

**SOUTH AFRICAN INTELLIGENCE OVERSIGHT AND THE
INTERCEPTION OF COMMUNICATION**

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Abstract

South African Intelligence services have made significant strides in conforming to civilian led control. Albeit, from numerous media reports and articles, and in an official Ministerial Intelligence Review Commission Report (for the period 2006 to 2009), acute problems within the intelligence services and intelligence oversight became evident. The interception of communication by the intelligence services appeared to be unregulated, unlawfully and inconsistent with the constitution. Furthermore, intelligence oversight appeared to be functioning in a reactive manner. This research report explores and explains the role of intelligence oversight in relation to the interception of communication. It concludes by recommending that intelligence oversight be institutionalised under chapter 9 of the constitution.

Declaration

I declare that this report is my own, unaided work. It is being submitted in partial fulfilment of the requirements of the degree of Master of Management (in the field of Public and Development Management) in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

Donovan Farrel Thebus

30 September 2011

Dedication

To my late father John Thebus.....it seems it all came too late for us.
“Blessed are the peacemakers: for they shall be called the children of
God”. (Matthew 5:9)

Acknowledgements

I would like to extend my gratitude to the interviewees who are individuals dedicated to their profession. I would also like to thank my supervisor Prof. Anthoni Van Nieuwkerk for his guidance.

Manenberg for what has past and is yet to come, we will remember that "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by them, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living." (Marx & Engels, 1989 , p. 413)

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Glossary of Terms

ANC	African National Congress
BOSS	Bureau for State Security
DCAF	Democratic Control of Armed Forces
DFID	UK Department of International Development
DIS	Department of Intelligence and Security
DONS	Department of National Security
HUMINT	Human Intelligence
JSCI	Joint Standing Committee on Intelligence
LI	Lawful Interception
MK	Umkhonto We Sizwe
N.S.M.S	National Security Management System
NCC	National Communication Centre
NIA	National Intelligence Agency
NIS	National Intelligence Service
OIGI	Office of the Inspector General for Intelligence
RICA	Regulation of Interception of Communication and Provision of Communication-Related Information
SIGINT	Signal Intelligence
SSC	State Security Council
SSR	Security Sector Reform
TRC	Truth and Reconciliation Commission
UDF	United Democratic Front

CHAPTER ONE: INTRODUCTION

1. Identification of the Research Theme

South African intelligence oversight and its ability to ensure the continuous control and accountability over civilian led intelligence services has been the context within which this study had been conducted. Intelligence oversight refers to “ensuring public accountability for the decisions and actions of security and intelligence agencies” (Leigh, 2005, pp. 5-7). The research theme was chosen in the wake of various media reports between 2006 and 2009, where the perception was created that intelligence oversight bodies poorly regulate the interception of communication, as practiced within South African intelligence (Business Day, 2006; Cape Argus, 2006; Mail and Guardian, 2009).

The interception of communication within the context of this study refers to the listening of voice communication between two parties, commonly known as ‘wiretapping’. However, the evolution in technology has ensured that value added information such as data, faxes and emails is also interceptable (Diffie & Landau, 2007, p. 173). A critical distinction and contestation in the practice of the interception of communication is between lawful interception (LI) based on the acquisition of a warrant and the interception for national security purposes, which is surreptitious and intrusive on people’s privacy. This contestation appears to be evident within the South African context.

Consequently, a 2006 investigation by the Office of the Inspector General for Intelligence (OIGI), found that the National Intelligence Agency conducted unlawful surveillance (interception) on targeted South African citizens, premised on partisan political interest (Office of the Inspector-General of Intelligence, 2006).

This led to a Ministerial Review Commission on Intelligence; declassified in 2008, the report provided a salient introspection into the post-apartheid intelligence 'machination' (Nathan, 2010, p. 195). Furthermore, in 2009, the National Prosecuting Authority (NPA) relinquished corruption charges faced by the current South African President Jacob Zuma, because of the appearance of undue executive influence in his prosecution. The evidence for the withdrawal of the charges was based on intercepted communication (held by state institutions) allegedly obtained by Mr Zuma's legal counsel, (Maughan, 2009; Johwa, 2009). Given South Africa's nascent security and intelligence reformation since 1994, there exists the aberration of a mired post-apartheid cultural restructuring of its intelligence and security services.

The main objective of this study is to discuss and analyse the role played by South African intelligence oversight bodies in the intelligence crisis of 2006 to 2009. A secondary objective of the study is to determine the reason for deficiencies in intelligence oversight (if any), given the problems with the unlawful interception of communication as practised by the intelligence services within South Africa.

2. Literature Survey

The concepts of 'intelligence oversight' and the 'interception of communication', which relates to this study, is a derivative associated with the management and tradecraft of state intelligence organisations, specifically within liberal democracies. In recent years, a large volume of academic literature has appeared on intelligence. The works relevant to this study are those of Lowenthal (2006), Shulsky & Schmitt (2002), Herman (1996), Treverton (2001) and Codevilla, (1992).

The media scandals in the United States and United Kingdom in the 1970's and 1980's, as well as the subsequent political fallout as a result of the intelligence failures and abuses, ensured that a growing body of literature mushroomed around the importance of ensuring intelligence oversight, accountability and control, within these and other democracies (Born, Johnston, & Leigh, 2005, p. 3). Much of the literature focuses on intelligence oversight especially in parliamentary systems of government. Works selectively cited in the study includes that of Born, Johnston, & Leigh (2005), Caparini (2002) and Gill & Phythian (2006). They allude to the contestation between the need for democratic accountability of the security services, balanced with responsibility of security services to ensure the safety of citizens.

Within this nexus, of democratic accountability and the safety of citizens lay the exceptional powers of governments and security services to infringe on people's privacy. The infringement on people's privacy has become possible through 'enhanced network surveillance' technologies, as argued by authors such as Shields (2006), Ritchie (2009), Diffie & Landau (2007) and Fitsanakis (2010). While the concept of privacy is not a key goal of the study, it has critical bearing on the need for regulation on the interception of communication and demand for accountability and control. Ritchie (2009) argues that at the centre of the discourse on "surveillance" is people's requirement for privacy.

As a constitutional state with explicit privacy requirements pertaining to the interception of communication South Africa, is uniquely placed within this discourse. Primary sources on South African intelligence useful to the study includes the Constitution of the Republic of South Africa (Act 108 of 1996), the Intelligence Oversight (Act 40 of 1994), Regulation of Interception of Communication and Provision of Communication Related-Information (the RICA Act 70 of 2002) and the official Ministerial Review Commission on Intelligence Report.

Sources relevant to the study on South Africa's intelligence history, with an element of the post apartheid experiences include that of O'Brien (2011) and Sanders (2006), who provide an introspection of both past and present intelligence practices. Literature on the interception of communication is limited to the discourse of lawful interception (LI) such as the work of Netshitenzhe (2004) where she describes the reasons and implications for legislation of LI. One can ascribe such limitation to the classified nature of interception of communication.

In the broader milieu of intelligence, Nathan (2010) and Seegers (2010) hold the view that South African intelligence has remained politically partisan and lacks leadership. The academic study by Dlomo, (2004) is a first in describing the workings of the Joint Standing Committee on Intelligence (JSCI) and it remains significant, as it provides the views of members of the JSCI on matters related to the strengths and weaknesses of intelligence oversight within the new dispensation.

From interviews conducted with sources that have knowledge of intelligence oversight and interception of communication, it was deduced that no open source study has yet been undertaken in describing intelligence oversight in relation to the interception of communication in South Africa. Consequently, this study has attempted to determine to what extent the interception of communication is under-regulated within the context of South Africa intelligence oversight.

3. Identification and Demarcation of the Research Problem

3.1 Problem Statement

The tension between secrecy and democracy is no more evident, as represented in the intelligence practice of the interception of communication, as it has the potential to subvert people's privacy, freedom and human rights. South Africa as a young liberal democracy is not immune to this potential contagion given its particular historical narrative.

On the 23rd of March 2006, the Inspector-General for Intelligence released a report to the media, based on its investigative findings, pertaining to the surveillance of a South African citizen, Mr S Macozoma, as well as the authenticity of intercepted e-mails relating to Project Avani¹. In the case of Mr Macozoma, the surveillance was found to be "without substance and merit" and that the "intrusive measure had been deployed without proper justification-lacked legitimacy and based on the facts before us, was therefore unlawful" (Office of the Inspector-General of Intelligence, 2006, p. 14).

Another finding relates to the electronic surveillance under Project Avani, which was supposedly "to assess and evaluate the effect that the presidential succession debate was having on the political climate and stability of the country" (Office of the Inspector-General of Intelligence, 2006, p. 16). In both instances, a post-facto investigation was conducted by the Office of the Inspector-General of Intelligence, based on the complaint by Mr Macozoma to the Minister for Intelligence.

¹ Project Avani was initiated by the NIA for the interception of non specific targets in the ANC Presidential succession battle (Office of the Inspector-General of Intelligence, 2006, pp. 15-16)

Against this background the principal research question posed by the study was whether the intelligence oversight bodies in South Africa are suitably structured, mandated and authorised to ensure the continuous control, accountability and monitoring of statutory intelligence services given the problems with the interception of communication.

Secondary questions are:

- If not suitably structured, why and to what extent, should the intelligence oversight regime be improved or changed.
- To what degree is, the interception of communication in South Africa statutorily regulated or unregulated.

3.2 Assumptions

The intelligence oversight regime in South Africa appears to be ineffective in dealing with the exceptional powers such as the interception of communication by the intelligence services and law enforcement agencies. There is the apparition of intelligence reform being incomplete, not because of the absence of oversight bodies, but in their failure to execute their responsibilities in a non-partisan manner. The fault line of the intelligence crisis of 2006 to 2009 is essentially located within the failed reformation of that which remained essentially the remnants of the apartheid intelligence and security culture.

3.3 Demarcation

The study focused on Intelligence Oversight as an important component in a democracy and its response to the interception of communication that led to an intelligence contagion between 2006 and 2009 in South Africa. As the study had been conducted from open sources data, it is restricted in acquiring a comprehensive knowledge base. Classified data or insight derived from classified data does not form part of this study. On the 10th September 2008, the former Minister for Intelligence Mr Ronnie Kasrils

publicly released the Ministerial Review Commission Report on Intelligence, which is significant as it provides information that was previously not in the public domain.

3.4. Methodology

The study employed research methods that are descriptive, analytical and comparative. The study has primarily been of a qualitative nature, as one of its aims was to build a detailed description of social reality, by utilising inductive logic (Strydom & Delport, 2005, p. 75). The qualitative method proceeded from the premise that a good understanding could be garnered from “accumulated knowledge acquired from a single researcher” (Fortune, 1999, p. 94).

In dealing with the study of intelligence oversight and the interception of communication, it instantly conjures up the notion of secrecy. The qualitative approach allowed for an in-depth study of the complexities and processes of intelligence oversight and the related matter of the interception of communication (Marshall, 1999, p. 46). The approach further provided an advantage in that qualitative research follows a nonlinear research path.

Given the research topic, there needed to be flexibility, insofar as the research process unfolds (Neuman, 2006, p. 152). The research design refers to the “strategies of enquiry, or tools that can be used to design qualitative research” (Denzin, 1994, pp. 202-208). The case study method used in many disciplines of which the political science and sociology fields are most common (Yin, 2003).

A case may refer to a “process, activity, event, programme or individual or multiple individuals or a period of time rather than a group of people” (Strydom & Delport, 2005, p. 273). The case study method is relevant to the study because it allows the researcher to analyse intelligence oversight and the approaches to the management of the interception of

communication in different countries. It would have been prudent to include African countries and similar developing democracies as part of the case study. However, the data on the interception of communication and intelligence oversight was not congruent with South Africa's constitutional and statutory development. The case studies were selected, based on liberal democratic systems of government. These countries have specific statutory requirements for the interception of communications and independent intelligence oversight bodies. This has been juxtaposed to South Africa, to establish "causal relations" for its effectiveness or lack thereof in the management of intelligence oversight and problems related to the interception of communication (Neuman, 2006, p. 159).

This study used both primary and secondary sources of data. The primary sources of data were sourced from documents such as statutory legislation, speeches and official public reports, for example the South African Ministerial Review Commission on Intelligence Report (2008). To aid in understanding the nature and processes of South African intelligence, both unstructured and semi-structured, one to one interviews were conducted. This enabled the researcher to determine the interviewees' insight, opinions, understanding and clarification on intelligence oversight and the interception of communication.

5. Structure of the Research

The structure of the research is as follows:

Chapter 1 : Introduction
This chapter outlines the context, research problem, assumptions, methodology and structure of the study
Chapter 2 : The conceptualisation of Intelligence, Oversight and the Interception of Communication
This chapter deals with the authoritative description of concepts relevant to the study. These include but are not limited to the spectrum of intelligence, communication interception and intelligence oversight. The chapter comparatively analyse the intelligence oversight regime of liberal democratic parliamentary countries that includes the United Kingdom, United States of America.
Chapter 3 : South African Intelligence – First as a Tragedy , Then as a Farce
Chapter three provides a historical overview of South African intelligence under apartheid. This includes a historical overview of the ANC security intelligence department in exile. Of importance is the security culture of opposing forces that evolved out of these respective historical narratives.
Chapter 4 : Democratic South Africa – An Intelligence Picture Emerges
This chapter deals with the statutory reforms of the post-apartheid intelligence dispensation. In particular, the different challenges for intelligence oversight within South Africa.
Chapter 5 : Evaluation
The final chapter comprises a summary as well as an evaluation of the assumptions formulated in the introductory chapter as well as recommendations and conclusion.

CHAPTER TWO: CONCEPTUALISING INTELLIGENCE, OVERSIGHT AND INTERCEPTION OF COMMUNICATION

1. Introduction

This chapter explores and explains the concepts relevant to intelligence oversight and the interception of communication. The oversight of intelligence is a means to foster accountability, transparency and openness of government and its policies within the context of a liberal democracy. The preceding discussion will however also look at the processes of intelligence, such as the interception of communication.

As a practitioner in the trade of intelligence, one often finds it difficult to provide an easy description of intelligence, especially to those outside of the milieu of the trade. Consequently, the concept conjures the notion of secrecy, the more one attempts to demystify the subject matter

2. The Concept and Purpose of Intelligence, Interception of Communication and Oversight

2.1 A Brief History of Intelligence

It is only the enlightened ruler and the wise general who will use the highest intelligence of the army for purposes of spying, and thereby they achieve great results.-Sun Tzu (George & Kline, 2006, p. 1)

One of the earliest written descriptions in the last 2,300 years on intelligence and military strategy has been articulated in the writings of Sun Tzu's *The Art of War*, which has found particular relevance in modern business strategy and practices (Warner, 2006, p. 484).

The use of spies predates the existence of the nation state and locates the espionage tradecraft in ancient history, from the biblical figure of Moses to Kautilya and his book *Arthasastra in India* (Warner, 2006, p. 485).

Herman (1996, p. 9) argues that intelligence as “permanent institutions” find their historical location in the middle of the nineteenth century. During this time intelligence became organised within “governmental institutions” for the purpose of decision-making and policy-making”. This, to a large degree, negated the seventeenth century’s evolution of diplomacy as a medium of gathering information through government “networks of overseas correspondence, with various degrees of clandestinely” (Herman, 1996, p. 12). British Intelligence is most probable the bulwark of Western intelligence, established in October 1909, as a single intelligence service with both domestic and foreign security and intelligence responsibility, in response to German espionage activities preceding World War I (Andrew, 2009, p. 3).

The Western model of intelligence as characterised by Herman (2000, p. 290) were “institution(s) with some commitment to telling truth to power, and some separation from the power itself”. Andrew (2000, p. 18) dispels the notion of “symmetry between the roles of the intelligence in East and West” and points out that Soviet Intelligence (KGB), was much ingrained in the state apparatus. Hence, he states that Western historians have particularly been oblivious to the role of the KGB and its predecessors in the foreign policy of the Soviet Union.

Within the domestic discourse of the Soviet Union and its satellite states, internal surveillance and monitoring was a main feature of the authoritarian regime in suppressing dissent and subversion of citizens (Andrew, 2000, p. 18). Soviet Intelligence history came into being through the October Revolution of 1917, removing the monarchy of Tsar Nicholas II and replacing it with the first Communist state. This resulted in a civil war, with significant intervention from foreign powers in Europe to rid Russia of

the communists, led by the Bolsheviks (West & Tsarev, 1998, p. 1). In December 1918, the Communist Party established the Vecheka², the organisation preceding the KGB. They were tasked with the responsibility “to deal with counter-revolutionary activities and espionage within the army and navy”, this was later extended to “running agent networks abroad” (West & Tsarev, 1998, p. 2). The intrinsic and symbiotic relationship between totalitarian states and its intelligence services played a critical role in propping-up the authoritarian regime in maintaining power and control.

A probable measure of Western intelligence strength in the post Cold War era, has been the availability of “oral and archival sources on intelligence activities” that has allowed for the shaping of an open intelligence discourse from both an academic and public point of view. Although one should concede that, the debate is largely dominated by the Anglo-Saxon nexus on intelligence (Goscha, 2007, pp. 100-101).

Lowenthal (2006, pp. 1-2) makes the distinction between intelligence and information, “information is anything that can be known.....intelligence refers to information that meets the stated or understood needs of policy makers and has been collected, refined, and narrowed to meet those needs”. Shulsky and Schmitt (2002, p. 1) are more direct in associating intelligence with that of a government, by stating that “intelligence refers to information relevant to a government’s formulation and implementation of policy to further its national security interest....”

Intelligence is closely associated with the concept of security, itself contested within the post-Cold War era. The concept of intelligence as an element of statecraft is therefore more of an “umbrella term”. It includes the: “...planning and collection to analysis and dissemination conducted in

² Vecheka was name of the first Soviet Political Secret Police (Leggett, 1981, p. 1)

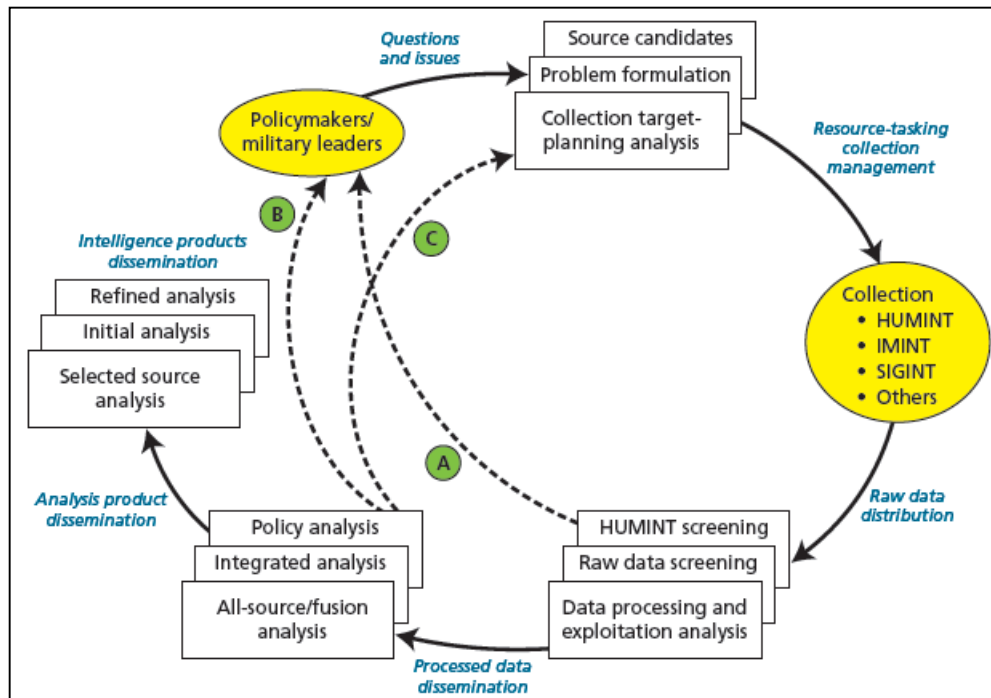
secret, aimed at manipulating or enhancing relative security by providing forewarning of threats or potential threats in a manner that allows for the timely implementation of a preventative policy or strategy, including, where deemed desirable, covert activities” (Gill & Phythian, 2006, p. 7)

On his part, Kent’s (1965, p. xxiii) definitive description of intelligence in relation to Lowenthal, Shulsky and Schmitt, and Gill and Phythian provides for a more introspective approach. Kent’s description indicates that the information required is specific, that the organisation requiring such information to produce new knowledge has a specific character. However, a limitation is the absence of a more grounded theory of intelligence that would enable less hitherto analysis (Gill & Phythian, *Intelligence in an Insecure World*, 2006, p. 6).

2.2. Intelligence as a Process

Within any business organisation, there are processes and normative standards that are required to produce a certain output or outcome that will make the business either profitable or relevant within its given operating environment. For an intelligence organisation, it is no different. Herman (1996, p. 39) states that the intelligence process is both “sequential and inter-agency”. For Lowenthal (2006, p. 40) there are five steps in the making of intelligence, these refer to establishing an intelligence requirement, collection, processing, analyses and dissemination of the acquired information.

Figure 1 : Intelligence Cycle and Process



Source: (Treverton & Gabbard, 2008, p. 4)

Like Lowenthal, Herman argues that these steps or stages are by no means cast in stone, but provide a “basic framework” for the provision of an intelligence product to the policy-maker (Herman, 1996, p. 39). It is the role of the policy makers to establish the intelligence requirements for collection. Collection is the most resource intensive part of acquiring an ultimate intelligence product and derives “directly from the intelligence requirements” (Lowenthal, 2006, p. 44). Two subsets of the methodology used for the collection of intelligence, is human intelligence (HUMINT) and signal intelligence (SIGINT).

Shulsky and Schmitt (2002, p. 11) distinguish between the different roles of HUMINT collection. The first is being an intelligence officer of a targeting intelligence agency and a source that provides the information to the intelligence agency. The sources are either witting, or unwitting in providing information to an intelligence organisation.

Much discussion has been waged on the importance of HUMINT versus technical collection within the post-modern era, the events of September 11, 2001 stands testament (Gill & Phythian, 2006, p. 77). The absence of human sources “means relying on observation, with all its invitation of self-deception” (Codevilla, 1992, p. 14). Gill and Phythian (2006, pp. 68-71) posits that HUMINT has become less reliable and in some instances has resorted to “second-hand intelligence” from either reliable or unreliable partners. For both academic and practitioners (Codevilla, Lowenthal Gill & Phythian, and Herman) alike, HUMINT has limitations, as it requires proximity to sources and represents greater risk to both intelligence officers and their sources.

The high degree of certainty of SIGINT has made it the choice of collection in the modern age (Herman, 1996, p. 66). One reason for this is the emotive nature of policy makers in relying on newer methods and equipment to meet policy objectives (Lowenthal, 2006, p. 45). Hence, the belief that intercepted communication is more critical than the traditional tradecraft of espionage and “equivalent not of one but of a thousand spies, all ideally placed, all secure, and all reporting instantaneously” (Codevilla, 1992, p. 15).

2.3. Interception of Communication

In the modern age of complex telecommunications, intelligence services and law enforcement agencies have benefited by establishing broader information collections platforms to defend their nation’s security interest (Fitsanakis, 2010, p. 404). The Australian Telecommunications (Interception and Access) Act of 1979 defines interception as

“...the listening to or recording, by any means, such a communication in its passage over that telecommunication system without the knowledge of the person making the communication” (Electronic Frontiers Australia, 2006)

Within the spectrum of the interception of communication, two distinctions ought to be made, that of interception for national security purposes and that which is used for the investigation of crime.

2.3.1 Interception for National Security Purposes

The end of the Cold War provided both positive and negative outcomes for the security of a global polity. The end of hostilities between East and West from a military and intelligence point of view allowed for a radical rethink of geo-political notion of security (Treverton G. F., 2001, p. 6). Walt (1991, p. 212) defines security as “the study of the threat, use, and control of military force...” He implies that in order to ensure the balance of power between peace and anarchy the concept of security has delineated to threats vested with the military.

Buzan (1991, p. 19-20) argued for the broadening of the security agenda, stating that “the security of human collectivises is affected by factors in five major sectors: military, political, economic, societal and environmental”. The five major sectors should not be seen as mutually exclusive from each other, but each one is dependent on the other. The intelligence requirement to sustain Buzan (1991, p. 19-20) methodology extends the need for intelligence agencies to combat ‘threat and vulnerabilities’.

Consequently, within this broad context of national security and given the threat and vulnerabilities in a post 11 September 2001 security environment, the traditional separation between law enforcement and national intelligence became more intimate (Treverton G. F., 2001, p. 167; Ritchie, 2009, p. 25). This intimacy could be qualified in both its cooperation with each other and its methods employed.

The effect of this blurred statutory law separation after 9/11 is evident in the workings of the National Security Agency (NSA) responsible for interception of communication outside of the United States (US). The NSA was unilaterally authorised as part of the 'war on terror' by the White House to conduct the interception of most or all US domestic communication without the acquisition of a warrant (Diffie & Landau, 2007, p. 301).

Consequently, Fitsanakis (2010, p. 422) argues that security legislation used during time of war is continually active in shaping state-sponsored communication interception in countries such as the US and the UK. This coupled with the "element of secrecy", he states represents a serious dilemma for "academic research on the practice, as well as government attitude on the interception of communication". Furthermore Diffie and Landau (2007, p. 313) assert that societal control is essentially the "control of communication" this is evident in the practice of lawful interception.

2.3.2 Lawful Interception

Since the early 'construction of the telegraph network', the common denominator in the interception of communication has been the advancement in communication technology, (Fitsanakis, 2010, p. 404; Headrick, 1991, p. 52). The use of such technology in the investigation of crime by law enforcement became an integral part of police operations in the early part of the 19th century (Diffie & Landau, 2007, pp. 133-134).

Wiretapping was the earliest form of interception by law enforcement. This entailed the use of junction boxes placed into telephone closets and on poles in order to effect the interception, making the interception much more conspicuous for observation by maintenance technicians and possible exposure to the public (Diffie & Landau, 2007, p. 132). The objective of such interception was for the acquisition of evidence, to be used in possible prosecution.

[illegible]

The practice of wiretapping or lawful interception (in its current form) requires the provisioning of a warrant from a Judge in order to effect an interception. In terms of the South African Regulation of Interception of Communication and Provision of Communication-Related Information Act 70 of 2002 (RICA) an application for an interception warrant may be issued by a Judge if there are reasonable grounds to believe that:

- i. a serious offence has been or is being or will probably be committed;
- ii. the gathering of information concerning an actual threat to the public health or safety, national security or compelling national economic interest of the Republic is necessary.
- iii. the gathering of information concerning a potential threat to the public health or safety or national security of the Republic is necessary. (Republic of South Africa, 2002)

The South Africa framework for LI standardised the domestic interception regime into a centralised state bureaucratic system that enables judicial authorisation and oversight over interception warrants (Netshitenzhe, 2004, p. 7). This is concurrent with Western liberal democracies where LI is highly regulated with built-in checks and balances against abuse (Branch, 2003 , p. 2). From a legislative perspective, South African LI omits the complex subject of national security warrants.

The Australian LI legislation makes clear provision for its intelligence services to conduct “B-Party”³ interception within a specific period as well as access to stored data held by the telecommunications services provider(s) (Electronic Frontiers Australia, 2006). Fitsanakis (2010, p. 405) argues that the hitherto “informal relationship” between law enforcement and intelligence agencies and telecommunications service providers led itself open to abuse of citizens privacy based on the snowballing effect of suspects or targets outside of the requirements of the initial warrant.

Branch (2003 , p. 2) states that there is a separation of authority between the application for the warrant and the actual triggering of the communications interception which can only be done by the telecommunication service provider. Furthermore, there is a concern that

³ B-party interception is interception of a service that is likely to be used by another (a non suspect) person to communicate with the suspect(Electronic Frontiers Australia, 2006)

these service providers have facilitated the “unwarranted abuse” of their client’s privacy with the intelligence and law enforcement agencies due to a “complex system of institutional arrangements” (Fitsanakis, 2010, p. 423).

2.3.3 Implications of “State-Sponsored Interception”

State-sponsored interception of communication has within the context of the age of digital communication become more complex, firstly because of the privatisation of telecommunication service providers and the arrival of new vendors and suppliers of communication (Landau, 2011, p. 2). Secondly, the use of digital technologies by intelligence services, law enforcement agencies and citizens, has led to the increase in the passing of legislation to protect people’s privacy. While, on the other hand, data storage requirements for the scrutiny by security and law enforcement agencies has become a common practice (Ritchie, 2009, p. 26).

Shields (2006, p. 22) argues that the policy maker and security services will continue to increase their demand for greater network surveillance as digital technology evolves and the threat level increases. However, he questions, if the rationale for more network surveillance is suffice, given the “tough trade-offs” that will have to be made. These “trade-offs” essentially involve a compromise in privacy, a core value in a liberal democracy and catalyst for “pressure groups and legislation, which reacts to technologies of surveillance and their implementations” (Diffie & Landau, 2007, p. 141; Ritchie, 2009, p. 26).

Ritchie (2009, p. 26-33) points out that the term privacy is both ambiguous and “fraught with conceptual complexities”. A definitive description within the liberal tradition argues that privacy entails the “right to autonomy”, that extends to the control over ones personal information and to who has access to such information (Diffie & Landau, 2007, p. 142). Ritchie (2009, p. 28) argues that communication service providers acquire considerable

amounts of data from customers, in order to provide value added services such as “itemised billing”, hence it is more of a question of who acquires my personal data and for what use, rather than the data itself.

Whilst in South Africa there are no mandatory data protection laws the Constitution (Act No 108 of 1996) states in its Bill of Rights that everyone has the right to privacy, which includes the right not to have:

- a) their person or home searched;
- b) their property searched
- c) their possessions seized; or
- d) the privacy of their communications infringed.

(Republic of South Africa, 1996)

While privacy could be contextualised as a human right that provides citizen's with the recourse of the law, if transgressed. Ritchie (2009, p. 29-30) however questions this argument in relation to the interception of communication, which is normally an undetected and intrusive form of surveillance. In this instance, people whom suspect or are aware that their communication were intercepted will have a “sense of violation” of their privacy, even though they are not quite certain what this violation means. (Ritchie, 2009, p. 30).

The contestation between individual freedom and securing the state has strong roots in the liberal tradition, although technology has tilted the scale towards the state through its access to large databases of private information of individuals (Diffie & Landau, 2007, p. 169). The former United States attorney general Janet Reno stated the following:

Technology permits us wonderful new opportunities, but it can also be misused just as creatively to threaten public safety and national security...Whether it benefits us or injures us depends almost entirely on the fingers on the keyboard (Reno, 1996).

In a post-September 11 security environment the need for greater circumspection in the escalation of state-sponsored communications interception has become more pertinent, as this escalation of surveillance does not lead to an increase in accountability (Shields, 2006, p. 22).

3. Intelligence Oversight

The drive towards accountability (oversight) of the security and intelligence sector in liberal democracy finds its' genesis in mid-1970, proving to be the key catalyst for security and intelligence reform across the world (Leigh, 2005, p. 3). Furthermore, he argues that apart from "scandal" security reform was influenced by constitutional reforms (e.g. South Africa and Canada), the subordination of the military to civilian rule (e.g. Argentina and South Korea) and legal challenges (e.g. United Kingdom and Netherlands) (Leigh, 2005, p. 4).

The Church Committee in the United States, established in 1975, represents one of the most extensive reviews of government's intelligence activities (Schwarz Jr., 2007, p. 270; Leigh, 2005, p. 3). It focused on "the extent to which agencies actions had been illegal, improper or unethical as well as the nature and extent of executive branch oversight and the need for improvement of congressional oversight" (Schwarz Jr., 2007, p. 270). This trend has continued within the current era throughout established and newly formed democracies. For Leigh (2005, pp. 5-7)

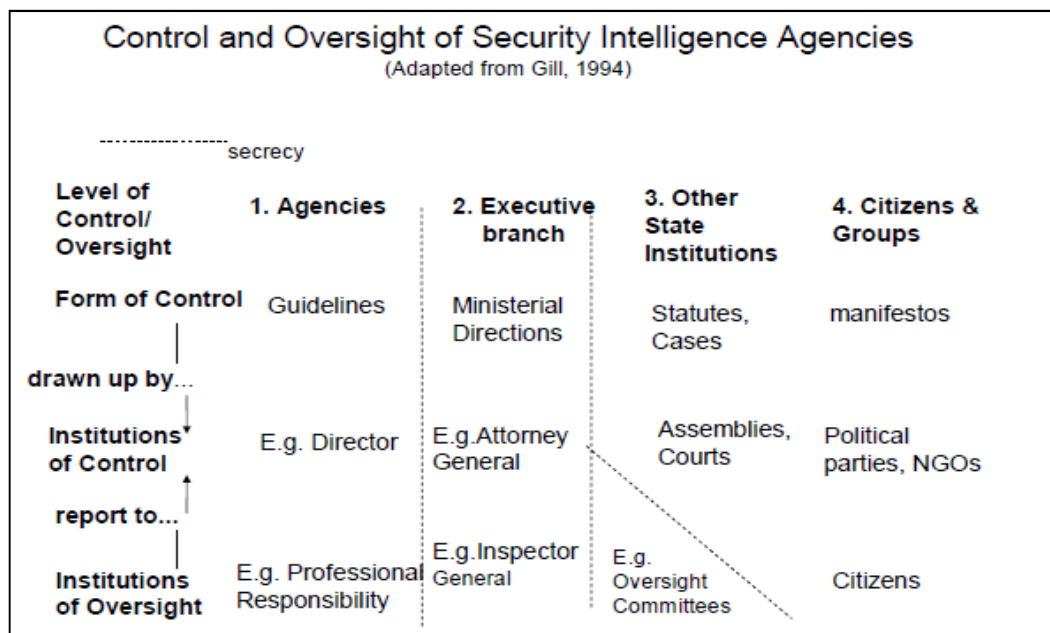
Intelligence oversight is a means of ensuring public accountability for the decisions and actions of security and intelligence agencies, through the establishment of mechanisms to prevent political abuse while providing for effective governance of the agencies; upholding the rule of law; and ensuring the proportionate use of exceptional powers in order to protect civil rights.

Gill and Phythian (2006, p. 151) states that oversight involves the “superintendence” of the activities of intelligence organisations and is not concerned with its “day to day” management but rather with their compliance to policies stated in their legal mandate.

3.1 Forms of Intelligence Oversight

The collapse of the bi-polar conflict of the Cold War and the terror attacks of September 11 2001 has ushered in the ascendancy of liberal democratic governance practices and values throughout most of the world. The evolution of states and their particular structures of ‘democratic control’ are symptomatic of a countries culture, history and politics (DCAF Intelligence Working Group, 2003, p. 36). Hence, the different forms or models exist for ensuring intelligence accountability and not a single rulebook (Gill, 2003, p. 4).

Figure 3: Forms of Intelligence Control and Oversight



Source: (Gill, 2003, p. 5)

The form of oversight is influenced by the specific organ of state that is involved in ensuring accountability, either the executive or the legislature (Leigh, 2005, p. 7). Although, it is argued that the particular form of oversight in a democracy is not that important, instead “direct and most relevant “democratic control of intelligence services and their activities is exercised by the executive (government), legislative (parliament) and judicial entities” (DCAF Intelligence Working Group, 2003, p. 36).

The role of the executive is important in ensuring control of the intelligence services that include tasking, steering and monitoring of their activities (Born & Leigh, 2007, p. 6). Control in its parochial form means adherence to specific practices and in its broadest sense inculcating the necessary conditions to ensure the attainment of established principles and “performance” (DCAF Intelligence Working Group, 2003). However, Caparini (2002, p. 14) believes that control could further mean political control.

The demarcation of effective executive control should not be confused with the hands on management of the services as this could essentially strangle external ministerial control and weaken intelligence oversight (Born & Leigh, 2007, p. 7). Within a democracy, the scrutiny of executive action lies primarily with elected public officials in parliament or the legislature (DCAF Intelligence Working Group, 2003). The involvement of elected officials provides legitimacy and subordinate intelligence oversight to democratic accountability (Born & Leigh, 2007, p. 10). For Muller-Willie (2006, p. 101) accountability involves a principal-agent relationship as it “describes the quality of being liable to give account of and answer for the discharge of duties or conduct”.

Two distinct rudiments is served by parliamentary intelligence oversight. Firstly, it ensures the prudential use of public funds and the manner in which those funds are used. Secondly, it ensures policy alignment to statutes and monitor its execution (DCAF Intelligence Working Group,

2003). The oversight of intelligence services by elected officials could be overwhelming given the inherent requirements of secrecy, hence the normative requirement of special or select committees to oversee this specialised field (Born & Leigh, 2007, p. 10).

Figure 4: Types of parliamentary intelligence oversight committees in democracies

Type of intelligence oversight committee	Examples of use
No parliamentary intelligence oversight committee	France (until June 2007)
No parliamentary intelligence oversight committee but Parliamentary intelligence oversight committee in combination of experts to ensure oversight of the intelligence services; members are appointed by the parliament; committee reports to the parliament	Norway
Parliamentary intelligence oversight committee and the parliament also has at its disposal an independent committee of experts, appointed by the parliament, which reports to the parliament government and intelligence services with an independent committee of experts, appointed by the government and reporting to the government	Belgium
Parliamentary intelligence oversight committee with expert staff	Netherlands
Not one but several parliamentary intelligence oversight committees for domestic, foreign and military intelligence	Germany, USA, Romania
Ad hoc investigative committees to investigate the role of the parliament has at its disposal an independent committee	German Parliament, Committee of Inquiry

Source: (Born & Leigh, 2007, p. 11)

The use of special or select committees comes with its own set of obstacles (Caparini, 2002, p. 13). Born and Leigh, (2007, p. 10) argues that the mandate of parliamentary intelligence oversight committees should include oversight over both policy and operational matters. This could provide an important linkage between the public and the workings of intelligence services, through the provision of annual reports even though reports would be censored due to secrecy constraints (see dotted lines in fig.3) (DCAF Intelligence Working Group, 2003, p. 49). The requirement of secrecy could raise the spectre of distrust and suspicion by 'ordinary'

members of parliament on the workings of the oversight committee (Born & Leigh, 2007, p. 11).

Furthermore, “political difference” may play an important role in the uncritical acceptance of ministerial reports and the information provided by the intelligence services, indicating “regulatory capture”⁴ of the oversight committee (Caparini, 2002, p. 14). Moreover, it is argued that “regulatory capture” could be as a result of the secret reports provided to the oversight committee increasing the risk of the committee engrossing themselves in the “power structure” of the agencies rather than being the “external critics” (Caparini, 2002, p. 14).

Another salient division of the state, which is responsible for broader constitutional oversight, is the judiciary. Born and Leigh (2007, p. 14) argue that it is a misnomer that the judiciary on the whole is involved in intelligence oversight. The efficacy of judicial oversight can be measured, firstly, in their autonomy from the other branches of government and secondly, whether they succumb to the interference or influence by the executive (Caparini, 2002, p. 14).

In 2009, the National Prosecuting Authority (NPA) relinquished corruption charges faced by the current South African President Jacob Zuma, because of the appearance of undue executive influence in the prosecution, of then Mr Zuma. The evidence for the withdrawal of the charges was based on intercepted communication allegedly obtained by Mr Zuma’s legal counsel, held by state institutions (Maughan, 2009; Johwa, 2009). Consequently, it is argued that the judicial oversight is most suitable where there is a dispute of individual’s rights, as in the case of the use of intrusive measures such as surveillance, wiretaps and spying on

⁴ “regulatory capture’ may occur when members of an oversight body identify too closely with the institutional objectives and problems of the agency being reviewed, losing the independent and critical perspective necessary to effective oversight ”(Caparini, 2002, p. 14)

political or religious activity (Born & Leigh, 2007, p. 14; Caparini, 2002, p. 15). Born and Leigh (2007, p. 14) states that there remains residual risk to the judiciary, especially where judges require security vetting from institutions that seek for example interception warrants which in turn could lead to the questioning of the impartiality of the judiciary to court proceedings. The courts are thus “inherently flawed” to ensure oversight for, or the “redress against security and intelligence agencies”, hence there is a need for an alternative remedy for individuals seeking justice due to the arbitrary actions of the intelligence services (Born & Leigh, 2007, p. 17).

Another dynamic for ensuring intelligence oversight is the role of civil society, human rights groups and the media in keeping government accountable for its actions (Gill & Phythian, 2006, pp. 168-169). However, Caparini, (2002, p. 16) argues that this is problematic as it comes into direct conflict with the “nation state” security interest and often leads to governments ignoring the criticism and demands. Born and Leigh (2007, p. 17) posits the notion of a “complaint system”, this they believe could strengthen accountability by pointing out administrative errors and setting measures for redress. In South Africa, the Inspector General for Intelligence was established to handle complaints from the public and the services and report to parliament. A weakness in this form of oversight is that it operates within the realm of secrecy and has a responsibility to account to the executive rather than providing “public assurance about accountability” (Born & Leigh, 2007, p. 19).

Within a transitional democracy such as South Africa, where security sector reform is essential to ensuring that intelligence services remain accountable to its civilian controllers, the proximity of the Inspector-General for Intelligence to the executive could prove problematic.

3.2 International Experiences in Intelligence Oversight

Arguably, the literature and conceptualisation of intelligence oversight and specifically intelligence, has a clear Anglo-Saxon essence to it. Intelligence oversight methodologies are influenced by the political contagion and media scandals of the 1970s and 1980s in among others, the United States and the United Kingdom. They consequently introduced the most aggressive and punitive oversight programmes at the time (Born & Johnson, 2005, p. 229).

They further draw a distinction between presidential and parliamentary oversight mechanisms with the common denominator being that these countries' political systems are democracies, as in the cases of the United States and the United Kingdom (UK). The United States' presidential system stands out, as to a large degree intelligence oversight is equally distributed between the two houses of Congress (House and Senate). The legislative branches of government, not only approves senior intelligence appointees, but preside over the efficacy, propriety and financial appropriation of agencies (Lowenthal, 2000; Born & Johnson, 2005).

Within the parliamentary system of the UK, intelligence oversight ultimately rests with the Prime Minister who has, direct access to the heads of services even though they have individual political heads to report to in their routine administrative duties (Leigh, 2003). For a political system without a written constitution, the introduction of the Security Services Act of 1989 and subsequent legislation in the form of the Intelligence Services Act of 1994 and the Regulation of Investigatory Powers Act of 2000 (RIPA) introduced the functions of a Commissioner with the responsibility of reviewing and reporting on the issuing of ministerial warrants.

Of particular importance is the introduction of an Interception Commissioner who reviews the issue and authorisation of warrants for the interception of mail and telecommunications (Leigh, 2005, pp. 79-82). The establishment of statutory law to regulate domestic intelligence and SIGINT in the UK was significant. The establishment of an Investigatory Powers Tribunal to investigate complaints from the public on abuses by security services or the possible interception of communication provided for public accountability. However, as Hannah, O'Brien, and Rathmell (2005, p. 17) points out, the oversight mechanism is fragmented in that there is a lack of external oversight functions.

They argue further that the Intelligence and Security Committee established by statute is not a parliamentary committee with the responsibility of accounting for financial appropriation. It has no power of authorisation and reports to the Prime Minister instead of reporting to parliament. By no means has the UK, as an established democracy, been alone in getting it right. Born and Leigh (2007, p. 5-6) argue that transitional or post-conflict democracies face serious challenges in reforming once repressive security structures to comply with democratic norms. They point to ignorance and inexperience as key challenges in making the transition possible.

4. Intelligence and Security Sector Reform

Wulf (2004, p. 3) argues that in defining SSR there was an initial bias towards the military as the object of the transformation. He however reiterates that security holds much broader connotations as in the case of "the security of every single human being" and hence puts forward a definition of SSR as defined by both the United Kingdom's Department for International Development (DFID):

"Security sector reform is the transformation of the security system which includes all actors their roles, responsibilities and

actions, so that it is managed and operated in a manner that is more consistent with democratic norms and sound principles of good governance, and thus contributes to a well functioning security framework. Responsible and accountable security forces reduce the risk of conflict, provide security for citizens and create the right environment for sustainable development. The overall objective of security sector reform is to contribute to a secure environment that is conducive to development". (DFID, 2002, p. 30)

Why caution the security-is-development nexus now? Seegers (2010, p. 278) is explicit in her argument that within the context of South African intelligence "there may be more continuity with the past than we would like to admit". The Democratic Control of Armed Forces (DCAF) Intelligence Working Group (2003, p. 62) states that:

"... the danger in countries of transition is that new intelligence services are perceived likely to remain essentially the same as the old. The result being that official denials of any connection between the new service and their infamous predecessor are for the most part unable to dispel the suspicion that they are splinter organizations of the former, resuscitated under new names and with functions that are more specialized"

Cawthra and Luckham (2003, p. 309) states that it is not obvious in the case of South Africa whether the "institutional culture and pathologies generated by the authoritarian and violent struggles have been entirely eradicated" through the process of security reform.

Furthermore, it is argued that the innate behaviour of new democracies are to employ intelligence "experts" from the former regime, this is "deleterious to the professionalization" of the new intelligence services. There should be a balance between intelligence, as the protector of

democracy, and intelligence as the guardian of the democratic order. It should never become the “centurion” of the democracy, as this role should rather be exercised by a healthy political opposition (Pale, 2010).

Matei and Bruneau, (2011, p. 607) states that there are several factors that cause the security reform within the intelligence services to stall in new democracies. These include the following salient factors:

the complexity of reform itself; legacies of the authoritarian regime impeding the democratic reform process; resistance and reluctance to reform by the intelligence services; lack of expertise by civilians; lack of support for intelligence and intelligence culture among intelligence outsiders; corruption and organized crime; and, at least hypothetically, the threat of overall democratic regress.

The DCAF Intelligence Working Group (2003) Paper reasons that there is a similar contradiction faced by intelligence services in transitional states:

“...there is high level of politicization and a desire within these services to maintain autonomy and a nationalistic policy, while relations with civil society remain hesitant, or very particular.

The lack of a modern doctrine, a code of conduct, standards and operational efficiency, and are, moreover, compromised by rivalries between the different organizations, and generally much too wasteful and expensive. The political culture of intelligence organizations is inward looking and emphasising ‘need-to-know’.

All too often, there is a lack of professionalism, little strategic capability and analytic capacity in, and largely insufficient coordination between the different intelligence services of the country” (DCAF Intelligence Working Group, 2003, pp. 60-62).

In the case of the interception of communication, it is posited that intelligence oversight control measures and monitoring procedures as a rule should be communicated effectively in what is realistic and constitutional. This will determine the boundaries and limitations in ensuring that all personnel proceed from the same understanding (Brile, 2010).

For example, there should be more transparency in the applications for warrants, which allows for the interception of communication. This information could be communicated to the public in the form of statistics. For example, statistics of how many warrants were approved, how many denied. This could give an indication of the degree of circumspection used by the judiciary in the issuing of warrants for the lawful interception of communication (Africa D. , 2010)

5. Conclusion

The equilibrium between democratic practices and secret intelligence collection remains a vexing problem for most democratically constituted intelligence services around the world (DCAF Intelligence Working Group, 2003, p. 75). The practice of intelligence oversight is but one of the mechanisms that can ensure a healthy equilibrium for open, transparent and accountable democratic practices.

However, it should be added that there exists a number of inherent factors that could arrest the deepening of intelligence oversight. These include the over reliance on secrecy and invoking national security to avoid upholding open and transparent government (DCAF Intelligence Working Group, 2003).

The rapid growth in technology has helped people to exercise their human rights and freedoms, by using social media, on their computers, cell phones etc. However, we take cognisance that technology has also created new threats to a global polity. This has led to an increased number of state-sponsored surveillance and cooperation, with limited accountability that threatens people's privacy.

What also emerges from the literature is a salient conceptualisation of the intelligence and intelligence oversight language in a more Anglo-Saxon narrative, which could represent a risk of analogous duplication in emerging democracies, where security sector reform will remain a central feature of their polity. Cawthra and Luckham (2003, p. 307) argues that SSR has a greater opportunity for "success where the state and security institutions have remained intact" regardless of the "complexity of the transition", as was the case in the nascent transitional democracy in South Africa.

CHAPTER THREE: SA INTELLIGENCE - FIRST AS TRAGEDY THEN AS FARCE

1. Introduction

In this chapter, the researcher presents an overview of the history of security and intelligence in South Africa, focussing on the amorphous apartheid security system and that of the ANC and its security and intelligence apparatus. By not focussing on the two main security protagonists within the pre-apartheid South African conflict, the current intelligence inertia cannot be contextualised properly

Most commentators, scholars, practitioners and specifically those in the security studies milieu, agree that the political transition in South Africa was a success. It should also be noted that the apartheid bureaucracy remained intact as a condition of the political settlement under the 'sunset-clauses' (Africa S. , 2009, p. 63). In so doing the bureaucratic functions, culture and institutional knowledge remained largely unchanged subject to a 'transformation' process.

This chapter will focus on the various formations and structures of the apartheid intelligence services. It will also provide an analogous account of the African National Congress Department of Intelligence and Security, formed in exile in 1969 (Sanders, 2006, pp. 110-113).

2. The New Republic: An Intelligence Picture Emerges

The appointment of Hendrik van den Bergh as head Bureau for State Security (BOSS) at its official formation in May 1969 signalled a change in the modus operandi of the Republican Intelligence. It also brought together the intrinsic relationship and confluence of Afrikaner nationalism, culture, intelligence and security (O'Brien K. A., 2011, p. 25).

Van den Bergh enjoyed a close relationship with Prime Minister John Vorster, who were detained together by the British in the Koffiefontein camp during the Second World War. One can infer that as an Afrikaner nationalist Van den Bergh had a general dislike for the British (Sanders, 2006, pp. 34-35).

With the Nationalist Party coming to power in 1948, intelligence liaison with the British became difficult. As Percy Sillitoe reported to the British Prime Minister Atlee, he objected to the formation of a security service after his visit to South Africa in 1949:

“The improper uses to which a Security Service might be put to use by the Nationalist might well include its employment against the Parliamentary Opposition and against those members of the British Community out of sympathy with the Nationalist political programme. It would certainly be used to keep down the black races.”

(Andrew, 2009, p. 444)

The formation of BOSS signalled a radical change in the longstanding relationship with colonial intelligence. This relationship was characterised by the British Empire playing the leading role in intelligence within the colonies and that of the Commonwealth (O'Brien K. A., 2011, p. 26). The BOSS bureaucracy derived its membership from the South African Police (SAP) and especially those from the security police, many of them handpicked by Van den Bergh himself (Sanders, 2006, p. 48).

The ‘Sharpeville massacre’ on the 21st of March 1960, where sixty-seven black protesters were killed by the SAP, marked not only the start of an active national liberation struggle by disenfranchised South Africans. It also signalled the start by the liberation movements, such as the ANC and Pan African National Congress (PAC) to take up arms against the apartheid government (TRC Report, 1998).

The notion of a revolutionary climate in South Africa, coupled with inherited belief of a communist plot '*rooi gevaar*' spurred Prime Minister John Vorster to introduce new security legislation, which provided the police with draconian power to curtail the viewed revolutionary threat (Seegers, 1996, p. 125). On this, Joe Slovo of the South African Communist Party (SACP) commented that "however firm the old type of policeman were, they were not torturers" (Ellis, 1998, p. 266).

One of the first commissions to investigate the fractured nature of security and intelligence service was the Potgieter Commission Report of 1970 (Hamann, 2001, p. 8). It noted the animosity between the military intelligence and BOSS over their respective operational mandates in the late 1960's, which the report also attempted to define (O'Brien K. A., 2011, p. 28). Moreover, military intelligence lost a considerable part of its budget to BOSS. Significant though, was the recommendation that a central intelligence organisation ought to be created, and was staffed by professionals with the necessary knowledge in the political, economic and other apposite fields (Sanders, 2006, p. 41).

The report was well received by Van den Bergh, as it provided him with greater intelligence coverage for his scope of work (Hamann, 2001, p. 8). His close relationship with Vorster provided the first foretaste of what a bureaucracy can achieve, in exerting personal influence on the policy maker. Vorster, however, was well aware of the shortcomings of the security police to provide strategic analysis and forecasting, given their disability, by essentially being the police.

General Hein du Toit Deputy Chief of Military Intelligence in 1969, stated that he regarded Van den Bergh as essentially a "pathological liar" (Hamann, 2001, p. 7). He viewed the Potgieter Commission as flawed, as its outcome was always predetermined to give Van den Bergh overall intelligence control, relegating the military to function externally in the event of war.

They were essentially police officers, running informers. Magnus Malan commented further that before South Africa became a Republic they were always told what to do by the British and afterwards lacked the “leadership needed to define the objectives and say where we should go” (Hamann, 2001, pp. 7-9).

The notoriety of BOSS to the public was evident in the way it portrayed the arrest of Bram Fischer, a leading member of the SACP, in ensnaring detained members of the SACP that Fischer had colluded with BOSS hence they provided incriminating statements against Fischer and others (Winter, 1981, pp. 101-102). In his exposé Gordon Winter, who defected to London and, was a BOSS agent, claimed that an assassination group known as the Z Squad was operating within BOSS (Winter, 1981, p. 312).

Subsequently, at the Truth and Reconciliation Commission hearings, two applications for amnesty were received which clearly points to ‘targeted assassinations during the BOSS existence (<http://www.justice.gov.za>, 1998). Hendrik van den Bergh noted that he had considerable operational capacity of which murder was not above it, emphasising that

“I am able with my department to do the impossible ... I can today tell you here, not for your records, but I can tell you, I have enough men to commit murder if I tell them, kill ...”

(O'Brien K. A., 2011, p. 38)

In Great Britain, in 1975, Labour Prime Minister Harold Wilson became suspicious that BOSS and internal elements in MI5, which is responsible for security services, were plotting to remove him as Prime Minister. He eventually resigned (Sanders, 2006, p. 61).

Whilst no formal report ever proved his suspicion, that BOSS was indeed involved, it lends further credence to the BOSS notoriety and intelligence reach. This comes in the light of Gordon Winter's exposé of BOSS and his presence in Britain at the time.

In trying to improve and communicate South Africa's apartheid policies during the period 1972 to 1978, Prime Minister Vorster agreed to the Department of Information (Sanders, 2006, p. 94). Its role was to counter the negative publicity around the world and in South Africa, with the explicit assistance of BOSS.

This intelligence-led propaganda machine eventually funded the Citizen newspaper through the miss-appropriation of public funds (Winter, 1981, p. 332). This ultimately led to the resignation and retirement of Vorster and Hendrik van den Bergh and the demise of BOSS, which reformulated itself as the Department of National Security (DONS) (Winter, 1981, p. 341; Sanders, 2006, p. 120).

In the early 1970s, resistance to apartheid reached a lull period, insofar as internal stability was concerned, inside South Africa and hence to a certain extent proved the effectiveness of the BOSS to manipulate internal security. In Southern Africa, though the interstate conflict continued unabated and more and more of South Africa's own domestic political discourse would become tide to the contagion in the region.

This confidence in the domestic security environment was not to last, as on the 16th of June 1976, student protests erupted in Soweto against the introduction of Afrikaans in African schools. The response of the government indicates that they were completely unprepared, as, what become a nationwide protest left almost 600 people dead, many as a result of the use of live ammunition on protesters (Sanders, 2006, p. 79).

Consequently, large numbers of youth fled the country to join the ANC and its military wing Umkhonto we Sizwe (MK). South African intelligence argued at the time, that the uprising was not a direct consequence of ANC instigation as it took them 'completely by surprise' (Hamann, 2001, p. 47).

With the belief that the Cold War was right on the doorstep of Southern Africa, the Apartheid government increasingly saw its stability or the instability of the Frontline States (Mozambique, Rhodesia (Zimbabwe) Angola) as an important strategic objective. Thus attempted, to ensure not only the longevity of white minority rule, but also presented itself as key ally in fighting the communist 'onslaught' in the region.

The election of P.W. Botha as Prime Minister of South Africa, in September 1978 saw the decline of BOSS, as a quasi-civilian intelligence service and its' renaming to DONS (Department of National Security), second was the rise of the military and military intelligence, from its obscurity under Hendrik van den Bergh (O'Brien K. A., 2011, p. 66). As Sanders (2006, p. 122) alludes to a Johannesburg Sunday Times article on 22 October 1978, which reported:

"After years...in the cold, the... [MID] has been restored to its 'rightful place' in the South African intelligence community ...[The MID]'s star has risen with Mr. P.W. Botha. The point was emphasised this week when the Chief of Defence Force, General Magnus Malan, was included in the negotiations with the Western Big Five over South West Africa. In the days,...van den Bergh was always at Mr. Vorster's elbow... Mr. Botha has consolidated his own control of the intelligence services by appointing Mr. Kobie Coetzee MP...as Deputy Defence Minister and of National Security. This brings both DONS and [MID] under Mr. Coetzee's direct control, and under the control of Mr. Botha himself."

A White Paper on Defence in 1979 points to the strategic shift in thinking of the white minority government by arguing that:

The process of ensuring and maintaining the sovereignty of a state's authority in a conflict situation has, through the evolution of warfare, shifted from purely military to an integrated national action... the resolution of conflict in the times in which we now live demands interdepartmental and co-ordinated actions in all fields – military, psychological, economic, political, sociological, technological, diplomatic, ideological and cultural, etc.

(Hamann, 2001, p. 57)

For the first time since becoming a Republic in 1961, the formation of a State Security Council (SSC) in 1972 and the creation of BOSS was a clear 'administrative ideology' conceptualised (Seegers, 1991, p. 254). The recognition that South Africa faced a 'total onslaught' inside the country and in Southern Africa spawned the demand for a 'total strategy' to counter the liberation and communist led revolutionary onslaught.

This total onslaught was headed by the SSC and the military, which partially because of its obscurity under Vorster were seen as most competent, professional and trained in countering and analysing the threat (Seegers, 1991, p. 255). In August 1979, the National Security Management System (N.S.M.S.), was institutionalised as the overarching structure of the 'total strategy' (O'Brien K. , 2001, pp. 111-112).

3. National Security Management System

The N.S.M.S. responsibility was to ensure the interdepartmental co-ordination of all government business on a day-to-day basis, that would increase government's effectiveness in managing an overall security posture (Seegers, 1991, p. 256; O'Brien K. A., 2011, p. 30). With its formation, a misnomer was created, believing that the civil service and the bureaucracy inflamed the security situation in the country.

Firstly, they were incapable of linking their inefficiency to deliver goods and services to township residence. This contributed to insecurity in the state and had the resulting effect of violence. Secondly, it was the military's inherent belief, that it was more effective in getting things done, as it had a clear view of the threat (Seegers, 1991, pp. 256-258).

At the beginning of the 1980's internal violence became more intense with the introduction of the tricameral Parliament and the constitutional reformation of 1983. This was encouraged by the fall of Rhodesia and the launch of the United Democratic Front (UDF). The UDF was a conglomerate of close to 600-affiliated organisations and fuelled the spectre of insurrection inside South Africa (Swilling, 1986, p. 1).

From this perspective, one should view the regimenting of the security forces. This included all branches of intelligence and specialised military units, with no or little distinction between foreign or domestic activities in combating the threat (O'Brien K. A., 2011, pp. 86-92). The 1980s provided the greatest cohesion between security services, especially between the military and the security branch that had primary responsibility for domestic stability.

The ANC became greatly energised after 1976, with a large influx of youth for military training and internal operations that included the attack on the South African Coal, Oil and Gas Corporation (SASOL), with an estimated damage of between 'R 6 million to R 70 million' (Sanders, 2006, p. 159).

Hamann (2001, pp. 123-124) reports that the South African military were acutely aware that the ANC in 1978, sent a high profile study group to Vietnam amongst others, on its return it formulated the 'The Four Pillars of Revolution- a Strategy for People's War'. The aim was to strengthening the underground structures of the ANC; mass action; armed offensive and international isolation of the Apartheid regime.

The independence of Zimbabwe, Angola and the coming to power of the Popular Movement for the Liberation of Angola (MPLA) provided the ANC with training facilities and closer geographical distance to their operational area in South Africa. This period also saw the South African military occupying vast areas inside Angola in support operations of National Union for the Total Independence of Angola (Unita) and as well as attacks against South West African People's Organisation (SWAPO).

A meeting chaired by P.W. Botha referred to as the 'Simonstad raad' or Simonstown Council in September 1979 was attended by security chiefs and bureaucratic planners (O'Brien K. A., 2011, p. 72). They set out to demarcate the intelligence responsibilities. The National Intelligence Service (NIS), the successor to DONS was to provide a national intelligence brief, with no offensive capability (O'Brien K. A., 2011, pp. 72-73).

The Security Branch's, main objective was to counter the ANC and its political affiliates, the newly named National Intelligence Service was given the responsibility for political and economic intelligence, foreign covert collection, and counter-espionage and intelligence evaluation (Ntsebeza & Bell, 2001, p. 67; Sanders, 2006, p. 150).

General Constand Viljoen commented on this period by saying that "up until 1985 we had very little trouble with the ANC". He continued in saying that the people's war strategy through "infiltrating the townships and revolutionising the youth" presented the security forces with a dilemma of how to deal with an asymmetrical warfare situation (Hamann, 2001, p. 127). The deputy head of ANC intelligence Joe Gqabi, was assassinated in Harare on 31 July 1981 by members of military intelligence, which alludes to their response in fighting soldiers without uniforms and the change in strategy in fighting the ANC (Sanders, 2006, p. 152).

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graph TD
    SP[State President] --> NSM[NSM]
    NSM --> JMC[JMCCs (All levels)]
    SP --> SADF[SADF]
    SP --> NIS[NIS]
    SP --> SSC[SSC]
    SP --> SAP[SAP]

    SADF --> SF[Special Forces]
    SADF --> MI[Military Intelligence]

    SF --> R1[1 Recce]
    SF --> R2[2 Recce]
    SF --> R3[3 R/Barnacle/CCB]
    R3 --> BU[Badger Unit]
    R3 --> F1[Fronts]
    SF --> R4[4 Recce]
    SF --> R5[5 Recce]
    SF --> R6[6 Recce]
    SF --> R7[SWA Recce Regiment]
    SF --> R8[TBC Special Forces]
    SF --> R9[32 Bn]

    MI --> DCC[DCC]
    DCC --> F2[Fronts]
    MI --> IO[Intelligence Operations]
    IO --> DST1[DST 1]
    IO --> DST2[DST 2]
    MI --> AI[Army Intelligence]
    AI --> H[Hammer]
    MI --> MedI[Medical Intelligence]
    MedI --> M7[7th Medical]
    M7 --> F3[Fronts]

    SSC --> WC[Working Committee]
    WC --> SSCSec[SSC Secretariat]
    WC --> KIK[KIK]
    SSCSec --> NIB[NIB]
    SSCSec --> StratKom[StratKom]
    StratKom --> GS[Gesveistaf]
    StratKom --> StratPlan[StratPlan]
    KIK --> Trowits[Trowits]

    SAP --> CSAP[Commissioner, SAP]
    CSAP --> SB[Security Branch]
    SB --> SWAPOL[SWAPOL]
    SWAPOL --> Koevoet[Koevoet]
    SB --> C[C Section]
    C --> C1[C1]
    C --> C2[C2]
    C --> C4[C4 (Trowits)]
    C --> O[Others]
    SB --> G[G Section]
    G --> Longreach[Longreach]
    G --> FC[Front Companies]
  
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Source: (O'Brien K. , 2001, p. 115)

The State Security Council (SSC) would consist of a number of sub branches namely Strategic Planning Branch, National Intelligence Interpretation Branch and the Stratkom branch. Of importance was the Counter Revolutionary Task Team (Trewits) which was responsible for intelligence co-ordination and target identification, although the possibility to build complete silos was restricted given the central co-ordination of operations and information, the security services generally had a free hand in combating the 'total onslaught' (O'Brien K. , 2001, pp. 117-119).

The NIS submission to the Truth and Reconciliation Commission (TRC) on the activities of Trewits as a liaison group of tactical intelligence was rejected, as it finds that:

“...the standpoint of former NIS Director General Niel Barnard and other former NIS operatives who have denied involvement

and /or knowledge that intelligence gathered was put to operational uses that included elimination. In evidence before the Commission, Dr. Barnard conceded that information was provided both to the Security Branch and the SADF but claimed that 'The Defence Force was not under my responsibility neither [was] the police. What the police or army did with the information I do not know.' The Commission finds his viewpoint that the manner in which intelligence supplied by his agency was used, was not his concern, unacceptable..."

(TRC Report, 1998, p. 287)

4. Mbokondo: The Stone that Grinds

The first formal formation of an organised security apparatus appears to be as a result of the 1969 Morogoro consultative conference in Tanzania, where Moses Mabhida, was appointed as head of the Department of Intelligence and Security (DIS) (Ellis, 1994, p. 287; O'Brien K. A., 2011, p. 77). The DIS focus area was twofold, to serve as internal police force for the ANC and for intelligence collection and analysis.

The ANC in exile presented itself as a viable government in waiting, to replace the nationalist government in South Africa. The 1976 Soweto uprising and the mass influx of youth into MK military camps presented a challenge to both the infrastructure and leadership of the ANC, as for almost two decades it remained paralysed in responding militarily to the security forces in South Africa (Ellis, 1994, p. 284).

In the mid 1970s, Joe Slovo on behalf of the South African Communist Party, requested training from the East German Ministry for State Security in the fields of counterintelligence, counterespionage and elements of "psychological interrogation" as a resulting effect of the ANC being infiltrated with "South African government agents" (Wolf, 1997, pp. 279-281).

These structures were created in a rather “ad hoc fashion” given the level of training of ANC personnel (O'Brien K. A., 2011, p. 77). A decade later in 1979 the DIS was renamed to the National Action Tribunal (NAT) with the belief that Western intelligence and apartheid spies were actively seeking to penetrate the ANC to change its ideology. NAT was organised into three components, Intelligence, Security and Processing of Information, with clear delineation for military intelligence, counter intelligence as well as correctional services. (Sanders, 2006, pp. 283-285).

In its submission to the Truth and Reconciliation Commission (TRC) the ANC, referring to the period between 1977 and 1979 alludes to an increase in apartheid state agents within its ranks, which they suspect were responsible for the poisoning of 500 trainees at the Catengue facility in September 1977 and the subsequent aerial bombardment of the same facility in 1979. In the ensuing years and receiving a steady flux of recruits, the ANC reported that agent provocateurs were responsible for agitating against the leadership of the organisation, which led to the subsequent execution of those whom were found to be guilty in 1981 (TRC Report, 1996, p. 354).

However, the executions did not stem the tide of what amounted to large-scale dissatisfaction of members in the military camps. In 1984 a mutiny in the Pango military camp, forced the organisation to launch several commissions of enquiry (Ellis, 1994, p. 280). In retrospect this amounted to systemic abuse of members, at the hands of Intelligence and Security personnel which the ANC described in its TRC submission in August 1996 as “a law unto themselves” operating in an environment with no accountability or control (TRC Report, 1996, p. 352)

Central to the demand of the mutineers, was that the ANC call a consultative conference to discuss the conditions within the camps, which one prisoner from the Quadro detention described as ‘when you get in there forget human rights’. Although the ANC dispelled the notion that the

Kabwe Conference in June 1985, was a result of the mutineer's demands but rather a reflection of the conditions inside South Africa (Trewhela, 2009, p. 29).

Consequently, O.R. Tambo announced the restructuring of the ANC security and intelligence apparatus known then as NAT and renaming it to its original name DIS. At the head of DIS in 1987, was Joe Nhlanhla the future Minister of Intelligence in the post apartheid government (Sanders, 2006, p. 293).

The exile history of the ANC intelligence and security illuminates a picture of an organisation that was intrinsically inward looking. In its submission to the TRC, it argued "security and intelligence structures of the ANC were established within the context of its adoption of underground forms of struggle" (TRC Report, 1997). New recruits of 1976 found this to be archaic although at the same time this may have led to the intelligence and security innovation of Operational Vula. Conceived to locate senior ANC personnel inside South Africa and to strengthening the underground and became what O'Brien (2011, p. 174) states as the first phase of guerrilla war.

Of Vula's intelligence work, which is available and known as Operation Bible, to hunt for apartheid agents within the senior ranks of the ANC, as Yunus Shaik head of the MJK unit and responsible for the operations reiterated that "...the ANC was riddled with infiltration and so was the entire democratic movement" (O'Malley P. , 2010). In so doing, the ANC came into its own, by running counter intelligence and counter espionage operations within South Africa (O'Brien K. A., 2011, pp. 174-175). Albeit in a very parochial manner, as the apartheid security system was an amorphous web. Ironically, Mo Shaik, who was part of the East German trained ANC intelligence members and is the current Director General of the South African Secret Service, headed Vula's intelligence section (O'Malley P. , 2007, p. 244). Operation Vula appeared to be coming too

late for the ANC to push for an insurrection given the cracks appearing in the apartheid regime and the real prospect of negotiations (O'Brien K. A., 2011, p. 174).

5. Conclusion

The end of Republican intelligence provided the nationalist government in South Africa with the prospect for building an intelligence and security architecture that would serve their intrinsic ideology of apartheid. An architecture that started with the quasi-civilian service of BOSS and based on its proximity to Prime Minister BJ Vorster attempted to usurp the role of military intelligence. The rise of the military with the demise BJ Vorster and Hendrik van den Berg increased the complexity of the architecture as the domestic political discourse and regional conflict became inherently linked.

In allowing the military to be the lead 'agency' in the 'total onslaught' it essentially removed the prospect of turf wars. Throughout the evolution of the Apartheid security and intelligence architecture, there appears to be a symbiotic relationship between the securocrats and politicians. The regimenting of a centralised bureaucracy made the National Security Management System effective, as it drowned out critical voices and allowed the military to dictate the 'efficacy' of the regime.

The ANC security intelligence apparatus, from its inception, represents a highly centralised inward looking organisation. The effect of infiltration by apartheid agents and internal contradictions directly shaped the organisations posture towards a defensive counter-intelligence paradigm. In the initiation of Operation Vula, it begins to negate this legacy by establishing active intelligence units in South Africa, separate from its military command. Although this alludes to its strategic thinking towards the future of the conflict and negotiations, one could further argue that it shows the indecisiveness of its security and intelligence conceptualisation at the negotiating table.

CHAPTER FOUR: NEW BEGINNINGS-REFORMING SOUTH AFRICAN INTELLIGENCE

1. Introduction

In order to address the legacy of human rights violation and the lack of legitimacy in the eyes of the public, the restructuring of South African intelligence was twofold. Firstly, the new objective of intelligence was the security of people and secondly, intelligence structures and ethos had to be defined in law with a system for checks and balances (Republic of South Africa , 1995).

The first section of this chapter will deal with the rapport between the NIS and the ANC. The second section will address aspects of statutory law that is the direct outcome of this pragmatism, as well as the problems associated with the policy decisions and amalgamation of the intelligence services. These aspects are important, as for some, it represents the salient fault line with the new intelligence dispensation.

2. In the Beginning there were Two Partners

“Well here we are, bloody terrorist, and for all you know fucking communist as well’. That broke the ice, and we all laughed, and I must say that from that moment on there was no tension” Mike Louw.

(Sanders, 2006, p. 248)

On the 12th of September 1989, the first of many meetings between members of the National Intelligence Service (NIS), Mike Louw and Maritz Spaarwater, and ANC leaders, Thabo Mbeki and Jacob Zuma, met in Switzerland, where the possibility of formal negotiations were raised (O'Brien K. A., 2011, p. 1). On the 2 February 1990, President F.W. de Klerk announced the unbanning of the ANC and other political organisations as well as the release of political prisoners.

The relationship between the National Intelligence Service and the ANC's Department of Intelligence and Security was cordial enough for the NIS to suggest that all intelligence structures be absorbed into the NIS. They argued that intelligence matters not form part of negotiations, hence removing intelligence matters from public input (Afrika, 2009, p. 60). This view had been rejected by the ANC, as it argued that the ANC was conscious that the intelligence services should not be used in future for political ends and that it should be subjected to oversight and public accountability (Africa & Mlombile, 2000, p. 4).

The intelligence services role in the political transition from the onset of 'talks about talks' and negotiations allowed for the early stages of 'regulatory capture' by the intelligence elites. Intelligence was the catalyst in the broader security sector reform, of the apartheid security system, including that of the former homelands of the Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states.

Afrika (2009, p. 70) points out that the success of the transformation of the intelligence services was the outcome of a 'systematic pacting' between political elites. The former head of ANC Department of Intelligence and Security (DIS), the late Joe Nhlanhla stated that:

"The redefinition of South Africa's security needs and the inter-relationship between the security of the state and that of the people must be seen in arriving at the new definition of national security. The security of the state depends on its ability to maintain its political independence, sovereignty and territorial integrity... The security of the people depends on the satisfaction of their political, economic, cultural and social needs...The security of the state depends on the security of the people, and the security of the people depends on the security of the state."

(Seegers, 2010, p. 270).

The South African example does represent a success story, in so far that it provided impetus to the growing advocacy of security sector reform albeit before the subject matter was properly contextualised. (Cawthra & Luckham, 2003, p. 308). Seegers (2010, p. 264) disputes whether the new security paradigm, no matter how appropriate in the South African context, was that effective, as the paradigm did not necessarily mean that it will succeed as a policy. Hence, she cautioned the notion of South Africa as a “model for security-is-development” paradigm, as there was a particular absence of critical review.

The negotiated process and the intelligence reformation in South Africa cannot be divorced from the political context and processes that led to statutory and legislative reform. One notable distinction that ought to be made, is that those negotiating on behalf of ANC DIS, were essentially political office bearers of the organisation as well as intelligence managers, who acted in the ANC’S political negotiations.

On the other hand, those participating on behalf of the NIS were essentially civil servants reporting to political office bearers. The reformation within the intelligence services started with F.W. de Klerk, who, whilst still presiding over the minority government, placed the NIS under the Office of the President in 1993 (Joffe, 1999, p. 332).

The establishment of a Transitional Executive Council (TEC) under Act 151 of 1993, allowed for the formal continuance of the restructuring of the intelligence services through the formation of the sub council on Intelligence. The sub council on intelligence attempted to bring the defragmented intelligence landscape together from all interested parties (O'Brien K. A., 2011, p. 197).

More importantly, its intent was ‘to adopt a set of basic principles on intelligence, which could also serve as a basis for the creation of a national intelligence capability in a new democratic dispensation;’

(Republic of South Africa, 1993). Essentially the TEC was a dichotomy between peacemaking and peace building. Thus, allowing in the interim for a participatory government to ensure joint peace and stability roles in the run-up to elections for a new government (O'Brien K. A., 2011, p. 198).

Afrika (2009, p. 62) contends that it is within the sub council on Intelligence of the TEC where it was agreed to that, 'members of existing intelligence entities should be absorbed into new structures'. This effectively ensured the dismantling of intelligence structures involved in the conflict prior to the existence of the agreement and the formation of new structures.

3. The Law and the New Intelligence Architecture

The South African transition to democracy came into being with the first democratic elections on the 27 April 1994 and the successive formation of the Government of National Unity (GNU). For many, the South African transition seems like a seamless negotiated settlement, well organised and managed, which largely kept the apartheid civil service intact as part of the 'sun set clauses', where civil servants were guaranteed their pensions and job tenure (O'Malley P. , 2007, pp. 400-401).

One of the most reflective documents produced as an outcome of the negotiated settlement was the adoption of the Constitution of the Republic of South-Africa, Act 108 of 1996. It established a constitutional State, with separation of powers, a bill of rights and a definitive description of national security that described in Article 198 (a) (b) (c) (d):

- National Security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
- National security must be pursued in compliance with the law, including international law.

- National security is subject to the authority of Parliament and the national executive.

Article 199 (4) (5) (6) (7) (8) of the Constitution elaborates on the establishment, structuring and conduct of security services and states as follows:

- The security services must be structured and regulated by national legislation.
- The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law.
- No member of any security service may obey a manifestly illegal order
- Neither the security services, nor any of their members, may, in the performance of their functions-
- Prejudice a political party interest that is legitimate in terms of the Constitution; or
- Further, in a partisan manner, any interest of a political party
- To give effect to the principles of transparency accountability, multiparty parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament

From the two articles above, a clear statutory negation of the apartheid security practices and the security state as an outcome of negotiations and historical context, were established through law, which further subordinates the security services to civilian oversight. Article 210 (a) (b) of the Constitution outlines the powers, functions and monitoring of the intelligence services as follows:

- National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service and must provide for-
 - (a) the coordination of all intelligence services; and
 - (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

To give effect to the broad principle that is outlined in the constitution, the government released a White Paper on Intelligence that explicitly sets out the 'philosophy, mission and role' of the new intelligence services and security. By implication, it linked the issue of development within the context of the post apartheid 'Reconstruction and Development Programme', a key election manifesto of the ANC (Republic of South Africa , 1995).

The White Paper postulated a fundamental shift from the past and called for a 'review of underlying principles of the intelligence system' to be transformed. It also defined the concept of security within the broader or widening paradigm:

- Security is conceived as a holistic phenomenon and incorporates political, social, economic and environmental issues.
- The objectives of security policy go beyond achieving an absence of war to encompass the pursuit of democracy, sustainable economic development and social justice.

The legislation, which was assented as the National Strategic Intelligence Act 39 of 1994 and commenced on the 1st of January 1995, brought together the NIS and non-statutory forces as well as the intelligence services of the TBVC states. It provided for the newly established intelligence community to operate within the confinement of a constitutional state.

This new intelligence regime created two separate intelligence structures that would control and manage the collection, of domestic intelligence (National Intelligence Agency) and foreign intelligence (South African Secret Service) respectively. The services would have a minister reporting to the executive.

The significance of the legislation was the formation of a Parliamentary oversight committee known as the as the Joint Standing Committee on Intelligence (JSCI) and an Inspector General for Intelligence as set out in the Intelligence Services Control Act 40 of 1994 .

Under the Intelligence Services Oversight ACT 40 of 1994, the parliamentary committee has the responsibility to perform the function of oversight for reporting to parliament with regard to the following:

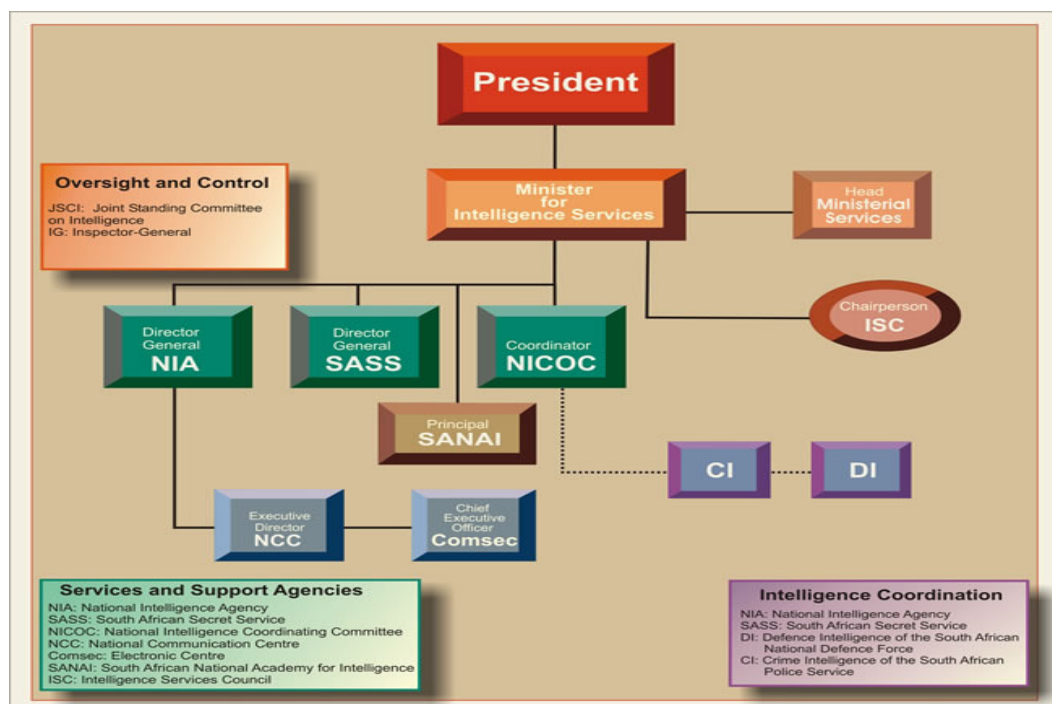
- a. in relation to the intelligence and counter-intelligence functions of the Services, which include the administration, financial management and expenditure of the Services; and
- b. in respect of the administration, financial management and expenditure of the Intelligence Services Entities.

The oversight committee functions as a multi-party committee based on proportional representation, pending a security clearance from the National Intelligence Agency. It further plays an important role in obtaining a report from the Auditor General to consider the financial statements as well as the qualification of these statements.

The Inspector-General for Intelligence is nominated by the Joint Standing Committee on Intelligence, and is appointed by the President with subsequent approval of the National Assembly through at least two-thirds support for the candidate. The OIGI is mandated to:

- a. monitor compliance by any Service and the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;
- b. to review the intelligence and counter-intelligence activities of, any Service;
- c. to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgression of the Constitution; laws and policies...

Figure 6 : South African Intelligence Architecture post 1994



Source: Ministry for Intelligence, 2008

4. An Inconvenient Marriage of Policies and Culture

Seegers (2010, p. 275) contends that on paper, the oversight regime appears to have substantial introspection and investigatory powers over the new intelligence service, but essentially the JSCI “lacks the power to shape intelligence in a substantive sense or to make policy” as it is the “executive that tells the services what to do”. The presence of the JSCI is indeed a departure from the apartheid era of non-parliamentary control of the intelligence services. However, there remains the question of whether there has been a qualitative change by the mere existence of the JSCI. There is an opinion that it has not functioned as well as it was legislatively intended (Pale, 2010).

There is an acute view that intelligence oversight (JSCI) serves the ANC as a political party rather than parliament, or the government for that matter, and points to the limitations of intelligence oversight in the current political milieu (Africa D. , 2010). For one practitioner of intelligence, there is a logic that the plethora of legislative and regulatory reforms has, to an extent, hamstrung the ability of the intelligence services to perform intelligence collection (SIGINT), as the intelligence environment is somewhat over regulated (Brile, 2010).

Instead, the inculcation of professionalism and integrity within the services to perform intelligence collection (SIGINT) could make intelligence oversight more effective in the sphere of collection (Brile, 2010). This could possibly reduce information leakages and the notion that intelligence oversight is less proactive and more ‘fire brigade’ orientated during moments of crisis (Brile, 2010; Africa D. , 2010; Pale, 2010).

The amalgamation process was particularly successful with the ANC Department of Intelligence taking most of the senior management posts within the services (O'Brien K. A., 2011, pp. 207-210). In the beginning there was the perception that old NIS personnel were "all criminals and should be jailed" but over time the relationship improved as the complexity of intelligence (legality and democracy) deepened and common understandings developed (Brile, 2010).

Although, Africa (2010) argues that we (ANC) slotted too into the mode of the old regime too early. The leadership of Minister Joe Nhlanhla was certainly reassuring as he guided the amalgamation process through the first years of the new government (Pale, 2010).

However, political identity and allegiances were still prevalent. The appointment of senior intelligence personnel since the Mandela era to the services has been definitive in the political gerrymandering of the services (Africa D. , 2010). At the same time, the record of these individuals was questionable with former Minister for Intelligence Lindiwe Sisulu commenting in an interview to the Financial Mail, that ANC intelligence in exile 'took our cue from the intelligence services of the apartheid state. We were a law unto ourselves' (Sanders, 2006, p. 344).

Pale (2010) states that political identity should not be present but concede that great strides have been made to address the issue through the recruitment of younger personnel. An example of this "revolving door" policy is that of Linda Mti the former chairperson of the JSCI who was appointed as head of the National Intelligence Coordinating Committee (NICOC), from parliamentarian to civil servant. The appointment of the former Inspector-General for Intelligence Zolile Ngcakani from the ranks of the intelligence services, both past senior members of ANC intelligence (Africa D. , 2010).

One of the weaknesses of the 'sunset clauses' was the salient adoption of the bureaucratic culture of the apartheid security services. This culture continued after the 1994 elections and for the duration of the Government of National Unity. Africa (2010) argues that the current mindset of the intelligence services is not different from the apartheid regime as the transformation of the services was not radical enough. This effectively 'cemented' the longevity of an administrative culture and operational procedure, which was convenient to the new owners of the services, given the inherent weaknesses explained of ANC intelligence (Sanders, 2006, p. 342).

Seegers (2010, p. 276) states that South African domestic intelligence is plagued by incompetence and the lack of professionalism. She posits, however, that the problem is closely related to "the inherently problematic nature of the concept of security" and the inclusion of other referents, other than the state in the conceptualisation of the new security agenda.

Seegers (2010, p. 279) argues further that the South African Intelligence agencies and spying were not created through the current security policies, given the weakness and current state of intelligence, which a former member of BOSS, NIS and NIA as quoted in Sanders (2006, pp. 342-343) described the new intelligence dispensation:

"There is no difference between what the ANC is doing in the intelligence Service and what the previous dispensation did. It is the same narrow-minded perspective...There is far less open debate now in the Intelligence Service, it is going to rot. I didn't leave because I had a political problem. It [was] just narrow-minded way of looking at things and also incompetent bosses...They must close that place down (the NIA and SASS) and start from scratch...It is becoming totally irrelevant and you cannot have a politically-laden intelligence service".

4. Ministerial Review Commission on Intelligence

After almost 15 years of democracy, intelligence institutions appear to be in a state of crisis with the former Minister for Intelligence Ronnie Kasrils (2006, p. 9), declaring to The International Intelligence Review Agencies Conference:

“In the grave intelligence crisis recently confronted by our fledgling democracy, where senior officials, including a former Director-General of our domestic intelligence service, were found to have flagrantly abused their powers in violation of our country’s Constitution and laws.”

In August 2006, the Minister for Intelligence Services, Mr. Ronnie Kasrils established a Ministerial Review Commission on Intelligence that made far-reaching conclusions and recommendations on post-apartheid intelligence management within South Africa. The review, itself a contested report, was approved by the cabinet and released at the last minute before the resignation of President Thabo Mbeki and other members of his cabinet, in 2008. As Laurie Nathan, a Commissioner on the Review Commission would state later:

“...the six months that have elapsed since the publication of the commission’s report, no comment on its findings and proposals has been made by the president [new], the cabinet, the Minister of Intelligence the Inspector General of Intelligence or the parliamentary committee that oversees the intelligence organisations. Are these office-bearers and institutions unperturbed by illegality and constitutional deviations in the intelligence world?”

(Nathan, 2009)

In the light of the above, the Ministerial Review Commission on Intelligence Report will serve as a case study. Exploring the recommendations of the report under the modalities of oversight, intrusive operations, and the interception of communication and institutional culture, it was found to be either illegal or influx as postulated in the Review Commission report. The Ministerial Review Commission came in the wake of the Inspector General's report in March 2006 and into the legality of the surveillance operations carried out by the NIA on Mr S Macozoma and other civilians.

The report highlighted the salient issues of political bias, in the NIA's operational procedure when it formulated Project Avani as a legitimate operation under the National Strategic Intelligence Act of 1994. Key amongst the collection requirements of Project Avani, were the ANC presidential succession struggle and 'inter-party dynamics' (Office of the Inspector General for Intelligence, 2006, p. 16).

Project Avani led to the formal suspension and dismissal of the Director General of the NIA Mr B Masethla as he firstly conceived Project Avani without Ministerial approval,- and secondly failed to comply with instruction to co-operate with the Office of the Inspector General for Intelligence (OIGI) to provide information on Project Avani. The investigation further uncovered that Project Avani used the National Communication Centre (NCC), responsible for Signal Intelligence (SIGINT) collection facilities, for the targeting of voice communication and dedicated telephone numbers of targets that were loaded for interception.

There was also further evidence of private individual(s) intercepting e-mails of targets for the NIA through outsourcing, which was included in the analysis of the 'political intelligence' as an outcome of Project Avani, even though they were found to be illegal and fabricated by the OIGI investigation (Office of the Inspector-General of Intelligence, 2006, p. 18).

A “review of the underlying principles of the system to be transformed” was first mooted in the White Paper on Intelligence in 1994, as a necessary requirement for security sector reform, but was never executed until the onset of the ‘crises of 2005/2006.

The aim of Review Commission was to:

“...strengthen mechanism of control of the civilian intelligence structures in order to ensure full compliance and alignment with the Constitution, constitutional principles and the rule of law, and particularly to minimise the potential for illegal conduct and abuse of power.”

(Ministerial Review Commission On Intelligence, 2008, p. 27)

The report highlighted some key issues which facilitated the intelligence crisis, that included the broad authorisation for the NIA to collect domestic political intelligence, that some methods of intrusive surveillance is unconstitutional, with members having a notion to “bend the rules” in the execution of their duties (Mail & Guardian Online, 2008).

The Inspector General for Intelligence as a statutory institution derives its mandate from the Intelligence Services Oversight Act 40 of 1994. The Review Commission made the following recommendations as to the role of the Inspector General:

- The Intelligence Services Oversight Act of 1994 should be amended so that the mandate of the Inspector-General is confined to the ombudsman role, which entails monitoring compliance by the intelligence structures with the Constitution and applicable legislation and policies; investigating complaints of non-compliance, abuse of power, misconduct and illegality by these structures; and certifying the reports submitted by the heads of the structures.

- The OIGI should be given independent organisational status, allowing it to receive and manage its budget independently of NIA and affording the Inspector-General full control over the resources and activities of the Office.
- The Inspector-General would remain functionally accountable to the JSCI but would be financially and administratively accountable to the Minister for the purposes of the Public Finance Management Act No. 1 of 1999. There is an urgent need for the Minister to issue regulations governing the Inspector-General's investigations, inspections and certification of the reports submitted by the heads of the services.
- With respect to the Inspector-General's investigations and inspections: The Inspector-General should not have the power to subpoena witnesses. The Inspector-General should be obliged to report criminal conduct by a member of an intelligence service to the SAPS.

In order, to ensure greater transparency over public finance, it recommended that the intelligence service's audit reports be tabled in Parliament. In so doing, it supported National Treasury's view that annual budgets and financial reports be presented to Parliament.

According to the Review Commission, the National Communication Centres (NCC) "appears to be engaged in signals monitoring that is unlawful and unconstitutional" as there is a case of non-compliance with the Regulation of Interception of Communication and Provision of Communication-Related Information, Act 70 of 2002 (RICA). That Act provides for the lawful interception of communication, through the acquisition of a warrant.

In its submission to the Review Commission the Inspector General of Intelligence provides for a more explicit answer to the legality and operations of the NCC, but the information has never been revealed to the public or found expression in any legislation:

- There is no legislative mandate for the NCC and electronic collection of signals.
- The regulatory framework governing the NCC's special powers is incomplete.
- Bulk interceptions are not usually subject to judicial control. There is a lack of internal compliance mechanisms for operational activities

In the NCC's submission to the Review Commission, it described itself as a signals organisation functioning under the mandate of NIA's counter-intelligence function. Hence, its "operational activities are subject to the oversight of the Inspector-General of Intelligence". It argues that since the intelligence debacle of 2005/2006, much has been done to ensure that stringent control measures are introduced, including the 'NCC's Interim Operational Policy'; the formation of an in-house Audit Committee that will ensure the report of abuse or illegality to the Executive Director, Minister and the Office of the Inspector General, which will conduct bi-annual audits.

A concern raised by the Commission with the NCC's Interim Operational Policy' was the absences of its compliance to RICA and it responded that their operational ambit excludes the requirements of RICA. Moreover, in January 2007 the Minister for Intelligence issued an instruction that no South African telephone number be loaded onto the NCC bulk interception system, without the authorisation from a warrant. The Review Commission argues that this should have led to a change within the interim policy, but it did not.

The Review Commission argues that it does not see a contradiction between the interceptions of SIGINT, which the NCC performs, and what RICA defines as interception. It hence recommended that the NCC be legislated and its interception functions be 'bounded' by RICA.

It further argued that the NCC legislation, as per its recommendations to the use of intrusive measures, which it views the interception of communication as inherently part, be restricted to where there is "reasonable grounds to believe that a serious criminal offence has been, is being or is likely to be committed".

In establishing control measures, it called for the introduction of ministerial regulations and operational directives to strengthen both executive and managerial control over intrusive operations. Of importance, it pointed out the need for "internal clearance panels" to guide operational prudence and compliance to legal norms.

The Review Commission pointed out that the Minister should give authorisation for intrusive measures; at the same time it states that there be judicial authorisation for intrusive measures and a judge should indicate if such intrusive measures is necessary based on the information provided. Absent from the Ministerial Review Commission Report is the role of political identity within the intelligence services, of which Laurie Nathan a member of the Review Commission has afterwards commented that:

"...the ANC and the government blur the boundary between the party and the state so that political threats to the ANC are regarded as threats to the state; there is an enduring affinity among ANC politicians and intelligence officers who were comrades during the liberation struggle; and the NIA's mandate, which covers non-criminal threats to stability and the constitutional order, draws the Agency inappropriately into the

arena of party politics. The available evidence suggests that intelligence officers do not have an independent political agenda but rather are enmeshed in the intrigues of the ruling party.”

(Nathan, 2010, p. 207)

5. Conclusion

The birth of peace in South Africa owes much to the foundations set by the two opposing intelligence services of the NIS and the ANC. The political transition was less than peaceful; security sector reform within the intelligence services was a product of a carefully managed process with little or no outside assistance. Thus, it guided the intelligence services to civilian led control in the form of parliamentary oversight and decentralising civilian intelligence into a-domestic and foreign branches.

South Africa, which in the 1990's has represented a perfect storm within a political, social and economic context, has made a major leap to liberal democracy, the acceptance of the security-is-development paradigm in its policy is testament to the statutory changes. The country, nevertheless, through the prism of its intelligence services is grappling to come to terms with the very nature of the practice of democracy within its security institutions and its accountability to the public.

Seegers (2010, p. 280) points out, that the importation of the widening or broadening of security “from a democratic context acquires new meanings and roles in authoritarian, transitional and democratising contexts”, which, she posits, is the case in South Africa intelligence.

Moreover, South Africa has witnessed some questionable intelligence failures since the start of the new intelligence regime. This has been, compounded by the ANC led government's difficulty in shedding its revolutionary character and culture in government, almost fusing the state and the government. This has led to the increasing use of the intelligence

services by bureaucratic functionaries employing state resources in settling political disputes, contributing to the 'eventual corruption of the intelligence establishment' (Joffe, 1999, p. 334).

CHAPTER FIVE: EVALUATION

The Cheka is dead long live the transformed and renamed
Cheka!

(Leggett, 1981, p. 339)

1. Introduction

The focus of this study was to discuss and analyse whether intelligence oversight bodies in South Africa are suitably structured, mandated and authorised to ensure the continuous control, accountability and monitoring of statutory intelligence services, given the problems with the interception of communication. The study further attempted to explore the regulation or un-regulation of the interception of communication in South Africa.

This chapter proceeds with evaluating the main assumptions, demarcated in the research. It concludes with some observations and recommendations that could deepen the accountability of intelligence oversight in South Africa.

2. Summary and Overview of Chapters

Chapter One advanced the purpose of the study, research problems, questions, assumptions and a selective review of the literature. The researched methods employed were descriptive, analytical and comparative.

Chapter Two provided a conceptual framework for the rest of the study. Firstly, we engaged the concept of intelligence, these included its historical origins, the intelligence processes, interception of communication and its implications, intelligence oversight and the role of security sector reform within the broader milieu of intelligence.

Chapter Three presented a historical overview of South African intelligence; important, as it is widely held that the intelligence services played a crucial role in facilitating the political transition and the formation of a civilian led intelligence dispensation. Consequently, it explored the Apartheid government's amorphous security apparatus and that of the African National Congress. Although diametrically opposed groups, they mimic similar organisational and behavioural characteristics.

Chapter Four had been divided into two sections; firstly, one examined the cursory relationship between the NIS and ANC intelligence that leads to the reorientation of the role of the security and intelligence services in the Constitution and relevant statutory legislation, this includes the subordination of intelligence to civilian control. The other section, deals with the implications and problems of reforming intelligence in South Africa. This includes an exploration and discussion of the declassified Ministerial Intelligence Review Commission Report.

3. Testing of Assumptions

The research was based on the following main assumption:

The intelligence oversight regime in South Africa appears to be ineffective in dealing with the exceptional powers such as the interception of communication by the intelligence services and law enforcement agencies. There is the apparition of intelligence reform being incomplete, not because of the absence of oversight bodies, but in their failure to execute their responsibilities in a non-partisan manner. The fault line of the intelligence crisis of 2006 to 2009 is essentially located within the failed reformation of that, which remained essentially the remnants of the apartheid intelligence and security culture.

From the onset, the research had demarcated to employ only open source data as classified information or insight derived from classified information did not form part of the study. This restricted the research in providing a detailed description of the interception of communication as intelligence and law enforcement agencies would not without lawful reasons amongst others avail its methodologies for academic study.

However, the research could be validated based on the availability of the declassified Ministerial Intelligence Review Commission Report of 2008.

3.1 Assumption One

The intelligence oversight regime in South Africa appears to be ineffective in dealing with the exceptional powers such as the interception of communication by the intelligence services and law enforcement agencies.

The Ministerial Review Commission on Intelligence came after almost fifteen years of the transition to a democratic dispensation in South Africa. However, the report and its recommendations provide introspection into the state of the intelligence services in South Africa. Given the country's past, the report accentuated an open expression of the intelligence dilemmas faced by the young democracy.

The strongest condemnation of the report appears to be in the realm of intrusive methods, specifically the interception of communication and the existence of the National Communication Centre, which the OIGI, in the report described as functioning 'unlawfully'. Here one should ask the question, why admit to this now, as it appears that the NCC has been in existence prior to the adoption of the RICA legislation with the full cognisance of the OIGI.

While calling for legislation to govern the NCC, the Review Commission has failed to draw a distinction between signal intelligence (SIGINT) and lawful interception or 'wiretapping'. These, point to the lack of technical and legal understanding of national security driven interception, as opposed to interception for evidential purposes.

In so doing, it has neglected an opportunity to ensure that the proposed legislation of the NCC would make this distinction in law, between SIGINT or national security interception and 'wiretapping' for evidential purposes. It had to consider the intelligence oversight requirements for these bodies responsible for the interception of communication separately, given their focus areas. As indicated in the literature the explosion in all forms of electronic, digital communications, and related technologies, will increase the demand for oversight for state-sponsored communication interception.

Thus, the opportunity for the broadening of the intelligence oversight regime into the interception of communication, aligned with the omnipresence of technology, as well as the need for a new intelligence oversight dispensation appears to have been lost. The exposure of the State capacity to engage in such intrusive measures is now, at least known to the public, through the publication of the report.

3.2 Assumption Two

There is the apparition of intelligence reform being incomplete, not because of the absence of oversight bodies, but in their failure to execute their responsibilities in a non-partisan manner.

The JSCI as a multi-party parliamentary committee of elected representatives to parliament has been silent on the existence of the NCC. As noted in the literature, the JSCI has a specific mandate to ensure proper financial management and control over the expenditure of the intelligence services. The omission of the large SIGINT budget to run the NCC is thus questionable. In view of this, public financial reports are

received from the Auditor-General's office. The two organisations are equally responsible for oversight. That opposing political parties within the JSCI are acquiesced in allowing the NCC to continue with the interception of communication without a statutory mandate and hence running parallel to the RICA legislation, which requires judicial authorisation for interception. This brings into question the notion of "regulatory capture" of the Joint Standing Committee on Intelligence and its effects in the broader legislature (Caparini, 2002, p. 14)

What became apparent in the study, is that South African Intelligence Oversight is not immune from the modalities of intelligence oversight, as practiced within traditional western liberal democracies. The Western notions of intelligence, subordinate these institutions to their democracy. Within transitional democracies such as South Africa, the experience has been no different.

This dilemma is critically present within the structure of the OIGI, in that firstly, it operates as an in-house intelligence ethics committee for the respective civilian intelligence services, at the expense of more public accountability. Secondly, it has neglected to ensure greater accountability of defence intelligence and crime intelligence.

The Review Commissions indication that the OIGI is dependent on the NIA for its budget, and that it is seriously under resourced presents a problem, in that the very organisations (NIA) that have to be presided over by the OIGI, to ensure statutory compliance, is responsible for its budget and the general appropriation of logistics and staff in the OIGI. The Review Commission called for the independence of the OIGI, in fulfilling the role of ombudsmen, and yet being accountable to the Minister for Intelligence i.e the executive. The Minister, would in-turn ensure the regulation of the scope and operational activities of the OIGI. This proves the commissions lack of conceptual understanding about the OIGI being independent within the context of South Africa's history.

This provides a clear indication of the potential for political gerrymandering, in that, the OIGI should not be fully independent and hence allow the Minister with vested control over the OIGI and its oversight role. It is clear from the necessity for a review commission, that the Office of the Inspector General for Intelligence, which derives its existence from the Constitution (Article 210) as a trusted person and representative of public interest, is structurally ill positioned to ensure oversight of all intelligence services without the spectre of political subjectivity and control from the national executive.

3.3 Assumption Three

The fault line of the intelligence crisis of 2006 to 2009 is essentially located within the failed reformation of essentially the remnants of the apartheid intelligence and security culture.

There is support in the literature for the notion that an intelligence organisation moving from a post conflict condition should have a greater internal location for oversight, given its history. It is then prudent to embed oversight within both internal management controls and the operational planning of individual services. In order to support the building of a corporate culture of integrity and professional conduct by both structures and members; this clearly represents a bane given the narrative in the report.

The Ministerial Review Commission raised a concern with the inundation of grievances lodged by members to the OIGI and recommended that such grievances, be excluded from its role. In the context of the OIGI legislative mandate, this would be a serious mistake, as intelligence officers have limited or no recourse to report illegal and unconstitutional activities by the intelligence services. In the light of the above, it is clear that there ought to be a balance between internal intelligence oversight as

recourse for personnel to report abuse and illegal activities, and the need for external public complaints to an independent ombudsman.

The intelligence services appear to have maintained the 'corporate culture' of the apartheid security establishment in keeping its annual budget totally apart from the normative parliamentary budgetary process. In so doing, it is transgressing a cardinal rule of liberal democracy, of providing open, accountable and transparent governance of fiscal allocation.

The exclusion of the intelligence budgetary process from the broader parliamentary process, by delegating it to the JSCI, impedes the control and monitoring of the intelligence services. It essentially removes the values and norms of the process of checks and balances crucial in a democratic polity, especially of institutions that could undermine such a democracy.

Inductively 'elite pacting' is credited for the smoothed political transition in the intelligence services and appears to still be relevant in the post political transition phase within the JSCI. One should take the argument further that 'elite pacting' is not unique to only the intelligence reformation in South Africa, but could certainly be generalised to have been part of a broader political elite consensus in the transition to democracy.

However effective in ensuring the 'miracle transition', the current aberration of 'elite pacting' in the form of consensual politics within the JSCI represents a potential risk to intelligence oversight as well as the integrity of the JSCI. This apparent frugal and consensual relationship among JSCI members in the interpretation of its statutory mandate makes the body less effective.

The bi-partisan approach, however commendable in a transitional democracy, if one can label this "consensual" political relationship as such, among opposing political parties within the JSCI could possibly be interpreted as a hangover of the Government of National Unity.

Furthermore, it brings into question the manner in which the committee is constituted, by means of proportional representation, which *ip so facto* essentially provides for ANC hegemony in the JSCI. This resonates with the view of Seegers (2010, p. 275) in the literature that the JSCI is weak in changing the culture of intelligence services through effective policy intervention. The effectiveness of the JSCI remains open to discussion.

South African intelligence oversight represents a case in point where the administrative and bureaucratic continuity of the apartheid intelligence services exists alongside the interest of an overarching hegemonic party such as the ANC within the state security apparatus. It appears that democratic institutions matter less; accountability and oversight is thus sacrificed in the interest of fragmented political control and monitoring of the intelligence services.

The conflagration with regard to Project Avani, the interception of communication by the NCC and the outsourcing of interception of internet traffic to private individuals, points to the failure to depoliticise the intelligence service and provides a casual explanation in the difficulty in fostering a new 'corporate identity' for the intelligence services.

This development of outsourcing technical intelligence collection to private contractors poses a significant threat to democracy. Whereas the state intelligence services remain subordinated to the constitution and regulatory requirements, private intelligence organisations represent to the intelligence services 'plausible deniability', or rather unaccountability.

This phenomenon through Project Avani has eluded the JSCI to ensure effective control over the outsourcing of statutory intelligence mandates, but importantly it reiterated the lack of policy and understanding of the potential danger of not regulating the interception of communication that was exploited by the National Intelligence Agency.

Is South Africa unique, given the legacy of apartheid intelligence services and ANC security culture as depicted in the political hubris of the unlawful interception of communications of citizens? As a young democracy, it is certainly grappling with negating its historical legacy, but within an international context, it certainly is not alone.

Seegers (2010, p. 276) in the literature argues that South African intelligence is plagued by incompetence and narrow-mindedness. One should note that often the academic literature neglects to emphasise that these institutions, have deep seated and ingrained undemocratic cultures and sub-cultures which are often a requirement in the provision of intelligence, which needs much more than just changing the rules or the reordering of organisational blocks and responsibility.

So only inductive assessment is possible within this research, particularly the behaviour of the ANC, in moving from revolutionary movement to a political party, and how this affects the behaviour of state institutions in government, such as intelligence.

4. Considerations in Ensuring Intelligence Oversight Accountability

The recommendations of the Ministerial Review Commission on Intelligence, principally on the role and function of the Office of the Inspector General for Intelligence, were superfluous in fomenting accountability and transparency of firstly intelligence oversight and secondly overall intelligence structures.

Hence, the following areas ought to be considered: The OIGI should become part of state institutions to protect constitutional democracy under Chapter 9 (section 181) of the constitution. The JSCI should become more accountable to parliament to ensure accountability and transparency as public representatives.

4.1 The OIGI as a Chapter 9 Institution

The Office of the Inspector General for Intelligence has subjectively abdicated its obligation to ensure that the public has reasonable trust in the integrity of its office. Furthermore, it has failed to ensure that the intelligence service operates within the boundaries of the constitution, without bending the rules.

It became more than what was mandated; essentially it became an extension of the intelligence services. It has therefore mimicked the role of an internal auditing department to ensure professional conduct and corporate governance. As limited or no report of its work is available, other than press statements and given the crisis surrounding the interception of communication, one can reasonably believe that it has failed in this task.

It is therefore prudent to allow for an Inspector General for Intelligence that is fully independent, accountable to the National Assembly as per section 181, subsection (2-5) of the Constitution of the Republic of South Africa.

When institutions such as intelligence oversight bodies find themselves embedded in the organisations that they should oversee, they will subjectively attempt to shield those organisations from criticism or unlawful conduct, as is the current case with the OIGI.

The Ministerial Review Commission was critical on the lack of legal competence within the intelligence services, instead of parading the current OIGI as an independent body; rather include it as an integral part of the Minister for Intelligence Services office to ensure good governance, intelligence assurance, operational compliance to statutes and directives.

The United Kingdom's experience of the appointment of an Interception Commissioner to oversee the interception of communication and the provision of albeit vetted public reports to parliament on the interception

activities of its services, holds intrinsic value to South Africa's young democracy.

It could provide the type of assurance on how healthy the democracy is and how confident the intelligence services are in reporting on their activities. In a constitutional democracy, it could also indicate a change in the corporate culture and its adaption to change.

4.2 The Re-construction of the JSCI as a Parliamentary Committee

The relevance of a Parliamentary committee on intelligence is indisputable. Their work is certainly unique, as it is in the frontline of maintaining the equilibrium between an open society and the defence of the constitutional order. In South Africa, the equilibrium is critical. Although the JSCI has kindled the mystique of intelligence oversight to the extent that it has become both a tool of the executive and that of the governing political party, the ANC.

This brings us to the crux of the representation of the committee, however non-partisan the ANC has exercised its considerable hegemony in the workings of the committee. The activities of the committee are classified and the committee members are vetted by the NIA, and if failing the requirements of vetting, they will be excluded from the committee.

The JSCI should be more accountable to parliament to allow for greater public introspection into its work. That the system of proportional representation should be disregarded, to allow minority political parties equal representation, as it should essentially be the convener of the committee. The constitution states that "national security must reflect the resolve of South Africans" and this should be reflected in the JSCI (Republic of South Africa, 1996). Given the arguments presented in this research, that security sector reform has stalled, it is prudent that parliament expands the resources to aid the JSCI in developing an

academic capacity to conduct research and policy advice, in support of parliamentary oversight.

5. Conclusion

The ghost that haunts South African intelligence, conveniently at times posited as harking back to the apartheid security service, has been negated through the reformation of the security sector even though incomplete. What remains of this ghost is the stoic bureaucratic administration, with the opacity of the new intelligence elite with their lack of professionalism and integrity. They have made the current intelligence dilemmas their own.

Within any liberal democracy, and given the post-September 11 global security environment, the balance between secrecy and the social contract is paramount. If the equilibrium tilts towards secrecy, it will destroy the very foundations of democracy. South Africa is a case in point where this balance is being disturbed, not so much by the lack of institutions to protect the social contract, but due to the abdication of their mandate of not being critical, fearless and non-partisan in securing the constitutional order in the interest of good governance.

The experience of intelligence organisations in newly formed and transitional democracies has essentially been to negate its authoritarian past of gross human rights violations and the provision of regime security. South Africa is a case in point where change to the intelligence services were necessitated, not so much through internal scandal, but with the interest of democratisation in the broader milieu of security sector reform.

In addition, there is the spectre of security sector reform being incomplete or worse farcical. As a practitioner, the researcher believe that on a micro level within the intelligence services, interpretation of the principles of the Rechtsstaat and its statutes is often left to middle management, which in most instances does not have the required legal competence.

It is within this paradigm that we ought to start probing and analysing intelligence management within South Africa. Firstly, that whatever the quality of the reform in the intelligence apparatus is, we should recognise that the democratic subordination of these institutions has taken place. Secondly, that these institutions should be held to account, in order to negate lending its constitutional mandate to the subordination of partisan political interest in the full glare of opposition parties in the legislature.

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