Edited by Piotr Mikuli and Grzegorz Kuca

Accountability and the Law

Rights, Authority and Transparency of Public Power

Comparative Constitutional Change

ROUTLEDGE

Accountability and the Law

This book discusses contemporary accountability and transparency mechanisms by presenting a selection of case studies.

The authors deal with various problems connected to controlling public institutions and incumbents' responsibility in state bodies. The work is divided into three parts. Part I: Law examines the institutional and objective approach. Part II: Fairness and Rights considers the subject approach, referring to a recipient of rights. Part III: Authority looks at the functional approach, referring to the executors of law. Providing insights into increasing understanding of various concepts, principles, and institutions characteristic of the modern state, the book makes a valuable contribution to the area of comparative constitutional change.

It will be a valuable resource for academics, researchers, and policy-makers working in the areas of constitutional law and politics.

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Comparative Constitutional Change

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Accountability and the Law

Rights, Authority and Transparency of Public Power

Edited by Piotr Mikuli and Grzegorz Kuca

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6 Transparency and accountability versus secrecy in intelligence operations

An Italian case study*

Arianna Vedaschi

6.1 Introduction

Transparency is a key principle of democracies. A system in which citizens are not informed promptly and correctly about public authorities' decisions and actions cannot be defined as democratic (Bobbio 1984). Besides, the principle of accountability is closely dependent on transparency; only if transparency is ensured can those who committed crimes (or any other kind of unlawful act)—including public officials—be held accountable for their conduct.

The concepts of transparency and accountability, as currently understood, became known through the works of Rousseau, Bentham, and Kant. For Rousseau (1762), transparency had to be considered a way to prevent public servants from committing fraud and other wrongdoings against the state. Along the same line, Bentham (1791) argued (even more openly than Rousseau) that if the Government and its officials were not obliged to be transparent regarding their choices and activities, they would very likely become influenced by external forces—or worse, corrupted—rather than driven by the intent to enhance the public good. Kant (1795) even conceived the idea of transparency (as opposed to secrecy) as one of the main mechanisms to ensure accountability of governmental bodies and to stave off war and anarchy.

These theories contributed to shaping the contemporary concepts of transparency and accountability, to the point that they can be said to be two mutually reinforcing principles (Bobbio 1984). Only together, as two faces of the same coin, can they enable citizens to be *aware* of what public powers do and to *have a voice* about their actions, influencing decision-making and having the opportunity to hold decision makers to account. Due to transparency, public powers become 'visible' (Cassese 2018) to all citizens, emerging from 'obscurity' (Sandulli 2007). At the same time, transparency and accountability are two tools from which public powers themselves draw their legitimisation in society (Habermas 1962). In fact, transparency and accountability allow the public sector to earn and maintain public trust.

However, even a democracy has some grey areas where full transparency cannot be guaranteed, for the sake of competing values or public interests that also deserve protection, of which national security is the most important. Citizens

* The author thanks Chiara Graziani for her research assistance.

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expect their governments to keep them safe from threats to their security; to do so, in some cases, governments may need to hide some information (Schoenfeld 2010). Therefore, to protect *salus rei publicae*, democracies can legitimately resort to secrecy. Nonetheless, to avoid (possible) abuses perpetrated behind the cloak of secrecy, strict guarantees must be provided, despite any exceptional circumstances. In other words, to be consistent with basic democratic values, any legal system must deem transparency as the rule and secrecy (or more generally, lack of transparency) as a limited exception (Vedaschi 2018a).

Intelligence activities exemplify the challenging balance between transparency (and, consequently, accountability) and the need to not reveal classified information, whose disclosure may jeopardise national security.

This chapter discusses the tricky relation between transparency and secrecy, focusing on the Italian intelligence services. The first section takes a diachronic perspective and analyses the evolution of intelligence from ancient times to the contemporary age, particularly dwelling on the history of Italian intelligence. The section explains how intelligence services are organised in Italy, after the entry into force of Law no. 124/2007, which—as modified by subsequent acts—currently regulates the Italian intelligence system. The chapter then addresses the relationship between Italian intelligence agencies and state powers (legislative, executive, and judiciary). Particular attention is paid to the mechanisms (as oversight of state secret privilege) that trigger significant tensions between transparency and accountability on the one hand, and secret agencies' need to work covertly to safeguard national security on the other. The next section examines how the intelligence system and the corresponding oversight mechanisms work in practice when major threats, such as international terrorism, must be tackled. Some brief concluding remarks follow.

6.2 The history of intelligence: a brief overview

The concept of intelligence refers to activities aimed at obtaining useful information to defend state security. Given the fact that such information needs to be shielded, insofar as its disclosure to potential enemies could harm security (Steele 2002, p. 129), intelligence activity has a strong link to secrecy.

There are at least two dimensions of security: internal and external. They are two sides of the same coin (i.e., national security).[1] Ensuring internal security means that threats *within* the state (e.g., domestic terrorism) must be monitored and prevented. In contrast, external security is safeguarded by operations seeking to contain threats from outside (e.g., war, international terrorism).

A brief historical overview is useful to show that protecting state security by obtaining information about (potential) enemies is a key goal that has been

1 Regarding the Italian Constitution, some scholars argue that there are two distinct constitutional foundations to legitimise the action of secret services in internal and external security (Massera 1990, p. 336). According to this theory, Art. 54 of the Italian Constitution, enshrining the duty of Italian citizens to be loyal to the Republic, grounds internal security activities, while Art. 52, the duty to defend the country, is the basis for external action.

pursued by public authorities since ancient times, long before the modern state came into existence (Mosca et al. 2008, p. 20).[2]

6.2.1 Intelligence from early history to the Restoration: a comparative perspective

In the 18th century BC, Hammurabi, the most famous king of the first Babylonian dynasty, used to ask some of his subjects to sneak among the soldiers of his enemies' armies in order to obtain information about their war strategies. Starting from the 16th century BC, the Egyptians took the same approach.[3] These tactics can be called proto-espionage.

The Persians brought in an innovation, in the form of a better organised informative apparatus, to be exploited during hostilities, while the Greeks elaborated on the first theories of military intelligence and tactics.

It is well known that espionage as a pivotal war element was promoted by the Chinese general Sun Tzu, who lived between 600 and 500 BC. Espionage techniques were also widely used by the Carthaginian general Hannibal, who led the First Punic War against the Roman Republic (Sheldon 1986, p. 53). Furthermore, the idea of *salus rei publicae*, which must prevail over any individual needs if endangered by any internal or external threat, owes its existence to Ancient Rome. In his work *De Legibus* (IV), written in 52 BC, Cicero argued that '*salus rei publicae suprema lex esto*'.

Going ahead through history, the Middle Ages did not grant espionage and informative activities the same importance as they had in the past, since conflicts were often characterised by the lack of information about the enemy's strategies (Vedaschi 2007, p. 13).

In the 13th century ad, when Genghis Khan launched the Mongol invasion and conquered many territories of Eurasia, he spread the use of espionage and, at the same time, exploited fake information to gain advantage over his enemies. Genghis Khan and his empire contributed to boosting information-sharing as a tool to build political alliances; he forged a close relationship with the Republic of Venice, and the exchange of information between the two parties was crucial for destroying the military bases of other maritime Republics, particularly Genoa. The Republic of Venice quickly implemented the techniques learned from its relations with the Mongol Empire. In subsequent years, Venice created a proto-intelligence, assigning espionage tasks to several officials. This approach was replicated by other states of the Italian peninsula.

Against this background, intelligence gained momentum, and several works began to discuss this topic, including Machiavelli's *The Art of War* (1519). Consequently, an increasing number of officials became interested in this matter,

2 The formal date for the birth of the modern state is 1648, when the peace of Westphalia put an end to the Thirty Years' War.

3 Even the Holy Bible refers to spies sent by Moses to Canaan in order to assess whether there were potential enemies.

gathering sensitive information for security purposes and improving their expertise in internal and external security. For example, Sir Walsingham, an English diplomat during the reign of Elizabeth I, laid the basis for developing cryptography (Archer 1993, p. 41). Some years later, in France, Cardinal Richelieu contributed to the establishment of a well-functioning spy service (Mosca et al. 2008, p. 21).

In England, the first intelligence department was created in 1653 by Sir Thurloe, Cromwell's secretary of state in the Commonwealth (Peacock 2020, p. 8). To improve the work of this department, which played a key role in discovering plots against Cromwell and his regime, Sir Thurloe hired an expert in cryptology to be in charge of breaking secret codes.[4]

During the Restoration, secret services evolved further, attributed to General von Clausewitz, who considered them an essential part of any war strategy, so the attention was mainly focused on military intelligence.

6.2.2 Intelligence from the 19th century onwards: focus on Italy

Starting from the 19th century, the UK and the US established full-fledged intelligence branches, that is, bodies with their own autonomous standing but whose activities are performed within the institutional framework. These were quickly followed by other countries in the comparative scenario, one of which is Italy, the focus of this chapter.

In Italy, intelligence activities started in the 1850s. At that time, some provisions governed them, but these rules were really fragmented and heterogeneous. Additionally, the regulation of intelligence was often left to secondary sources of law issued by the executive (if not to the orders of the Ministry of Defence).

The first secret agency[5] was created in 1854, when Italy had not been unified yet under the reign of the Savoy dynasty. It was established within the Ministry of Foreign Affairs and had no autonomy from it. A year later, another body was set up, performing informative functions within the military forces.

These bodies were still operational when the First World War broke out in 1914. By the time Italy joined the war in 1915, it was immediately evident that the informative system needed to be strengthened and improved. Therefore, a special investigative body dedicated to counterespionage activities was rapidly put in place.

During the Fascist regime (1922–1943), the military intelligence service was further enhanced. In particular, Servizio Informazioni Militari (SIM, or the Military Information Service) was organised in several departments and special units. SIM was an integrated service operating for land, air, and naval armed forces.

In 1939, at the outbreak of the Second World War, SIM was split into two branches: Servizio Informazioni (SI, or the Information Service), working for the Italian armed forces, and Servizio Informazioni Difensive (SID, or the Defensive

4 They dismantled the Sealed Knot (i.e., a royalist secret society) due to this information.

5 In this chapter, 'agency' and 'service' are used as synonyms to identify bodies dealing with intelligence activity.

Information Service), the informative body of the Italian Social Republic (the so-called Repubblica di Salò).[6]

At the end of the war in 1945, SI was replaced by Servizio Informazioni delle Forze Armate (SIFAR, or the Information Service of the Italian Armed Forces), whereas SID was still operating. Additionally, Servizio Informazioni Operative e Situazioni (SIOS, or the Service for Operative Information and Situations) was created, tasked with acquiring information about foreign countries that were considered potential enemies. They all answered directly to the Capo di Stato Maggiore della Difesa (Chief of Defence), the chief general officer of the Italian armed forces, who reported to the Ministry of Defence.

No amendments to the organisation of the Italian intelligence services were made in the immediate aftermath of 1948, when the Republican Constitution entered into force.[7] Only in 1965 did the Decree of the President of the Republic no. 1477/1965[8] merge SIFAR and SID, under the name of SID, carrying out functions that earlier pertained to both. This new body reported to the minister of defence.

Since SIOS coexisted with the 'new' SID, many of their activities were duplicated, causing uncertainty and inefficiency. A reform in this field, aimed at unifying the existing bodies and simplifying such intricate regulation, emerged as an imperative need. This scenario was exactly the rationale behind the adoption of Law no. 801/1977 by the Italian Parliament. Importantly, this law is the first primary source regulating intelligence services in Italy, overriding previous secondary regulations.

In addition to the above-mentioned necessity to have a comprehensive legislative reform enacted as early as possible, due to the complexity of the earlier intelligence framework, some other reasons, entirely political in nature, led to the enactment of Law no. 801/1977. Specifically, during the 1960s, some Italian intelligence agents became embroiled in the so-called *Solo* plan scandal.[9] At that time, Italy was under

6 Repubblica di Salò was named after the small town (Salò, in Northern Italy) where Benito Mussolini—following the armistice of 8 September 1943—established the headquarters of a Fascist state, comprising some of the Italian territories that were still under the Nazi military occupation. The Italian Social Republic was de facto controlled by the Germans, to the point that it was commonly identified as a 'puppet state'.

7 The only relevant innovation regarding secret services and intelligence matters was that in 1948, Divisione Affari Generali and Riservati (Division for General and Confidential Affairs) was established within the Interior Ministry; in 1974, it was dissolved and replaced by an Anti-Terrorism Inspectorate.

8 In the Italian legal system, although this act is formally issued by the President of the Republic, its substantive content is determined by the executive branch, and within the hierarchy of sources, it has secondary rank (see Art. 87 of the Italian Constitution). Therefore, these changes were substantively enacted by the Government, which, by its own act, decided that secret services answered to one of its ministers.

9 The *Solo* plan refers to a planned military coup, led by Giovanni De Lorenzo, commander-in-chief of the Carabinieri and previously of the SIFAR. It was based on assessments, made by De Lorenzo and other former SIFAR officials, regarding the subversive nature of some political opponents. The attempt failed, and De Lorenzo was immediately removed from his position.

the threat of political terrorism,[10] while on the international scene, the Cold War caused a situation of persisting tension. All these factors—and the related political debate—contributed to pushing the Italian legislature towards a new regulation of intelligence, which tried to take democratic principles, including transparency and accountability, into greater consideration (Anzon 1991, p. 1).

The main feature of Law no. 801/1977 is the key role of the Italian President of the Council of Ministers (PCM).[11] According to Article 1, the PCM was 'responsible overall'[12] for security intelligence policies and had to coordinate the activities. In particular, the 1977 Law established two secret agencies: Servizio per le Informazioni e la Sicurezza Militare (SISMI, or the Service for Military Information and Security)[13] and Servizio per le Informazioni e la Sicurezza Democratica (SISDE, or the Service for Democratic Information and Security).[14] The former dealt with military issues and reported to the minister of defence,[15] while the latter, answering to the interior minister, addressed all those situations that threatened the democratic order of the state and its institutions.[16] In both cases, the minister of defence (with regard to SISMI) and the interior minister (with regard to SISDE) acted on the basis of (detailed) guidelines issued by the PCM (Labriola 1978, p. 46).[17]

Within this framework, the PCM was supported in his or her activities by a body named Comitato Esecutivo per i Servizi di Informazione e di Sicurezza (CESIS, or the Executive Committee for Information and Security Services).[18] It had to provide the PCM with all useful elements to coordinate the secret services, and it was tasked with processing and analysing all the information retrieved by SISMI and SISDE. Additionally, it coordinated the relationship with foreign intelligence agencies. CESIS was chaired by the PCM, who appointed its members.[19]

10 In Italy, the 1970s are known as the 'leaden years'. The country was characterised by outbursts of political violence from both left-wing and right-wing extremist groups.

11 The PCM is the head of the Italian Government. In Italy, the executive power is vested in the PCM and the Council of Ministers (Art. 95, Italian Constitution). In giving the PCM a pivotal role in the intelligence system, Law no. 801/1977 implemented two judgements of the Italian Constitutional Court (nos. 82/1976 and 86/1977), pointing out the PCM's primary responsibility for national security matters, due to the PCM's institutional status.

12 The translation from Italian to English is made by the author.

13 Art. 4 of Law no. 801/1977.

14 Art. 6 of Law no. 801/1977.

15 The minister of defence had to appoint the SISMI director and other high officials.

16 The interior minister was vested with the power to appoint the SISDE director and other high officials. Both the interior minister (for SISDE) and the minister of defence (for SISMI) had to ask for the preventive opinion of the Interministerial Committee for Information and Security.

17 In this regard, this Italian scholar argued that the activity of the two ministers was hierarchically subordinated to the PCM.

18 Art. 3 of Law no. 801/1977.

19 The composition of CESIS could vary, being determined by the PCM. Anyway, pursuant to Art. 3 of Law no. 801/1977, it was mandatory to include the heads of SISMI and SISDE among the members of CESIS.

Another crucial body was Comitato Interministeriale per le Informazioni e la Sicurezza (CIIS, or the Interministerial Committee for Information and Security).[20] Comprising several ministers of the Italian Republic,[21] it had the primary function of counselling the PCM regarding general goals to be pursued through the activity of the intelligence system. Similar to CESIS, CIIS was headed by the PCM. Formally, CESIS and CIIS were separate bodies with unambiguously different tasks, and both answered to the PCM.

Finally, political oversight of Italian intelligence activities was carried out by Comitato Parlamentare di Controllo (COPACO, or the Parliamentary Oversight Committee).[22] It consisted of eight members of the Houses of the Italian Parliament,[23] four deputies and four senators, who elected the chair among themselves. They were appointed by the presidents of the two Houses 'based on proportionality requirements'.[24] COPACO had to monitor the intelligence system and check that all bodies acted in compliance with Law no. 801/1977. Furthermore, it was empowered to request the PCM and CIIS for information about intelligence activities, submit proposals about the forthcoming actions of secret services and make observations on matters dealing with intelligence. However, when COPACO required information from the PCM, the latter, invoking state secrecy, could reject the request, even based on a flimsy explanation of the reasons on which secrecy was grounded.

From a more general perspective, the PCM played a critical role regarding state secrecy. Although the PCM was not the only authority empowered to assert it—since high officials of intelligence agencies could do so as well—he or she was the only one who could confirm the existence of a state secret, in case the privilege was invoked by a public official acting as a defendant or a witness during criminal proceedings.[25] Nonetheless, among other limits, secrecy could never shield acts against the 'constitutional order'.[26] Such a limit would then be reiterated by the current legislation and, as Section 6.5 will show, was at the core of the *Abu Omar* case (Pace 2014, p. 7; Vedaschi 2013a, p. 163).

20 Art. 2 of Law no. 801/1977.

21 These included the minister for foreign affairs, the interior minister, the minister of justice, the minister of defence, and the minister of economics and finance. Other ministers who are not included in this list—as well as the heads of SISMI and SISDE, several public authorities and intelligence experts—could occasionally join CIIS meetings, but they did not enjoy voting rights.

22 Art. 11 of Law no. 801/1977.

23 Italy has a bicameral Parliament, comprising two Houses (the Chamber of Deputies and the Senate of the Republic).

24 Art. 11, para. 2 of Law no. 801/1977. The translation from Italian to English was made by the author.

25 When a witness or a defendant invoked state secrecy to shield any information requested during criminal proceedings, the judge was obliged to suspend the process and ask the PCM whether (or not) he or she confirmed secrecy. The PCM had 60 days to answer.

26 Art. 12 of Law no. 801/1977. The same prohibition was reiterated by Art. 39 of Law no. 124/2004 (see Section 6.4.2). According to some scholars, this is a logical (rather than a legal) limitation to the use of secrecy (e.g., Giupponi 2007, p. 384).

6.3 The current intelligence legal framework

The described legal framework, provided by Law no. 801/1977, was reformed in 2007, when the 1977 legislation was repealed by Law no. 124/2007,[27] addressing intelligence agencies and the use of state secrecy. This law remains in force, as amended in 2012.[28] Specifically, Law no. 133/2012 enhanced the use of technology in information-gathering techniques and, above all, strengthened the oversight of intelligence operations performed by Comitato Parlamentare per la Sicurezza della Repubblica (COPASIR, or the Parliamentary Committee for the Security of the Republic, discussed below), which replaced COPACO (Franchini 2014, p. 1).

The 2007 legislative reform occurred for many reasons (Giupponi and Fabbrini 2010, p. 443). First, a change in the international scenario, after the 9/11 terrorist attacks, progressively entailed the need for a stronger role of secret services and a quicker exchange of secret information (Pisano 2003, p. 263). Second, from 2003 onwards, Italian SISMI officials became involved in the *Abu Omar* case,[29] joining an extraordinary rendition operation coordinated by the US Central Intelligence Agency (CIA); consequently, some judicial investigations were conducted, bringing criminal proceedings concerning unlawful actions allegedly committed by them. These events pushed forward the demands for better oversight and the consequent accountability of secret agencies, as well as an independent review of the use of state secrecy. Third, between 1977 and 2007, the Italian Constitutional Court had addressed the issue of state secrecy in several judgements (Vedaschi 2013b, p. 98), always emphasising the PCM's role in secrecy issues and, more generally, his or her 'leadership' in secret services.[30]

6.3.1 Law no. 124/2007: main features

The 2007 legislative reform enhanced the PCM's status as the head of the Italian intelligence system and created the Comitato Interministeriale per la Sicurezza della Repubblica (CISR, or the Interministerial Committee for the Security of the Republic)[31] to provide advice to other bodies, make proposals, and set priorities in the field of security. Among other relevant novelties, the following can be listed: a set of functional guarantees granted to intelligence agents,[32] the consolidation

27 Indeed, several reform projects had already been presented from 1977 onwards. Among them, it is worth mentioning the one presented in 1993 by the then PCM, Carlo Azeglio Ciampi, to merge the two secret services into one agency divided into two branches (one dealing with internal threats and the other with external threats). This project was dropped because it came at the end of the parliamentary term. From 1993 to 2007, at least 60 further projects were presented, but they never succeeded.

28 See Section 6.4.1.

29 See Section 6.5.2.

30 See Judgement no. 110/1998 and Ord. no. 404/2005.

31 A security committee within the executive branch.

32 This means that they can be exempted from criminal conviction for some unlawful activities committed when performing their duties.

and improvement of oversight mechanisms on intelligence operations, and some procedural rules regarding the use of secrecy in criminal proceedings.

However, the so-called double track system has been preserved, insofar as external and internal intelligence agencies are still separate but with their names changed; they are now called Agenzia Informazioni e Sicurezza Interna (AISI, or the Agency for Internal Information and Security) and Agenzia Informazioni e Sicurezza Esterna (AISE, or the Agency for External Information and Security). While AISI addresses internal threats, AISE is focused on external ones, and Article 7, para. 4 of Law no. 124/2007 prevents them from interfering with each other's activities. Thus, it seems that a merely 'geographical' criterion distinguishes between AISI's and AISE's tasks, yet scholars (e.g., Bonetti 2008, p. 264) note that this territorial differentiation entails functional implications, since AISI is more inclined to address terrorism and domestic criminalities, whereas AISE specialises in military issues. Nevertheless, with the outbreak of international terrorism, along with the evolution of the traditional concept of war (Vedaschi 2007), it is difficult to keep a strict distinction based on the territorial reach of the threat or on its nature.

It is useful to separately examine each of the mentioned new features brought by Law no. 124/2007. The PCM's role was emphasised by the reform. Indisputably, the head of the Italian Government already held a key position within the intelligence system. At any rate, the 2007 law stipulates that the PCM is vested with the 'oversight of and overall responsibility for security intelligence policy in the interests and defence of the Republic and its underlying democratic institutions as established by the Constitution'.[33] Furthermore, the PCM decides on the budget of secret services and issues regulations on matters regarding them. As for state secrecy, the PCM is in charge of applying and confirming the state secret privilege in criminal proceedings, being the only one empowered to do so. The PCM also appoints a number of high officials of the secret services. Notably, the PCM can delegate his or her functions to the delegated authority, whose appointment is not mandatory, but the PCM can only designate ministers without a portfolio[34] or undersecretaries of state.[35] When the PCM appoints a delegated authority,[36] the opinion of the Council of Ministers is not required.[37]

33 Art. 1, para. 1(a) of Law no. 124/2007. The official English translation of Law no. 124/2007 is available at www.sicurezzanazionale.gov.it/sisr.nsf/english/law-no-124-2007.html.

34 In the Italian legal system, they are ministers of the Italian Government with no spending power.

35 In Italy, undersecretaries of state are appointed by a decree of the President of the Republic, on the PCM's proposal, in agreement with the concerned minister.

36 After Law no. 124/2007 took effect, six PCMs decided to appoint delegated authorities, as follows: Silvio Berlusconi appointed Gianni Letta; Mario Monti appointed Gianni De Gennaro; Enrico Letta appointed Marco Minniti, who was appointed again during the administration led by Matteo Renzi; Paolo Gentiloni appointed Luciano Pizzetti; Giuseppe Conte, in both the administrations he led, has decided not to appoint a delegated authority. The current PCM, Mario Draghi, appointed Franco Gabrielli.

37 This provision derogates from the general rules established by Art. 9, para. 2 of Law no. 400/1988.

The PCM (or the delegated authority) is supported by the Dipartimento delle Informazioni per la Sicurezza (DIS, or the Security Intelligence Department), whose head he or she appoints.[38] DIS coordinates the activities of AISE and AISI, reports the information gathered by the two agencies to the PCM, and promotes meetings between AISE and AISI to ensure the exchange of information between them. Hence, DIS has relevant connecting functions, acting as a link between the PCM and secret services on one hand, and between AISE and AISI on the other.

As mentioned, Law no. 124/2007 set up another body, still within the Presidency of the Council of Ministers but outside DIS: CISR, headed by the PCM and comprising the delegated authority (if appointed) and several ministers.[39] CISR performs a number of tasks, including to 'advise, make proposals and take decisions regarding the lines and general goals of security intelligence policy'.[40]

Another relevant new feature of the 2007 legislative reform is embodied by functional guarantees. According to Article 17 of Law no. 124/2007, in some narrowly tailored circumstances, members of AISE and AISI[41] are exempted from judicial investigation and prosecution for their conduct in the performance of their duties when their actions would qualify as crimes pursuant to the law (Pisa 2007, p. 1431). In other words, functional guarantees are very limited exceptions to the general rule of accountability before criminal courts and de facto provide secret agents with partial immunity from ordinary jurisdiction (Praduroux 2015, p. 282).

Functional guarantees aim at balancing two competing interests. On one hand, intelligence services need room to discharge their duties; on the other hand, it must be ensured that intelligence agents carry out their activities within the bounds of the law and are accountable for their actions. To apply functional guarantees, four (cumulative) requirements must be met. First, unlawful acts must have been authorised by the PCM. Importantly, generic authorisations to commit criminal offences do not justify them, since ad hoc authorisation is requested.[42] Second, the commission of crimes must be 'indispensable' to accomplish an operation and proportionate to the goal pursued.[43] Third, the conduct must result from a careful and objective 'weighing of the public and private interest

38 The PCM also has to appoint the heads of AISE and AISI.

39 Specifically, the ministers of foreign affairs, the interior, defence, finance, and economic development.

40 Art. 5, para. 1 of Law no. 124/2007.

41 They can also apply to citizens who are not involved in intelligence agencies if they are cooperating with intelligence agents and their cooperation is essential for attaining the pursued goal.

42 In ordinary circumstances, the authorisation is granted by the PCM or when appointed, by the delegated authority. However, in extraordinary cases of 'absolute urgency', it can be provided by the director of AISE or AISI, but the PCM (or the delegated authority) has to ratify it within 10 days (otherwise, they have to inform the judicial authority without delay). Art. 18, paras. 4–6 of Law no. 124/2007.

43 In other words, there must be no room for any alternative.

involved'. Fourth, criminal acts must 'cause the minimum damage possible to affected interests'.[44]

When all the above-mentioned conditions occur, functional guarantees can be invoked by persons under investigation and defendants at any stage of criminal proceedings, from preliminary investigations up to the trial. The judge (or the public prosecutor) has to ask the PCM whether he or she confirms the existence of an ad hoc authorisation. On one hand, if the PCM confirms that the operation has been authorised and all other requirements are fulfilled, the judicial process (or the investigation) must be dismissed. On the other hand, if the PCM says that there has been no authorisation or that the conduct by the intelligence official(s) has exceeded the limits set by the authorisation, the criminal proceedings go ahead. If the judiciary and the PCM disagree on the authorisation—and hence on the existence of functional guarantees—the Constitutional Court can be called on to adjudicate the dispute,[45] referred to as 'conflict of allocation of powers'.[46]

Nevertheless, Law no. 124/2007 prescribes that functional guarantees cannot be applied to some serious offences (Marenghi et al. 2007, p. 716). These include 'crimes endangering or injuring the life, physical integrity, personal dignity, personal freedom, moral freedom, health or safety of one or more persons';[47] crimes against state institutions or against political rights of citizens or against the administration of justice; and terrorism and Mafia-style crimes. These limits aim to ensure that constitutional principles and rights guarantees are not breached, even where 'special rules' govern a highly sensitive activity (as intelligence is).

Regarding oversight functions, according to Law no. 124/2007, there are two mechanisms.[48] On one hand, political oversight of secret services' activities is handled (at least at the first stage) by COPASIR, which replaced COPACO (as mentioned). On the other hand, the Constitutional Court rules on disputes that may arise between the PCM and the judiciary when secrecy is invoked in criminal proceedings (judicial oversight). It must be borne in mind that no other Italian judge is empowered to scrutinise these matters.

44 Art. 17, para. 6 of Law no. 124/2006.

45 Art. 19, para. 8 of Law no. 124/2007.

46 The tasks of the Constitutional Court are listed by Art. 134 of the Italian Constitution, according to which it can rule on:
'– controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
– conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;
– charges brought against the President of the Republic, according to the provisions of the Constitution' (translation by the Italian Senate).

47 Art. 17, para. 2 of Law no. 124/2007.

48 A couple of scholars (Giupponi and Fabbrini 2010, p. 454) also include internal administrative review as one of the oversight mechanisms. These tasks are carried out by the Inspection Office, set up within DIS. This office has to check that 'security intelligence activities comply with Acts of Parliament and with governmental Regulations, as well as with the directives and Provisions issued by the President of the Council of Ministers' (Art. 4, para. 3(i) of Law no. 124/2007).

Both oversight mechanisms (on the activity of intelligence services and the use of state secrecy in criminal cases) are examined in detail in the next section, as they shed light on the challenging relation between the intelligence system and state powers. Section 6.5 then discusses how intelligence agencies work and state secrecy is resorted to in times of international terrorism.

6.4 The Italian intelligence system and its interactions with state powers

In the current framework, Italian intelligence services interact—in varying degrees and at different stages—with the legislative, executive, and judicial branches. These interactions form the focal point of oversight mechanisms, political and judicial. In particular, political oversight focuses on the relation between intelligence and the legislative power. In contrast, judicial oversight may be triggered when state secrecy is resorted to in criminal proceedings to shield intelligence activities. This perspective shows how secrecy may work as an element of tension between intelligence services and the judiciary on one hand, and the latter and the PCM on the other hand. Acting as the sole reviewer of state secrets, the Constitutional Court[49] is called on to resolve these disputes.

6.4.1 Political oversight of secret services' activities

Political oversight is handled by a parliamentary committee, that is, COPASIR. Pursuant to Article 30 of Law no. 124/2007, this body consists of five deputies and five senators, appointed by the president of each House of Parliament within 20 days of the opening of every Parliament. The committee's composition is proportional to the number of parliamentary groups,[50] so equal representation of both majority and opposition groups should be ensured. It is chaired by a member of the political opposition.[51]

COPASIR's general function is to 'constantly and systematically verify that the Security Intelligence System's activities are carried out in observance both of the Constitution and of the law and in the defence and exclusive interests of the Republic and its institutions'.[52] To discharge its duties, it can resort to several tools. First, it examines the report on the intelligence services' activities that the PCM has to submit every six months. Second, COPASIR has to be informed within 30 days when intelligence agencies have performed operations

49 In the Italian legal system, the Constitutional Court is not part of the judiciary, given its constitutional adjudication functions.

50 In Italy, parliamentary groups can be defined as the transposition of political parties within the Parliament.

51 The president is elected by absolute majority and secret ballot. If no candidate attains the absolute majority at the first ballot, a second will be held between the two candidates who have obtained the highest number of votes. The president of the COPASIR represents the whole body and convenes its meeting.

52 Art. 30 of Law no. 124/2007.

in which unlawful actions have been authorised by the PCM (see Section 6.3.1). The PCM is also obliged to keep COPASIR informed when asked to confirm state secrecy in criminal proceedings, and must also disclose his or her final decision (i.e., whether to confirm secrecy). Third, COPASIR can require copies of sensitive documents from the PCM, who can refuse to disclose them by resorting to state secrecy. However, if COPASIR does not agree on the invocation of secrecy, it can bring the matter before the Houses of Parliament, which may pass a motion of no confidence in the PCM and its Government. At any rate, in the event of a vote of no confidence, classified documents will still not be disclosed ex post. Hence, the PCM remains the sole keeper of state secrecy (Vedaschi 2018a, p. 910), even when he or she and the Government are forced to resign. Fourth, COPASIR can decide to hold hearings, asking the PCM, other ministers, heads of intelligence agencies, and individuals who are not involved in the intelligence system to provide information that might be useful for its oversight.

Along with the listed tools, and closely related to its oversight role, COPASIR has further tasks (i.e., advisory, reporting, and warning functions). As for COPASIR's advisory role, the PCM has to ask for its opinion before adopting any regulations dealing with the organisation of intelligence and prior to appointing the heads of DIS, AISI, and AISE. However, its opinion is not legally binding.

Regarding its reporting duties, COPASIR has to present an annual report to the Houses of Parliament to keep them informed of the activities carried out by the intelligence services in that period. COPASIR also plays a warning role; in performing its other functions, when it discovers irregular conduct by any of the bodies of the intelligence system, it should inform the PCM and the presidents of the Chamber of Deputies and of the Senate. After the reform enacted through Law no. 133/2012, its power in this regard has been strengthened, as it can ask the PCM not only to consider the matter but also to order internal inquiries, whose findings have to be transmitted to COPASIR itself. Finally, it can review the budget related to the operations of the intelligence agencies by accessing the DIS archives.

This overview shows that the primary raison d'être of this parliamentary committee is to create a link between intelligence activities and the Parliament (and ultimately, citizens the Parliament represents). Given that most intelligence activities are secret by nature, it would be unacceptable in a democratic country to carry them out entirely outside of democratic institutions. Therefore, COPASIR's functions are vital to ensure transparency and political accountability. The former is sought by provisions requiring that intelligence operations be disclosed to COPASIR, and even if not in detail, they may be reported to the Parliament. The latter should be guaranteed as COPASIR may refer issues to the Houses of Parliament, which may pass a motion of no confidence. From a political perspective, irregular conduct of intelligence bodies may lead to broken confidence between the Parliament (rather, its majority) and the Government.

At least in theory, COPASIR is essential to keep democracy alive in the sensitive field of intelligence, necessarily characterised by covert operations and confidential (where not classified) information.

6.4.2 Judicial oversight and the use of state secrecy in criminal proceedings

The other oversight mechanism may be performed by the Italian Constitutional Court. According to the Italian Code of Criminal Procedure (c.c.p.)[53] and Law no. 124/2007,[54] public officials[55] taking part in criminal proceedings as defendants or witnesses are obliged not to answer questions by the public prosecutor (during investigations) or by the judge (during the process) about facts or information shielded by state secrecy. Nevertheless, when a defendant or a witness invokes state secret privilege to avoid answering questions, the public prosecutor or the judge (depending on the stage of the criminal proceedings) cannot take this claim for granted. However, they must suspend any activity aimed at obtaining such information and ask the PCM to confirm whether (or not) the matter of concern is really a state secret.

At that point, the situation is in the hands of the PCM (not of the Government as a whole), who has 30 days to examine the issue and decide whether (or not) state secrecy should be confirmed. If the PCM does not give any answer within this period (or provides an explicitly negative answer), the defendant or the witness is obliged to refer the matter to judicial authorities, since no secrecy is considered to exist. Within 30 days, if the PCM confirms the existence of the state secret privilege, the PCM must submit a document to the judge (or the prosecutor), explaining the reasons behind his or her decision, so the public prosecutor or the judge are prevented from obtaining and using, directly or indirectly, the information shielded by the privilege. Hence, there are two alternatives. First, if this material is essential to the criminal investigation (or process), the case must be dismissed 'due to the existence of a state secret'.[56] Second, if there are distinct and autonomous elements that are in no way related to the classified material, the criminal trial can move forward by relying on them.[57]

This overview of the approach to secrecy in the Italian legal system—in particular, during criminal proceedings—highlights the central position of the executive branch, specifically of the PCM, in secrecy matters. However, in some cases, the judge or the prosecutor does not agree with the PCM on the invocation of secrecy; for example, arguing that the PCM has not confirmed secrecy in compliance with the law. In other circumstances, the PCM does not agree with the judge or the prosecutor, claiming that they are using the materials

53 Art. 202.

54 Art. 41.

55 Members of secret agencies qualify as public officials in the meaning of Art. 357 of the Italian Criminal Code (c.c.).

56 Art. 41, para. 3 of Law no. 124/2007.

57 In this regard, the Constitutional Court states that 'the assertion of the state secrecy' by the PCM may not 'forbid prosecutors from investigating crimes relating to the reported crime' but may only 'prevent the prosecutors from acquiring and using any elements or evidence shielded by secrecy'. Nonetheless, in practice, this is often very difficult for judges and prosecutors. See the Constitutional Court judgement of 10 April 1998, no. 110 (translated by the author).

that are supposed to be classified as evidence. The Italian Constitutional Court is called on to decide on these disputes (called conflicts of allocation of powers).[58] Since Law no. 124/2007 states that no state secret can be invoked against the Constitutional Court,[59] this court has a very important role, being the only one empowered to scrutinise the assertion of secrecy from a substantive point of view.

When the Constitutional Court assesses the legitimacy of secrecy invocation, it must take into account the limits of secrecy. The most important one is enshrined in Article 39, para. 11 of Law no. 124/2007. According to this provision, under no circumstance can acts endangering the 'constitutional order' or other serious crimes[60] be concealed by secrecy. In other words, defendants and witnesses cannot invoke state secrecy in criminal proceedings to hide the fact that they committed crimes against the constitutional order. Ideally, if any defendant or witness does so, the PCM should not confirm secrecy; ultimately, should the PCM confirm secrecy to shield these acts, the Constitutional Court should declare his or her assertion unlawful, since Article 39, para. 11 of Law no. 124/2007 is breached.

In cases where the Constitutional Court decides that secrecy has been neither correctly invoked nor confirmed by the PCM, its judgement allows the judge or the prosecutor to use the concerned material as evidence. Therefore, the prosecutor can investigate, and the judge can base his or her decision on this information. In the opposite circumstance—that is, when the Constitutional Court ascertains that secrecy has been correctly resorted to—its word is final. Judges and prosecutors must abstain from any further inquiry or evaluation on that material, and the criminal proceedings can continue only if there are further pieces of evidence.

In this legal framework, the Constitutional Court is vested with significant powers. Although its oversight role is performed only when a conflict of allocation of powers arises between the PCM and the judiciary, it can be considered the 'last bulwark' of transparency and accountability of intelligence services. To what extent this role is effectively performed in practice will be clearer through the analysis in the next section of a recent Italian case dealing with secrecy, intelligence, and national security threats.

6.5 Intelligence agencies 'in action' in times of international terrorism

The examined legal framework, governing intelligence agencies and the use of state secrecy in Italy, needs to be viewed from a practical perspective. How do intelligence services operate in times of international terrorism? Do oversight mechanisms work in practice? Is the tension between secrecy on one hand, and transparency and accountability on the other hand, increased by jihadist terrorism? The *Abu Omar* case, concerning the extraordinary rendition of a suspected

58 See note 46.

59 Art. 40, para. 8.

60 Ravaging (Art. 285 c.c.), Mafia-related crimes (Arts. 416-bis, 413-ter c.c.), and slaughter (Art. 422 c.c.).

terrorist, sheds light on these questions, and its analysis is essential for investigating intelligence services from an 'operative' viewpoint. Before addressing it, some contextual information on the 'new' terrorist threat is needed.

6.5.1 International terrorism and the metamorphosis of security threats

As mentioned, the outbreak of international terrorism in 2001 and attacks perpetrated in Europe in the following years (Madrid in 2004 and London in 2005)[61] were among the factors contributing to the emphasis on the need for a legislative reform of intelligence services. International terrorism since 2001 is different from that which occurred before (Walker 2011, p. 5), but one of the main features of this new phenomenon is its ongoing metamorphosis.

The terrorism that many European countries had already experienced before 2001 (e.g., Rote Armee Fraktion in Germany, political terrorism in Italy, Euskadi Ta Askatasuna in Spain, Irish Republican Army in the UK) had some traits that differentiated it from international terrorism. For example, 'old' terrorism was prevalently domestic because it lacked a transnational reach and it had a political, or at least an ideological, purpose (e.g., independence). In contrast, international terrorism aims at destruction (at least apparently and at the first stage) without a well-defined goal. It can unleash its violence at any moment, in whatever place, against anybody, and without a clear reason.

However, international terrorism itself evolved over the years. In the aftermath of the 9/11 attacks, it was essentially identified with Al-Qaeda (and other related terrorist cells). It worked as an extremist group whose main targets were the US and the Western world in general (Baines and O'Shaughnessy 2016, p. 172). Al-Qaeda primarily involved its members in its activities, and it did not seek to include people who were geographically and culturally distant from Islamic extremism, nor was its goal to build a state (Vedaschi 2020, p. 302). The situation changed in 2014, when Al-Adnani delivered a speech self-proclaiming the Islamic Caliphate a state, led by Al-Baghdadi (Vedaschi 2016a, p. 1). Radicalisation efforts—also exploiting new technologies—increased in order to attract as many people as possible from other countries, religions, and cultures to embrace extremist ideologies. Afterwards, the Islamic State was militarily defeated and lost all of its territories, so its state ambitions were disrupted; nonetheless, recruiting strategies are still being implemented as the terrorists hope to 'come back' by keeping the allegiance of its 'citizens' alive.

Against this background, from 2001 to the present, security threats have been dramatically transformed; consequently, approaches to tackling them have changed too. A number of measures have been enacted, limiting—where not breaching—human rights that constitutions and supranational tools guarantee

61 This 'escalation of violence' continued in the following years in Paris (2015), Berlin (2016), Nice (2016), and Strasbourg (2018), among others, and is still ongoing.

(Roach et al. 2005). Some of them, namely targeted killings and extraordinary renditions, violate the right to life and the right not to be tortured (Vedaschi 2018b, p. 89). The former practice consists of killing suspected terrorists, targeted overseas, usually by means of airstrikes (O'Connell 2012, p. 263). The latter involves the abduction of individuals suspected of having links with terrorism in order to bring them to territories where they are tortured to induce them to reveal useful information to fight terrorism (Satterthwaite 2013, p. 589). In both cases, targets are identified by relying on secret intelligence files, and covert operations are carried out, with the cooperation of the intelligence services of multiple countries.[62]

6.5.2 Extraordinary renditions, state secrecy, and the Italian Constitutional Court

The *Abu Omar* case, involving extraordinary rendition, is well known. Nasr Osama Mustafa Hassan (aka Abu Omar) was an Egyptian-born imam with refugee status in Italy. In 2003, while he was under investigation due to alleged ties to a terrorist cell, he was abducted in Milan by CIA and SISMI agents and rendered to Egypt, where he was detained incommunicado and tortured (Amnesty International 2006).

After an investigation led by the Public Prosecutor of Milan, in 2009, the Tribunal of Milan (Judgement no. 12428/2009) convicted 23 US officials in absentia for Abu Omar's kidnapping (the other three US citizens were acquitted because of diplomatic immunity). Five Italian intelligence agents invoked the state secret privilege, and the PCM confirmed it, so the tribunal was forced to dismiss charges against them (Vedaschi 2013b, p. 95).

A long and complex judiciary path began (Vedaschi 2017, p. 166), in which the PCM's decision to confirm state secrecy—shielding actions of SISMI officers—was repeatedly challenged by Italian judicial and prosecuting authorities at different stages of the criminal proceedings, giving rise to conflicts of allocation of powers before the Constitutional Court.[63] However, the latter always decided in the PCM's favour. As a result, a 'curtain of secrecy'[64] was dropped on the events. Due to the Constitutional Court's approach, even the Court of Cassation (i.e., the court of last instance in the Italian legal system) was forced to acquit Italian agents due to the existence of the state secret (Judgement no. 20447/2014).

The Constitutional Court issued two decisions (Judgements nos. 106/2009 and 24/2014) in which it argued in favour of the head of the executive branch.

62 Both targeted killings and extraordinary renditions are led by the US (Scheppele 2005, p. 285), but other democratic countries cooperate with them.

63 See note 46.

64 This was evocatively stated by the Court of Appeals of Milan, when in 2010 (Judgement no. 3688/2010), after the first ruling of the Constitutional Court, it was forced to dismiss charges against Italian agents, upholding the decision of the Tribunal of Milan.

In its 2009 ruling, the Constitutional Court recalled its previous case law, dating back to the 1970s,[65] where it emphasised the link between state secrecy and *salus rei publicae*. Although the court remarked on its own role as the sole reviewer of state secrecy, it stressed the PCM's significant powers in this domain, paving the way for the following steps of its reasoning, based on a restrictive interpretation of the concept of constitutional order, to allow a wide use of state secrecy. As mentioned, the state secret privilege cannot be claimed on acts against the constitutional order. The Constitutional Court affirmed that this concept identified the acts aimed to 'overthrow the democratic system or the institutions of the Italian Republic' and to dismantle 'the overall democratic structure of the institutions'. Although SISMI officers cooperated with the US in an operation—Abu Omar's rendition—whose outcome was the kidnapping aimed to torture the target, definitely infringing human rights and, ultimately, the fundamental value of human dignity, they did not try to subvert state institutions; therefore, in the court's view, their acts did not breach the constitutional order.

This reading of constitutional order is far too narrow. In the Italian constitutional framework, constitutional order is a wider concept, embracing all those rights and values on which democracy rests. Hence, this concept includes (but is not limited to) the restrictive meaning given by the court, which pertains to the idea of the constitutional system, referring to state institutions and their reciprocal relation (i.e., the form of Government). By conflating the constitutional order with the constitutional system, the court de facto avoided ruling on the issue, showing self-restraint and deference to the PCM.

The arguments in favour of transparency and accountability for human right violations fared no better in 2014, when a further conflict of allocation of powers arose between the PCM and the judiciary. In its Decision no. 24/2014, the Constitutional Court followed three main steps. First, it reiterated its 2009 reasoning, holding that the exclusive power to decide on secrecy issues was vested in the PCM. Second, it addressed a point raised by the Court of Cassation, which had called on the Constitutional Court to resolve the dispute. The Court of Cassation claimed that secrecy had been invoked too late; the defendants resorted to it only after the investigative stage of the criminal proceedings ended. Moreover, the facts were already known by civil society.[66] According to the Constitutional Court, these elements were irrelevant and did not affect the lawfulness of the PCM's decision. Third, the Constitutional Court reacted to a further argument of the Court of Cassation. The latter maintained that the Italian officials' actions had been performed outside of their official capacity; thus, they could not be shielded by the state secret privilege. The Constitutional Court argued that this hypothesis was not realistic because if the agents had acted in their personal

65 Judgements nos. 82/1976 and 86/1977.

66 This was due to reports on extraordinary renditions, widely circulated by institutions and non-governmental organisations (Open Society Foundation 2013; European Parliament 2007).

capacity, the PCM would have taken measures against them, but nothing like that happened (Vedaschi 2013a, p. 163).

With its 2014 judgement, the Constitutional Court put an end to the *Abu Omar* case at the national level.[67] The only form of relief for Abu Omar and his wife came in 2016 from the European Court of Human Rights, which, of course, could only grant them compensation, being unable to effectively punish the Italian agents (Vedaschi 2016b).

By showing self-restraint and limiting its scrutiny to a mere formal and procedural assessment, the Constitutional Court gave up its role as the reviewer of state secrecy, leaving it to the PCM's high-handedness (potentially leading to abuses). This stance might ultimately trigger the erosion of basic principles of democracy, such as transparency and accountability, and lead to unpunished violations of human rights.

Moreover, in *Abu Omar*, political oversight was not initiated, since COPASIR did not bring the matter before the Parliament. Indeed, this oversight mechanism, when triggered, is weak in practice. In fact, in a parliamentary system such as Italy's, there is a political continuum between the majority of the Parliament and the executive branch (and its head), so the former will hardly vote against the latter on national security matters. Additionally, in the unlikely event of a vote of no confidence, the PCM's decision to keep the material classified cannot be changed. Furthermore, national security is a field where political forces (the majority and the opposition) traditionally share the same positions, so the bipartisan composition of COPASIR[68] might not be enough to ensure effective checks.

6.6 Concluding remarks

This chapter has examined Italian intelligence agencies' history, current framework, and practical issues in times of international terrorism. A few relevant points arise from the analysis.

The overview of the historical development of Italian intelligence services shows that the Italian legislature, from the origins of the regulation of intelligence up to 2012 (when the 2007 law was slightly amended), has been striving to enhance transparency and accountability in this sensitive field. This effort stems from at least two features. First, from 1977 onwards, intelligence services and their activities have been regulated by legislative acts, which means that many more guarantees are ensured, compared with secondary sources, which governed these issues before 1977. Second, due to the 2007 legislative reform, at least in principle, oversight is now better framed. In particular, the Constitutional Court is endowed with significant review powers.

However, some flaws persist in this framework. As explained, the political oversight performed by COPASIR is weak in practice. The Constitutional Court,

67 The Court of Cassation was forced to dismiss the case against the Italian agents.
68 See Section 6.4.1.

called on to decide on the use of secrecy in a case of extraordinary rendition, took a deferential approach and blatantly limited its scrutiny to formal and procedural issues.

These drawbacks can hardly be overcome by means of further legislative reforms. On one side, the weaknesses of the COPASIR oversight function depend on the intrinsic nature of the Italian parliamentary system (i.e., the political continuum between the executive branch and the majority of the Parliament) and on political dynamics (i.e., the above-mentioned alignment, at least traditionally, between the majority and the opposition parties on national security matters). On the other side, the Constitutional Court has chosen to embrace a self-restrained attitude, albeit it has highly significant review powers (pursuant to the legal framework). Therefore, two contrasting trends can be detected: the 2007 legislative reform's commitment to better safeguarding of transparency and accountability when intelligence is in action, opposed by the self-restraint of the Constitutional Court when called on to resolve disputes on the assertion of state secret privilege.

Nonetheless, this court's stance must be interpreted in the light of the historical-political context of the world under ongoing terrorist threats. In this scenario, many sensitive interests need protection. Specifically, relations with foreign secret services are crucial, and perhaps the need to preserve them was part of the rationale that led the Constitutional Court to decide in favour of the PCM. However, it must not be forgotten that human dignity, the right to life, and the right not to be tortured stand on the other side. They are at the core of democracy and should thus prevail over national security, which should not overstep transparency and accountability when the above-mentioned values and rights are concerned.

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