely in the dissent by the Norwegian President of the Court Rolv Ryssdal in the Leander case. He argued that "precisely because the inherent secrecy of the control system renders the citizen's right to respect for private life especially vulnerable, it is essential that any complaint alleging violation of that right should be examined by a national authority which is completely independent of the executive and invested with effective power of investigation." (cf. partly dissenting opinion of judge Ryssdal para. 5) In our view, the E05 Committee so far meets his requirements. What is even more important is that it seems that the complainants are satisfied with the Committee's investigation. However, there is probably still room for improvement regardig the amount of information given to the complainant, in order to assure the person concerned that his or hers rights are not infringed.
