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## A Critical Evaluation of the Intelligence Oversight Regime in Botswana

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LESEGO TSHOLOFELO, MAR 3 2014

### Intelligence Democracy Dilemma: A Critical Evaluation of the Intelligence Oversight Regime in Botswana

In March 2008 Botswana ushered in the Directorate of Intelligence and Security Services (DISS) following the passing of the Intelligence and Security Services Act, 2007. The move was met with uncertainty and controversy which saw Opposition Members of Parliament walk out of Parliament at the height of the Bill's debate. Such cold reception and the subsequent negative publicity have dogged the agency ever since. This dissertation looks at the inception of the DISS in the context of the inherent challenges posed by secret intelligence services within democracies. It critically evaluates the oversight regime in place and the perceptions about security intelligence as they obtain in the country. It finds that, whereas the country's oversight mechanisms cover the five basic oversight principles of internal control, executive control, parliamentary oversight, judicial review and external oversight, they are not sufficient for Intelligence Community (IC) operating within a modern democracy. Currently, both the Parliamentary Committee and the Tribunal have nothing to show for their five-year existence in the form of the required parliamentary reports since the agency's inception. Compounding the Act's oversight weaknesses is the fact that it conspicuously excludes the other intelligence gathering entities like the police, military and the anti-corruption agency despite the trio's elaborate covert operations amongst the citizens. It is therefore imperative for these oversight structures to be reviewed if the country is to maintain its status as a model of democracy in Africa.

### CHAPTER ONE: Introduction

*"Intelligence and intelligence services are simultaneously necessary for democracy and a threat to it.*

*– Jervis (2007)<sup>[1]</sup>*

The balance that ought to be struck between effectiveness of secret intelligence services and promotion of democratic imperatives of transparency and accountability is often a dicey and perpetual juggling act for modern democracies. The desired balance has proven challenging even in the longest established democracies of the world. The recently enacted Justice and Security Act 2013 in the United Kingdom, which amongst others addresses intelligence oversight mechanisms, attests to the necessity of a continuous balancing act in the quest of optimizing on both effectiveness and accountability.<sup>[2]</sup> Similarly, the on-going American Edward Snowden saga has also reignited the discussions on recurring conflicts between security and civil liberties in the United States (US) and further afield.<sup>[3]</sup> In light of such developments in countries with long histories of intelligence in co-existence with democracy, it underscores the imperative for developing democracies like Botswana to constantly reflect on this dilemma with a view to taking proactive measures and not reacting to scandals or failures as it is often the case with intelligence reforms.<sup>[4]</sup>

As a country that lays claim to the longest uninterrupted democracy in Africa, the question therefore is, are Botswana's intelligence oversight mechanisms adequate to address the intelligence democracy dilemma?

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Whilst the decision by the government of Botswana to put intelligence service on a legislative footing is a commendable one, a closer examination of its control/oversight structures and bureaucratic culture has revealed some deficiencies that need to be addressed if the country is to continue maintaining both its democratic credentials and an effective intelligence entity. The deficiencies are mainly with regard to the oversight structures' independence and access to information. Additionally, the exclusion of other intelligence gathering agencies from intelligence oversight presents a gaping hole and challenge to the current system. The stakes are high for this kind of reflection, for it is democracy and political stability amongst others that the country has consistently conjured up as the trump card for its international voice and attraction of the much needed Foreign Direct Investment.

As a subject of scholarly study, 'civil-intelligence relations' has been given relatively less attention in comparison to its military counterpart, civil-military relations.<sup>[5]</sup> It was not until the 1970s that the issue of intelligence accountability or oversight became topical, especially in the US where the Church and the Pike Committees had uncovered abuse in the activities of the US intelligence community.<sup>[6]</sup> These included instances where the agencies had unlawfully spied on the US citizens.<sup>[7]</sup> Subsequently, similar enquiries took place in other western democracies like the Hope Royal Commission in Australia (1974-77), and the McDonald Commission in Canada (1977-80). In subsequent years there have been similar enquiries in the above countries and other democracies around the world.<sup>[8]</sup> The constant theme attendant to these enquiries has been the quest for a balance between intelligence services effectiveness and preservation of civil liberties of their respective citizens. Ordinarily, governments are pressured into legislating for intelligence services as part of democratization in general, accompanied by security sector reform in particular, or in other instances in the aftermath of an intelligence scandal or failure. The former was at the heart of reforms in the Eastern bloc countries at the fall of the Soviet Union, in South America and closer to Botswana in South Africa.<sup>[9]</sup> On the other hand, intelligence scandals or failures compelled the likes of the US, Canada, UK and Australia to move to legislate for or reform their intelligence services.

In Botswana, however, the establishment of this legislative base for the intelligence services has been more complicated, despite not being prompted by the aforementioned reasons. The process was fraught with controversy and met with a furore of resistance from both the opposition party ranks and the civil society. This was despite the fact that intelligence operations were already being carried out by the Botswana Police Services (BPS), the Botswana Defence Force (BDF) and the Directorate on Corruption and Economic Crime (DCEC) without specific legal oversight structures in place as contained, for instance, in the Intelligence and Security Services Act (ISS), 2007 establishing the Directorate of Intelligence and Security Services (DISS). Some skeptics even questioned the necessity of creating such an organization, given that the country had survived the 'most' trying security challenges of the Southern Africa independence wars in the seventies and eighties.<sup>[10]</sup> Furthermore, there is little written on Botswana's intelligence services throughout history. Published accounts of the state security sector in the country have mostly been on the BPS, the BDF and the DCEC. Whilst these institutions have intelligence units within their structures, the studies have tended to pay no particular attention to these and how they are governed. Such absence of information and knowledge about the country's intelligence terrain was apparent in the public discourse on the establishment of the DISS.

The controversy surrounding the introduction of the DISS through the ISS Act of 2007 culminated with the government giving in to demands of the dissenting groups by having both parliamentary and judicial oversight measures within the Bill, which were astonishingly conspicuous by their absence in the initial one. However, in spite of the retreat by the government, the DISS has since then found it difficult to fend off negative perceptions of an unwelcome organ allegedly imposed on Botswana citizens by the ruling Botswana Democratic Party (BDP) elite to protect their own partisan interests.<sup>[11]</sup> The situation has not abated to date. Given the suspicious and often perception-riddled culture towards intelligence in Botswana, it is imperative to get a deeper understanding of the institution's governance in relation to the country's democratic culture.

Striking a balance between intelligence effectiveness and democracy is a complex and often elusive endeavour for liberal democracies. This is not helped by the fact that both democracy and intelligence or national security tend to have ambiguous meanings to different people. In dealing with this nexus, T. J. Tapia-Valdes argues that at the core of it is that "the practical importance of national security compels the search for an approach that could make security goals compatible with democratic values and human rights".<sup>[12]</sup> This search, as suggested by Tapia-Valdes above,

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has led democratic nations to put in place mechanisms that seek to comply with the notion of the separation of powers between the executive (government), parliament and the judiciary.

In light of this, recent studies on democratic control of intelligence services have proffered five basic principles of intelligence governance: executive control, legislative oversight, judicial review, internal and external controls.<sup>[13]</sup> According to Hans Born, the executive branch controls the intelligence services by giving them direction, including tasking, prioritizing, and making resources available. The legislative branch on the other hand, is responsible for oversight whilst the judiciary branch monitors and regulates the use of special powers. Internal mechanisms of command and control by the services themselves are equally important. Lastly, civil society, think tanks/academics, media and individual citizens also provide restraint to the intelligence services through failure revelations and/or alternative views.<sup>[14]</sup> The presence of these in the governance of intelligence, whilst not a complete panacea should however, facilitate for an amicable existence of intelligence within a democratic state. Whilst the Botswana's ISS Act 2007 has sought to address all the above mentioned basic principles, it falls short in some areas of design and implementation of these.

Drawing from both primary and secondary sources including elite interviews, this paper qualitatively evaluates the adequacy and effectiveness of intelligence oversight regime in Botswana. This evaluation is carried out against the aforementioned five basic principles of control and oversight as the lynchpins of acceptable security intelligence governance in democracies. Whilst taking cognizance of the fact that efficiency of intelligence oversight largely depends on tailoring it to the peculiarities of needs and characteristics of individual countries,<sup>[15]</sup> the study does look comparatively at other jurisdictions for lessons and benchmarking purposes.

In the next chapter (2), the role and historical account of intelligence in Botswana, with its attendant organisational and bureaucratic culture leading to the creation of the legal framework in current use are discussed. Evaluating and understanding a system of intelligence governance goes beyond interpretation of the legislation governing those services, but rather requires an interdisciplinary approach.<sup>[16]</sup> This chapter will therefore, put in perspective the debates around the creation of the DISS and how they have impacted on the country's intelligence oversight regime.

Chapter 3 explores the security and intelligence governance as currently in practice in the Botswana context. Control within the DISS and by the executive is discussed in detail, as is the legislative and judicial oversight arrangements. Lastly, the role played by the citizens through civil society and the media in keeping the intelligence services in check is analysed. In considering internal control, existing mechanisms will be unpacked and scrutinized in order to establish their relevance and adequacy. At the core of legislative oversight is access and independence of a parliamentary committee. As Leigh aptly puts it, "in a democracy no area of state activity should be a "no go" zone for the legislature, including security sectors".<sup>[17]</sup> Given the DIS's mandate, which encompasses both internal and external threats, there exists the inevitability of having citizens and residents being directly affected by its activities. In the event of them being aggrieved, the availability of recourse is a necessity. Here, independence and impartiality of a judicial system in place are hugely important and will be examined. Finally, the effectiveness of civil society and the media in their oversight role is examined. In sum, this chapter will establish existing gaps against these five basic principles of oversight and control.

Chapter 4 seeks to illuminate key challenges faced by Botswana in its endeavour to maintain an effective secret intelligence agency whilst guarding against any threat to its 47 year-old democracy. Whilst some pitfalls are inherent to intelligence services in general, there are those which are a result of the cultural aspects and peculiarities of each polity. As a developing democracy and one that is experimenting with a legislated intelligence service, Botswana has to contend with challenges attendant to such a backdrop. Such challenges and their impact on intelligence governance will be analysed.

Finally, Chapter 5 concludes by noting the welcome creation of the DISS through legislation. It however, highlights the accompanying key deficiencies and their implications in Botswana's security and intelligence governance regime in its current form.

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## CHAPTER TWO: The Evolution of Botswana's Intelligence Services

*"I wish to assure Honourable Members and the public that it is not the intention of this Government to use the Directorate to monitor our Opposition Parties or any other person who does not necessarily pose a threat to our National Security, and thus the Bill states clearly that the Service shall remain apolitical."*

– Phandu Skelemani (2007)<sup>[18]</sup>

The tumultuous circumstances surrounding the formation of the Directorate of Intelligence and Security Service (DISS) in 2006/7 have had a considerably negative effect on its image which continues unabated to date. The haste and manner with which the DISS legislation was enacted sowed seeds of skepticism and suspicion about the role of the agency in democratic Botswana. An apparent failure to address this concern has seen the agency being dogged by negative publicity for the better part of its short existence. Consequently, this has undermined the DISS civil-intelligence relations and by extension negatively affected the effectiveness of the country's oversight mechanisms.

### *Pre DIS Period*

Whilst intelligence is often touted as the second oldest profession,<sup>[19]</sup> it was not until 1923 that formalised intelligence activities took root in Botswana (then Bechuanaland Protectorate) under the auspices of Britain<sup>[20]</sup>. At the time, collection requirements mostly centred on Pan-Africanist activities in Southern Africa. In the early 1950s, the Bechuanaland Protectorate Special Branch came into being, employing plain clothes officers, most of whom were former policemen.<sup>[21]</sup> According to Neil Parsons, the intelligence reports were filed under eight headings; "Reports on Meetings, Movements of Prominent Members of Tribes, Attitudes of the Public towards Government, African National Congress (ANC), Communications, Motor transport, General and Cattle."<sup>[22]</sup> From this file list, perhaps with the exception of the ANC, it is clear that the colonial authorities were at the time mostly concerned about the domestic threats. This however, slightly changed between 1961 and 1964 when the concentration was on activities of apartheid South African and South West African (now Namibia) refugees and political activists some of whom were transiting the Protectorate to Tanganyika (present day Tanzania).<sup>[23]</sup>

At Botswana's independence in 1966, the national security threats were still mostly inward looking including notably communism and communist inspired activities, Pan-Africanist activities, labour unions as well as opposition by local Chiefs arising from their discontent with regard to the erosion of their traditional powers.<sup>[24]</sup> The threat posed by apartheid South Africa is conspicuously missing from the briefing prepared for the incoming Botswana Prime Minister Seretse Khama in August 1966.<sup>[25]</sup> However, the colonial view of national security was to be short-lived in independent Botswana as in 1968 a new charter stipulating the duties of the Botswana Police Special Branch (SB) was issued.<sup>[26]</sup> This charter had three main duties for the intelligence: a) Security Intelligence, b) Protective Security and c) Counter Espionage. Security Intelligence entailed coverage of subversive movements, organizations and individuals whilst Protective Security was concerned with protection of information, operations, vital points and personnel. The third one, as the name suggests, was the province of foreign intelligence organisations that operated within or against the Government. The SB also had the responsibility of personal close protection for the President and his vice as well as visiting foreign dignitaries. Even though the head of the SB reported to the Police Commissioner, he also had direct access to the President of the Republic for any sensitive briefings.

While the issuing of the SB charter indicated a departure from the erstwhile branding of domestic dissent as national security transgression it is apparent that this did not stop the surveillance of such groups. This is especially true given the fact that Security Intelligence as contained in the charter entailed what was referred to as subversive movements. According to Peter Gill, the term 'subversion' if not properly qualified can mean anything, including political and labour movement's activities that are both lawful and peaceful. This ambiguity is known to have been widely abused in such countries as Canada and the US. The McDonald Commission (1977-80) in Canada found that the Royal Canadian Mounted Police (RCMP) had unlawfully targeted political groups under the guise of subversion.<sup>[27]</sup> The scandals emanating from the McDonald Commission led to removing of the intelligence work from the RCMP and the

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subsequent establishment of a statutory Canadian Security Intelligence Service (CSIS).<sup>[28]</sup> The term subversion was also specifically excluded from CSIS statute given its ambiguity. Similarly, the Federal Bureau of Investigations (FBI) in the US was fingered by the Church Committee for violations against US citizens.<sup>[29]</sup> Incidentally, in Botswana, revelations in recent years have suggested that the SB was guilty of similar transgressions.<sup>[30]</sup> If comments attributed to the late former Leader of the Opposition Dr. Kenneth Koma are anything to go by, the SB was also involved in such abuse.<sup>[31]</sup> The late former Botswana National Front (BNF) leader was reportedly kept under surveillance from the early days of party formations in Bechuanaland throughout his political life.<sup>[32]</sup> In his autobiography, former Botswana government minister David Magang recalls incidents in 1981 and 1993 when the SB were involved in keeping round the clock tabs on one of the ruling BDP factions that was out of favour with the party's leadership.<sup>[33]</sup> The meetings that the SB was monitoring were supposedly of BDP functionaries canvassing for support for their preferred candidates (certainly a normal democratic endeavour).

Subsequently, in 1998, the SB morphed into the Security Intelligence Services (SIS). While there had been slight alterations to the mandate of the SB over time since the charter was issued in 1968, this was in essence a change in name only, with no major changes to the core mandate.<sup>[34]</sup> There had been however an additional role with the passage of the 1986 National Security Act as a consequence of military harassment at the hands of apartheid South Africa. The Act sought to address such military incursions.<sup>[35]</sup>

Meanwhile, in the mid-90s there had been discussions behind the scenes within the Botswana security establishment to set up an independent intelligence organization.<sup>[36]</sup> The rationale behind this was among others things, the fact that the security environment had evolved globally.<sup>[37]</sup> The SIS was also increasingly finding it difficult to forge partnerships with their international counterparts on account that they were effectively a police service. The discomfort of sharing intelligence which was likely to be used for policing or prosecutorial purposes, and in the process compromising sources, meant that the SB's partners were reluctant to share and collaborate.<sup>[38]</sup> However, owing to fears of loss of power occasioned by the jettisoning of the SIS from the BPS, some senior police officers apparently stalled the process.<sup>[39]</sup> It was not until the mid-2000s that the process regained the momentum culminating with the tabling of the ISS Bill in November 2006.

## *Creation of Legal Framework for the DISS*

The tabling of the Bill was followed by an uproarious time in Parliament which at its height saw members of the opposition walking out in protest against it. They lamented lack of consultation prior to the tabling of the Bill. The furore was not confined to the lawmaking body; civil society joined in questioning some of the provisions of the Bill while the press, for their part, was awash with headlines announcing the end of democracy in Botswana. A joint statement by civil society comprising local human rights groups, churches and the media decried the manner in which Parliament was dealing with the Bill and lamented the absence of oversight mechanisms coupled with what they believed to be excessive powers conferred upon the Director General.<sup>[40]</sup> Perhaps in a demonstration of a participatory tenet of democracy, the then Justice, Defence and Security Minister, Phandu Skelemani, beat a retreat and held some consultation meetings with members of civil society on the bill. This was, however, undermined by the failure of a motion tabled by BDP MP Keletso Rakhudu seeking to commit the Bill to a Special Parliamentary Committee given its contentious and esoteric nature.<sup>[41]</sup> The passage of the motion would have further extended the consultation process. In the end, calls for such consultation were put paid by the defeat of the motion with a significant number of MPs absent from the house.<sup>[42]</sup> This robbed the country of the much needed debate and national consensus on the Bill and would set in motion the beginning of frosty civil-intelligence relations for the imminent DISS.

At the Bill's second reading, Minister Skelemani assured Parliament that "with appropriate legislation, openness and transparency, we should be able to guard against any abuse" and that "properly managed the proposed institution will promote our stability and safeguard our democracy."<sup>[43]</sup> Such assurances were, however, overshadowed by the continued calls by civil society for more consultation. "A cornerstone of our liberal parliamentary democracy has been undermined by those who are reluctant to work in a transparent and accountable manner", civil society charged in a press release soon after the Bill passed the second reading.<sup>[44]</sup> When the Bill ultimately came to pass, Government had yielded to calls for oversight and accountability by providing for the establishment of a Parliamentary Committee

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on Intelligence and Security (PCIS) and a Tribunal.<sup>[45]</sup> What was perhaps interesting was that they were still those who irrevocably opposed the formation of such an intelligence organization, even after those additional key provisions. Ironically though, intelligence collection, as earlier pointed out, had existed for decades stretching back to pre-independence era whilst the country was a British Protectorate to modern day Botswana, albeit un-legislated for.<sup>[46]</sup> Whilst they pointed to all the perils associated with intelligence, they seemingly overlooked the fact that a legislated agency by all intents and purposes is preferable to one that is not.

On 1<sup>st</sup> April 2008, Botswana ushered in the new DISS with the responsibility to “investigate, gather, co-ordinate, evaluate, correlate, interpret, disseminate and store information”<sup>[47]</sup> on national security. The mandate is wide ranging, including such roles as security vetting, support to other Government departments on security related matters and protective security for the President, Vice President, their immediate families and visiting foreign VIPs. In addition to the ‘traditional’ intelligence mandates of gathering, evaluation and dissemination, the DISS is also empowered with executive powers of arrest and searches. In comparable terms this lumps together the mandates of the USA’s FBI, Central Intelligence Agency (CIA) and the Secret Service.

According to Gill, security intelligence mandates are “essentially contested” especially with reference to national security, subversion and terrorism.<sup>[48]</sup> It is this contestation which, if not properly navigated through, can threaten the intelligence-democracy equilibrium in liberal democracies. Gill posits that, definitions of national security can be narrow or wide. In narrow definitions, national security threat would be seen through the prism of military threat, whilst a wide definition would broadly include political, societal and economic threats. He warns that it is the broad definition that we should be wary of, as it has tended to be abused in the past.<sup>[49]</sup>

In light of the fact that the DISS’s ISS Act has opted not only for a broad definition of national security, but an equally broad overall mandate, it is crucial to scrutinize it further for possible challenges to oversight mechanisms. It is particularly the first part of the four-part national security definition that needs such scrutiny. This is because it has retained the term ‘subversion’ from the SB and SIS era with its attendant ambiguity and propensity for abuse. It reads;

“Any activity relating to espionage, sabotage, terrorism or subversion, or intention to engage in any such activity directed against, or detrimental to the interest of Botswana and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, terrorism or subversion, but does not include any lawful advocacy, protest or dissent not performed in conjunction with any such activity.”<sup>[50]</sup>

While it is reassuring that this definition of national security specifically excludes “lawful advocacy, protest or dissent,”<sup>[51]</sup> it is its connection to subversion and terrorism both of which are problematic in their parameters that is worrisome. As earlier demonstrated, ‘subversion’ has wittingly or otherwise, been confused with lawful dissent. On the other hand, the terrorism definition has remained contested globally,<sup>[52]</sup> and as at present, Botswana is yet to enact specific terrorism legislation. Therefore, these broad concepts remain susceptible to abuse as was the case with DISS’s forerunners.

On commencement of its operations, the DISS faced a sustained barrage of negative publicity in the local media. This has prompted the Director General (DG) Isaac Kgosi to issue ad-hoc press releases and on occasion field questions about the Directorate in the media. However, this did not stop the onslaught. In one instance an opposition MP accused the agency of killing and torturing suspects prompting Kgosi to rebut and remind the public that his agency was a non-partisan public institution operating within the laws of Botswana.<sup>[53]</sup> He challenged those that have complaints to lodge them with the Tribunal through the High Court as provided for by section 32 (2) of the ISS Act. In yet another article, *mmegi* newspaper headlined, “Khama using DIS to purge BDP operatives,” the DISS was accused of having investigated members of the ruling party at the behest of the President.<sup>[54]</sup> Yet again the DG was put on the defensive resulting in another press release, denying the accusations and reassuring the public of non-participation of his staff in partisan politics.<sup>[55]</sup> Whilst there has not been any substantive charges investigated by the Tribunal, these allegations have created a public perception that the DISS is a partisan entity under the influence of the ruling BDP leadership. Such a perception does not bode well for apolitical national intelligence governance in a democracy.

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The portrayal of the DISS as a partisan entity has its roots in the ascension to the Presidency of the current president Lt Gen. Seretse Khama Ian Khama. Some have argued that the commencement of operations by the agency on the same date President Khama was inaugurated was no mere coincidence. "As an MP when we discussed the Bill in 2007 I did not subscribe to it. My reasons were amongst others, that it is being done to meet the needs of an individual, the Head of State," says Isaac Mabiletsa, an opposition Botswana Congress Party (BCP) MP.<sup>[56]</sup> It is a perception that has taken root in the country. Uyapo Ndadi, a Gaborone-based human rights lawyer says whilst he welcomes and sees the need for a DISS, he contends that its introduction was not properly handled.<sup>[57]</sup> He says, "It was deemed to be a Khama project for protection of his interests and this was not dispelled. The question of 'why now?' was never answered. Why do we now have to have a creature like this? What has changed? What triggered it? So that question needs to be answered."<sup>[58]</sup> It is this perception that has continued to see the DISS being drawn into partisan allegations. The fact that the thinking and indeed some paper work on the idea of DISS creation started almost a decade earlier has never come to the fore. As a result the 'Khama project' label has stuck despite section 16 of the Act specifically prohibiting officers from partisan activities.<sup>[59]</sup> This particular section has also been operationalised by its incorporation into the DISS Disciplinary Code.<sup>[60]</sup> Now, instead of being seen as a safeguard of the country's democracy as Minister Skelemani promised above, the DISS is viewed as the opposite on the basis that it is believed to tilt the scales in favour of the ruling BDP. Yet again, this perception does not augur well for national intelligence governance in a democracy.

The perceptions have not only been restricted to allegations of partisanship. Allegations of unlawful surveillance on citizens by the DISS have been made, even by some MPs on the parliamentary floor.<sup>[61]</sup> This has had an inadvertent negative effect on the civil liberties of the people. Kagiso Molatlhegi, the Chairman of the Parliamentary Committee on Intelligence and Security (PCIS) and ruling BDP MP concedes that, whilst he believes the perception is founded on unsubstantiated allegations as they have come to understand, it inevitably affects people in a negative way.

"Indeed civil liberties have been affected but only due to the perception that has been created which as we know is false. These days as a politician when you talk to someone over the phone and as soon as you get into issues that may seem controversial they immediately request discussing the issue in person instead. So that indicates to you that people are not free to express themselves because they believe someone is listening to their conversations."<sup>[62]</sup>

Real or perceived as Molatlhegi argues it is, the reality is that such a perception is actually having an effect on how the citizens handle their day-to-day interactions. To the extent that people believe they are living under constant surveillance is an indictment to a state of free society that democracy must guarantee.

In light of this apparent negative perception, the effectiveness of the DISS may also be under threat. As an institution of government, the Directorate needs to be given the capability through resourcing to effectively execute its mandate. However, given the perception that has in effect demonized it in the eyes of the very citizens it is to protect, it becomes a challenge. Its funding almost always elicits controversy.<sup>[63]</sup> As MP Mabiletsa argues, it becomes difficult for one to advocate for its funding when there are others in one's constituency that believe the Directorate is a menace in their lives. This, he claims, is also compounded by the fact that, even in general terms they, as MPs, have no clue what it does so that they could justify their support for it. During the 2013/14 budget debates Minister Mokgwetsi Masisi, under whose portfolio the DISS falls, was forced to withdraw his Ministry's budget owing to MPs complaints against the DISS budget specifically.<sup>[64]</sup> Whilst such an incident is normal and indeed welcome in a democracy, it is its link to the perception and suspicions that the DISS is unaccountable with its allocated funds that is worrisome.

Notwithstanding the uncertainty of its early days, the DISS has received accolades from some quarters, not least of which is the country's President in his 2010 State of the Nation address,

"By the same token, the efforts of the DIS continue to unearth and expose organized crime syndicates threatening our national interests, such as groups and syndicates involved in a wide array of illegal activities like terrorism, money laundering, fraud, drug trafficking and distribution, human smuggling and trafficking, white collar crime and official corruption. It is little wonder that those who have an inclination to commit such offenses are quick to criticize and discredit the organization."<sup>[65]</sup>

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While this acknowledgement coming from the highest office in the land and the number one consumer of intelligence may be instructive of DISS's importance, it has not done much to change perceptions about the Directorate. It remains a feared entity in the country, with some believing it operates beyond the precepts of the law.<sup>[66]</sup> Such fear can only point to the fact that civil-intelligence relations, which like civil-military relations are essential in a democracy, are not at their most desirable.

While it is commendable for Botswana to have created a legal framework for intelligence, the circumstances under which the DISS was created left in its trail, suspicions and perceptions that present a challenge to its oversight regime. Former Speaker of the National Assembly Matlapeng Ray Molomo says the fact that Botswana Parliament found it normal to pass a law without the participation of the opposition was an "outstanding example of the democratic deficit in the Parliament of Botswana."<sup>[67]</sup> Subsequently,<sup>[68]</sup> as Sir David Omand says, public and parliamentary support is necessary for the legitimisation of intelligence. Unlike back in 1977 when the formation of the BDF was widely backed across party lines,<sup>[69]</sup> the DISS creation lacked national consensus and buy-in. As a consequence of this, suspicions and mistrust have continued to plague the Directorate. Notwithstanding the veracity of allegations that have come to be associated with the DISS, the public perception as it stands threatens Botswana's democratic credentials. This situation further weakens the already deficient oversight mechanisms as will be elucidated in the next chapter.

## CHAPTER THREE: Intelligence Governance in Botswana

*"Like the iron ingot that can be forged as plough or sword, or even heated, beaten, and reshaped from one to the other, intelligence is not good or bad; it may serve democracy or tyranny..."*

– Philip H. J. Davies & Kristian C. Gustafson (2013)<sup>[70]</sup>

Government accountability is a key aspect in a democracy for all structures of the state including the security and intelligence sector. In attaining this, there is an imperative for openness and transparency. Nonetheless, intelligence services as a matter of necessity need secrecy, for it is their stock in trade in not only utilizing to uncover secrets in national interest, but also to protect the same from adversaries. In a democratic dispensation, intelligence governance that spreads responsibilities of control and oversight over the various arms of government has been embraced. Control entails direction of the intelligence by the elected government of the day whilst oversight reviews the services' activities and expenditure including ensuring compliance with the mandate while observing the rule of law. The basic principles of executive control, legislative oversight, judicial review, internal control, and external scrutiny have been adopted by recent studies on intelligence governance to address these responsibilities.<sup>[71]</sup> Whilst Botswana's Intelligence and Security Act 2007 has attempted to address all these principles, there remain some noteworthy gaps. These shortcomings permeate all the five basic principles envisaged for intelligence control and oversight.

### *Executive Control*

The executive control of the DISS is exercised by the President and the Central Intelligence Committee (CIC). Section 6(a) of the Intelligence and Security Service Act (ISS) stipulates that the Director General (DG) shall "report to the President and the Government on threats and potential threats to national security."<sup>[72]</sup> The direction is provided by the CIC, which is chaired by the President and comprising the Vice President, the Minister responsible for Intelligence, the Foreign Affairs Minister, the Permanent Secretary to the President and the Attorney General as the civilian members. The BDF Commander, the DG, the Deputy DG, the Commissioner of Police, the Deputy Commander of BDF, the head of Military Intelligence and the Deputy Commissioner of Police complete the composition of the committee. The committee's main function is to "guide the Directorate generally on all matters relating to national security and intelligence interests".<sup>[73]</sup>



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According to Ian Leigh, the dilemma in executive direction is the balance between “too much or too little” control.<sup>[74]</sup> Effectively what Leigh cautions against is that too much control poses dangers of political manipulation and abuse while too little control may lead to intelligence becoming a law unto themselves or a state within a state. In the case of the DISS, the CIC comprises a mix of politicians, civil service bureaucrats and security chiefs, which should allay fears of partisanship in the direction of the Directorate. However, this has not stopped some observers casting doubts over the neutrality of the appointed officials in the committee, pointing to the fact that they are after all political appointees.<sup>[75]</sup> Be that as it may, international common practice suggests that the direction of intelligence services is vested on elected officials or those appointed by them.<sup>[76]</sup> To that end, there is not necessarily any impropriety with the composition of the CIC. Bruneau and Boraz posit that, “The executive branch is the primary consumer of intelligence and therefore provides the greatest direction to the intelligence community on a daily basis.”<sup>[77]</sup> The same has been reflected in the intelligence cycle.

As the government of the day, the executive branch has a responsibility to ensure that intelligence informs their policy agenda or else it is rendered irrelevant.<sup>[78]</sup> As to the determination of the extent of the proximity of the Botswana executive and the DISS, it is not easily discernible owing to the absence of publicly available information regarding the two entities’ interaction with each other on intelligence matters.

However, what emerges as a matter of concern is the unilateral appointment of the Director General by the President.<sup>[79]</sup> In most liberal democracies such an appointment, including those of other security chiefs, requires confirmation by Parliament or consultation with the opposition representation.<sup>[80]</sup> Lauren Hutton argues that such an arrangement promotes consensus building, creating a national character of the appointment and thereby removing the perception of partisanship.<sup>[81]</sup> The current appointment process does not meet these ideals. For instance, a president who may harbour ill intentions on the use of the Directorate may appoint someone who, once in office, would be at both his own personal and political bidding instead of national interest. In the Botswana context, this deficiency is further compounded by the fact that the President also appoints members of the parliamentary committee tasked with overseeing the intelligence.

Additionally, the absence of either a National Security Strategy (NSS) or National Security Policy (NSP) raises questions on the context of the direction the CIC provides to the DIS.<sup>[82]</sup> The guidance by the political leadership to the security establishment is usually embodied in such documents as the NSS and NSP.<sup>[83]</sup> For example, when the South Africans were reforming their intelligence services post-apartheid, a comprehensive White Paper set out the philosophy, mission and role of their intelligence in a new democratic South Africa.<sup>[84]</sup> Such a framework reduces any uncertainty with regard to the relationship between intelligence and policymaking. Ambiguities on such terms as subversion and terrorism could also be minimised. The Botswana Parliamentary oversight is allowed nowhere near operations of the DIS, therefore an opportunity exists for possible manipulation by the executive on DIS’s tasking and direction.

## *Legislative Oversight*

Legislative oversight is vested in the Parliamentary Committee on Intelligence and Security (PCIS) pursuant to sections 38-40 of the Act. The PCIS is tasked “to examine the expenditure, administration and policy of the Directorate.”<sup>[85]</sup> Access to information and independence are key elements in the ability of an oversight committee to effectively exercise its role. Firstly, conspicuously missing from the PCIS’s functions is the oversight on the activities or operations of the Directorate. Without access to at least some operational information, the question arises as to how the committee ensures the DISS’s activities are consistent with their mandate. While it is acknowledged that there are inherent dangers with exposing intelligence matters to parliamentary scrutiny,<sup>[86]</sup> it cannot be overstated that in a well-functioning liberal democracy no area of government is a “no-go” for the legislature.<sup>[87]</sup> The ISS Act therefore, clearly falls short in that it does not empower the PCIS to examine the operations of the DISS.

Secondly, the independence of the PCIS also calls for close observation. Notwithstanding that the committee is referred to as parliamentary and endowed with the same powers and privileges as other parliamentary committees as per the National Assembly (Powers and Privileges) Act,<sup>[88]</sup> it fundamentally differs with them. The President appoints members of the committee after consulting the Speaker of the National Assembly and the Leader of the

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Opposition.<sup>[89]</sup> This is in contrast with the appointment of other parliamentary committees where it is the Parliamentary Selection Committee (PSC) that is seized with such a task.<sup>[90]</sup> Critics have cast aspersions over this arrangement with former Speaker of the Botswana National Assembly, Matlapeng Ray Molomo branding it a “special presidential committee.”<sup>[91]</sup> At the core of Molomo’s and other skeptics’ concern is the committee’s lack of independence from the executive. Botswana seems to have transplanted the bulk of the ISS Act from the UK. However, in their newly enacted Justice and Security Act 2013, the UK has done away with a provision where the Prime Minister (PM) appoints the committee.<sup>[92]</sup> In the new Act, the UK PM instead nominates members, with endorsement left to parliament. In Botswana’s case, the PCIS is not only appointed by the President, but also reports its findings to him/her, and only then can they proceed to parliament after the report has been redacted by a minister responsible for intelligence. Botswana’s parliamentary oversight therefore fails on the key elements of access and independence in that the PCIS is clueless on what the DISS operations entail, over and above the fact that it is in effect accountable to the executive through its appointment and reporting processes.

Consequently, the concerns over this lack of independence on account of the PCIS’s appointment by the President have led to Opposition MPs resigning from the committee in protest.<sup>[93]</sup> Currently there is only one Opposition MP (MP Bagalatia Arone) of the Botswana Congress Party (BCP) remaining in the committee. With its current composition the committee has lost its effectiveness as premised on credibility emanating from its inter-party posture. The human rights group, *Ditshwanelo* observed prior to the MPs resignation that it “would render it an empty shell, accountable only to the ruling party. Such a situation would make a mockery of Botswana being a multi-party democracy.”<sup>[94]</sup> The MPs have not been replaced and as such the effectiveness and efficiency of this committee as an oversight mechanism has been greatly compromised. The non-replacement of the members further renders the committee non-compliant with section 39 (1) which stipulates membership of nine MPs. With the “shall” wording, it is peremptory in its requirement of nine members.

The ineffectiveness of the PCIS is further demonstrated by their failure to deliver on their obligations as spelt out in ISS Act. As earlier elucidated, pursuant to section 40 of the ISS Act, the Minister responsible for intelligence has to ultimately table the committee’s report before parliament after satisfying himself that nothing in it is prejudicial to the discharge of the DISS mandate. Since its inception soon after the DISS came into being in 2008, there has never been a PCIS report laid before Botswana’s National Assembly.<sup>[95]</sup> This is despite the peremptory nature of the wording of section 40 (2) which suggest that the legislature intended that the report must be tabled before the National Assembly without fail. Notwithstanding the good work the committee may be doing behind the scenes, the fact that such work has not been witnessed and interrogated by parliament compromises its effectiveness. As a result, speculation is rife that either the committee is failing on its mandate or they are concealing wrongdoing.

The parliament’s Public Accounts Committee (PAC) remains perhaps the most credible of the oversight structures in relation to the DISS. The committee is charged with public expenditure oversight and is selected as per the Standing Orders of parliament.<sup>[96]</sup> Furthermore, it is currently chaired by an opposition MP, Nehemiah Modubule and has been hailed as non-partisan.<sup>[97]</sup> Even though the committee’s effectiveness has been criticised due to its lack of powers to sanction, as it only makes recommendations,<sup>[98]</sup> it fares way better than the PCIS in relation to the DISS oversight. Since 2012, the DISS DG as the accounting officer of the Directorate has publicly appeared before it and subjected to scrutiny like other department heads of government. For the head of a country’s intelligence outfit to be publicly made to account for his organizations’ expenditure, is without doubt in itself a laudable undertaking. In 2010 prior to the public appearances by the accounting officers, the PAC uncovered irregularities in DISS accounts where funds earmarked for disaster emergencies had been misappropriated to the agency at its inception in 2008. The minister responsible for the DISS, Mokgweetsi Masisi was in March 2011 forced to apologise to parliament for the ‘omission’ which turned out to have been unauthorised.<sup>[99]</sup> The PAC has therefore, by far demonstrated that it can hold the DISS to account. The same has unfortunately not been replicated by the PCIS so far.

## Judicial Oversight

Judicial review in intelligence matters is by practice two-pronged, with one function being to review actions of the services, and the other being to issue warrants in case of a need for intrusive activities by the intelligence services. As previously highlighted, the DISS mandate extends to both internal and external threats and as a result, tackling of

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internal threats would inevitably entail some of its operations being targeted against Botswana citizens. Those that feel aggrieved may seek recourse before the Tribunal established under section 31 of the ISS Act to deal with such complaints. The Tribunal, at the level of the High Court, consists of three persons with its Chairperson being “a High Court Judge, a retired High Court Judge or a Legal practitioner who qualifies to be appointed a High Court Judge.”<sup>[100]</sup> As in the appointment of the PCIS, there are questions on the independence of the Tribunal since it is appointed by the President albeit “after consultation with the Leader of the Opposition in the National Assembly.”<sup>[101]</sup> Since the Tribunal is at the same level as the High Court, perhaps it would attract fewer doubts if the appointment of the members followed a similar process as that of High Court Justices, who are appointed on the recommendation of the Judicial Service Commission (JSC). Opposition Member of the PCIS, Bagalatia Arone argues that the provision where the appointing authority is required to consult the Leader of Opposition is not adequate, since in practice, it has come to mean merely informing him/her.<sup>[102]</sup> The current process has therefore, not inspired much confidence. An inference could be drawn here that such lack of confidence probably explains why, after five years of existence, the Tribunal is yet to adjudicate over any case.

Further to the appointment process, there have been concerns raised on the composition of the current committee. As Monageng Mogalakwe points out, the current Chairperson of the Tribunal, Isaac Seloko, is an active member of the ruling BDP.<sup>[103]</sup> In July 2013, Seloko contested for the position of Deputy Secretary General of the party,<sup>[104]</sup> having been the Chairman of the party’s Disciplinary Committee since 2011.<sup>[105]</sup> This undermines the spirit of the Act’s political neutrality. The appointment attracted charges of politicisation of the national intelligence apparatus from the moment the appointments were first announced.<sup>[106]</sup> While Seloko, the current Chairman, may be qualified as a longtime experienced attorney, his close association with the ruling party does not augur well for a DISS that is projected as being apolitical.

In the five years of DISS’s existence there is no case over which the Tribunal has adjudicated. Section 37 (3) of the ISS Act provides for the Tribunal’s report to be tabled in the National Assembly after the Minister has satisfied himself that anything prejudicial to the DISS’ functions has been excluded from it. That there is no such report in the public domain implies that either there has never been any case lodged, or the Tribunal has failed to comply with the above mentioned section of the ISS Act which peremptorily stipulates that the report be laid before the National Assembly. In the case of the former, it would be a worrisome disconnect given the numerous allegations that have been hurled at the DISS.<sup>[107]</sup> Either way, such a scenario does not inspire confidence in the DISS and the Judicial oversight mechanism in place. The importance of investigating allegations of impropriety cannot be overemphasised. Lord Salmon has argued that “whenever allegations or rumours are such as to cause a national crisis of confidence they must be investigated in order to establish the truth so that any evil found may be rooted out or to reassure the public that the rumours were groundless.”<sup>[108]</sup> The fact that no known investigations have been carried out, despite numerous allegations reported in the local media, not only perpetuates a negative perception about the DISS’s credibility, but also casts aspersions on the effectiveness of the Tribunal as an oversight mechanism.

The issuing of warrants for intrusive investigations by the DISS is covered under section 22 of the ISS Act. The DG, or any staff authorized by him, shall apply and show cause to a Senior Magistrate or a Judge of the High Court and obtain an order in a secret hearing to conduct an investigation “such as searches or interception of postal mail, electronic mail, computer or telephonic communications.”<sup>[109]</sup> There is no information publicly available on the use of this provision. However, there have been allegations of private phone intercept by some sections of the public which gained crescendo after some MPs made such allegations in Parliament.<sup>[110]</sup> Like many of the allegations against the DISS, there has never been any evidence proffered to substantiate these claims. However, here yet again the onus is on any of the relevant oversight entities to look into the matter with a view to allaying these fears, which Lord Salmon cautions against above. The continued spreading of these rumours without remedial enquiry, as currently prevails, undermines the spirit of section 22 of the ISS Act and by extension weakens its oversight purpose.

## *Internal Control*

According to Bruneau and Boraz internal controls entail (i) legal counsels and Inspector General (IG); (ii) professional ethos and institutional norms; and (iii) multiple intelligence organizations.<sup>[111]</sup> With regard to (i), the DISS does not have internal IGs. This proves deficient in light of the functions of the Intelligence and Security Council (ISC) as

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established by section 29 of the Act.<sup>[112]</sup> The ISC comprises of the Permanent Secretary to the President, the Attorney General, the DG, and the Deputy DG.<sup>[113]</sup> Pursuant to section 30 (b) of the ISS Act, the ISC also examines complaints lodged by the members of the DISS. In its work so far, the council has reviewed punishments meted out to the DISS members through the Disciplinary Code.<sup>[114]</sup> Given the presence of both the DG and the Deputy DG in the Council, it seems anomalous for the ISC to review the two's actions in their presence. As the ultimate authority in findings of the DISS disciplinary process, it is questionable whether the DG is the rightful person to review his/her own actions whilst sitting in the ISC. It is on this basis that the internal IGs are imperative to tend to those members who feel aggrieved by the DISS including actions of the DG. Whilst the ISC provides another layer of executive oversight in relation to reviewing the policies and activities of the DISS, its composition is found wanting in relation to the examination of complaints from the DISS members. However, there is an office of the Legal Counsel within the DISS structures whose function is to ensure the Directorate operates within its legal parameters. It has to be noted though that the Legal Counsel is mainly the DG's advisor on legal matters and would not necessarily perform such functions as those of an IG. Ultimately, the absence of an IG robs the Directorate of an avenue through which officers can register excesses within it.

In respect of (ii) (professional ethos and institutional norms), the DISS does not have a Code of Conduct in place. The Intelligence and Security Act instead provides for the issuance and maintenance of a Disciplinary Code (DC) for the DISS officers.<sup>[115]</sup> The Act further stipulates the punishments that the DC shall provide which include dismissal, reduction in rank, reprimand, admonition and recovery costs in respect of loss of property.<sup>[116]</sup> In compliance with this provision the DISS has since issued its officers a DC.<sup>[117]</sup> The fact that the code has actually been implemented with some of the above mentioned punishments having been meted out,<sup>[118]</sup> points to the right direction in this aspect of internal control. What perhaps is lacking is the openness of this mechanism. It would certainly prove valuable to the confidence the public has in the DISS if there could be a way in which they (the public) could know the code is being implemented. Its non-availability in public results in doubts about its existence. The DC alone however, is not enough. Dr Zibani Maundeni's assessment is that the ISS Act limits the code of ethics to only article 20 of the Act.<sup>[119]</sup> It is Maundeni's contention that the Act is primarily concerned with harnessing secrecy and withholding of information as opposed to promotion of ethical ways and objective analysis.

In relation to the use of multiple intelligence organizations (iii) as a form of internal control, the arrangement is nonexistent in the Botswana context. While other security agencies like the police and the military have in their remit intelligence units, DISS remains the sole national security intelligence organization in Botswana. The National Intelligence Community established through section 27 of the ISS Act provides for a coordinating platform for all national entities dealing with intelligence and security related matters.<sup>[120]</sup> Once intelligence has been shared and exchanged at this forum, it is ultimately the DISS that delivers the final product to Government pursuant to section 7 (a), which designates the agency as the principal advisor on intelligence and national security matters. No other department does the same.

## *External Oversight*

External controls in democracies include free media, think tanks, academia, and Nongovernmental Organisations (NGOs).<sup>[121]</sup> "Regulation by revelation" as Richard J. Aldrich terms it, is an inevitable and important form of informal accountability performed by today's media.<sup>[122]</sup> Intelligence reforms have come about in other jurisdictions owing to revelations by the fourth estate.<sup>[123]</sup> Former Speaker Molomo has made the following observation about the relationship of the media, intelligence and government in Botswana; "the executive still allows the public, civil society organizations, the media and the opposition parties to criticise not only the intelligence and security agents but also the ruling party political leadership in the country, including the president, who is virtually the head of the intelligence edifice."<sup>[124]</sup> Many familiar with Botswana would attest to this observation, as they would with another Molomo summation; "oftentimes the accusations that have been leveled against the intelligence and security agents and the imputations of executive complicity have been provocative, verging on public abuse and libel."<sup>[125]</sup> The problem here has been the somewhat belligerent relationship between the local media and the Directorate, and its subsequent impact on the former's role as an oversight.

While the media could be blamed for the nature of reportage that Molomo alludes to above, the Directorate certainly

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shares the blame as well. Owing to an overly secretive culture under the guise of national security at times, the agency has allowed its image to be defined by sensationalist reporting in the media based on the dearth of factual information at the reporters' disposal. In the relatively short period of five years of its existence, a negative perception has come to define everything about the DISS. It would seem that the DISS hopes such coverage would just fade away. There is no doubt that the DISS, like all intelligence agencies, would by all means prefer to operate unobtrusively and away from the public glare. However, being endowed with executive powers of arrest, the DISS will certainly struggle to stay away from public scrutiny in a way preferable to them. Sir David Omand's advice on the inevitability of the media's foray into secret intelligence is apt, "It is now in practice as well as in law impossible to envisage reversing this trend and for the secret agencies to retreat back into the shadows."<sup>[126]</sup> Therefore, according to Omand, this is a relationship that needs to be managed well given "the paradox that is the existence of secret intelligence in an open society."<sup>[127]</sup> A cursory "no comment" on all that involves intelligence and security will lead to speculative and at times exaggerated reporting on the part of the media. Whilst some distance between the media and government is necessary for the very performance of the oversight role objectively, an adversarial one as encapsulated in Molomo's summation above would certainly be equally counterproductive to both sides. This would, in the long run, not augur well for an effective oversight role by the media.

Notwithstanding the foregoing, there has been a glimmer of hope occasioned by the interaction between the DISS and the Editors' forum, a collective of local media houses' senior reporters. According to one of the members, Kealeboga Dihutso of *Duma Fm*, the inaugural meeting was enlightening to reporters' view of the nature of DISS mandate.<sup>[128]</sup> If this is continued, it would be mutually beneficial in addressing the dichotomy of preservation of national security secrets and the obligation on the media to inform the public. The relationship could blossom into something akin to the UK's D-Notice Committee, a non-statutory institution whose purpose is to provide advice to the media and government officials about publication of sensitive security matters.<sup>[129]</sup> A DISS-Editors Forum, if maintained, could therefore go a long way in enhancing the media's oversight role on national security matters from a more informed perspective.

Civil society has, in relation to intelligence matters, taken their role quite seriously dating back to the time the ISS Bill was being debated. Spirited calls by civil society collective resulted in the Bill being amended to include both the parliamentary and judicial oversight mechanisms (see chapter 2). The *Ditswanelo*, Center for Human Rights for instance, has continued to raise its voice whenever there seems to be misstep in the intelligence governance in the country. These amongst others, were their critical view on the apparent haste with which the Bill was passed by Parliament<sup>[130]</sup> and lamenting the repercussions attendant to the withdrawal of opposition MPs from the PCIS.<sup>[131]</sup> On the basis of the importance of issues they have commented on, civil society oversight role could be hailed as being significant so far.

In contrast with other security organs such as the BDF,<sup>[132]</sup> the DISS has not openly embraced the academia as an important player on issues of national security.<sup>[133]</sup> The academia also seems to steer clear of research involving the country's intelligence, which has perhaps in part, led to the misconception that intelligence is a 'new phenomenon' in Botswana.<sup>[134]</sup> Maundeni actually believes the DISS and the academia view each other with suspicion as opposed to partners. He cites a case in which the government deported and declared a former academic at the University of Botswana a *persona non grata*.<sup>[135]</sup> In light of Maundeni's take, it is unlikely that there could be any significant role played by the academics in the form of alternate analysis. Such form of oversight is therefore nonexistent.

In their current composition Botswana's intelligence oversight mechanisms have deficiencies permeating across all the five basic principles of executive control, legislative oversight, judicial review, internal control and external oversight. The absence of any reports from both the PCIS and the Tribunal has negated what would otherwise be the stronger aspects of the current oversight regime. The current situation has been in part occasioned by a number of challenges as will be elucidated in chapter 4.

## CHAPTER FOUR: Challenges to Intelligence Effectiveness and Democracy Equilibrium in Botswana

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“...the kinds of problems that the national security expert must tackle are difficult, if not insoluble. He must determine what threats exist; which values and interests should be protected first; how many restrictions should the citizen be expected to tolerate because of national security demands; and how much should the people know about the reasons and measures of national security policies.”

– J. A. Tapia-Valdes (1982)<sup>[136]</sup>

As Tapia-Valdes notes above, the pursuit of a balance between the paradoxes that is secret intelligence on one hand, and transparency and accountability on the other is an intricate venture. The exercise is replete with challenges, some of which are inherent to intelligence in general, while some emanate from the peculiarities of a nation's polity. Botswana's intelligence community has a fair share of its own pitfalls to addressing the tradeoffs between security and civil liberties. The challenges identified here include, politicisation of intelligence, the conflict between secrecy and transparency, parliamentary maturity, lack of resources for oversight structures, exclusion of other intelligence entities from oversight and the general inadequacy of awareness of the intelligence field. Whilst the inherent challenges may be pervasive, some like lack of resources for oversight structures and awareness about intelligence can be resolved. If left unchecked, these challenges could further undermine the already deficient oversight measures in place.

The politicisation of intelligence in its various forms is inevitable given the political environment within which intelligence is conducted. As Peter Gill states, intelligence activities “are inescapably bound up with politics.”<sup>[137]</sup> Writing in 1987 on intelligence politicisation, another intelligence scholar Harry Howe Ransom observed three categories of politicisation. The first one is when “an agency or an issue has become a point of contention between organised political groupings, normally political parties. This can be categorized as partisan politicisation.” Secondly it “is popularisation, or publicity, which generates public debate over ends and means. In this case we often have bipartisan politicisation.” Lastly “when intelligence estimates are influenced by embedded policy positions. ...resulting in self-fulfilling intelligence prophecies or “intelligence to please” that distorts reality.”<sup>[138]</sup>

It is the first of Ransom categories of politicisation that is relevant to the analysis of Botswana in this paper's context. The other two are seldom evident in the public domain and therefore their nature is difficult to analyse. In 2008, the Botswana weekly publication, *Sunday Standard* lamented, in a commentary headlined “Politicising DISS will prove counterproductive,” what they deemed politicisation of the country's national intelligence entity.<sup>[139]</sup> The concern was not without basis as it was on the backdrop of the appointment of a prominent local attorney, who also doubles as the ruling BDP official, to the chairmanship of the intelligence Tribunal. The appointment of Isaac Seloko, left in its wake criticism of partisanship in the affairs of the DISS. Given the role that the Tribunal plays in Botswana's intelligence oversight regime, the perception that the appointment created remains a source of concern amongst some observers as it is seen as intended to protect the interests of the ruling BDP, of which Seloko is a key member. Seloko has to date remained the chairman of the Tribunal and also continues to play an active role in the affairs of the BDP

Such charges of partisanship have been extended to the DISS itself with opposition parties crying foul of political surveillance by the organization on behalf of the President. The accusations have been vigorously denied by the BDP government including the President.<sup>[140]</sup> While the veracity of these accusations has not been established on account that they never make it to the Tribunal, their presence remains a concern. In the absence of proof to the contrary, they create a perception that indeed the DISS has been politicised to the extent that it spies on lawful political groups. It has to be pointed out that allegations of political meddling by the intelligence are not new and peculiar to the DISS, they have been made over the years during the times of its forerunners, the SB and SIS.<sup>[141]</sup> In the event these charges are unfounded, as the DISS has come out strongly denying them, the organisation is faced with a challenge to unshackle itself from the alleged misdeeds of its predecessors. The perpetuation of such rumours has the possible effect of undermining the oversight mechanisms currently in place. This is especially true if they are not seen to be moving to address these concerns. Ultimately, the oversight structures may look solid on paper, but if they lack credibility, they will not inspire much public trust.

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Compounding concerns of politicisation is the dominance of one party in the politics of Botswana. The BDP has ruled the country for more than four decades, winning all the past ten elections since independence from the British in 1966. The dominance of the BDP has thus created a strong executive, which historically has been able to count on the numerical advantage of its party's MPs, who display strong inclinations to weigh in on national issues based on party caucus resolutions. As a consequence of this, the line between the executive branch and parliament has been at times blurred and this extends to parliamentary committees, including the PCIS. The PCIS situation has been further exacerbated by the resignation of opposition MPs from the committee (see chapter 3).<sup>[142]</sup>

Notwithstanding the fact that parliamentary oversight is an indispensable tool in intelligence governance of democracies, it is fraught with challenges. These are rooted in the conflict between the inherent natures of the two institutions, that is, parliament as an open institution, being required to preside over the workings of a secret state organisation. Questions abound as to how an institution dedicated to free debate and wide open to public access can at the same time be saddled with the responsibility of being custodians of the nation's most sensitive secrets.<sup>[143]</sup> A strict parliamentary oversight in keeping with the spirit of parliament would undoubtedly endanger the effectiveness and efficiency of the intelligence services which need secrecy to carry out their mandate. It is therefore, important to delicately strike a balance between these competing needs; as Tapia Valdes says, "determine ... which values and interests should be protected first..."<sup>[144]</sup> It is a challenge that at best could be characterised by a continued balancing act, without any definitive solution, but rather dependent on both the political and security climate. In the absence of any report by the PCIS to the National Assembly since the inception of DISS, it remains to be seen how this dilemma will be dealt with in Botswana. The ISS Act requires the responsible Minister to issue a statement to National Assembly, as to whether any matter has been excluded from the report being tabled due to its sensitivity. If the past exchanges between ruling party MPs and their opposition colleagues on DISS matters are anything to go by, the debate on a PCIS report may likely degenerate into partisan wrangling.

Ian Leigh thus warns, "...an immature approach by parliamentarians may lead to sensationalism in public debate and to wild accusations and conspiracy theories being aired under parliamentary privilege."<sup>[145]</sup> This, according to Leigh, may lead to the media and public having and perpetuating inaccurate impressions and as a consequence result in distrust between security officials and parliamentarians. There may be further distrust between committee members and other MPs.<sup>[146]</sup> It is a challenge that rings true to Botswana as observed by members of the PCIS. One of the members, MP Bagalatia Arone says that his colleagues in the opposition BCP for instance, find fault with the fact that he does not freely share with them any information he obtains whilst in the course of PCIS duties.<sup>[147]</sup> The classification procedures prevent him from doing so, but it would seem his colleagues find it hard to understand this coming from an elected opposition MP. PCIS Chairman MP Kagiso Molatlhegi, despite being from the ruling BDP, has also found that his colleagues in parliament view them with suspicion due to their association with the DISS through the committee.<sup>[148]</sup> Whilst this distrust is in part as a result of the secrecy and transparency contradiction in the realms of intelligence and parliament, it also points to the level of maturity of parliament. Therefore, the failure by legislators to put aside partisan politics for the sake of a national undertaking remains a challenge.

The immaturity referred to by Leigh was on display again when opposition MPs withdrew from the PCIS in protest, a move that drew a public expression of concern from the local human rights group, *Ditshwanelo*.<sup>[149]</sup> The only remaining opposition MP, Arone, is at odds with the withdrawal of his colleagues from the committee.<sup>[150]</sup> His take is that, when participating in parliamentary committees, MPs should rise above party politics and serve the nation. He argues that, considering that the ISS Act is a relatively new piece of legislation on a matter that is also new to them, the opposition members should have stayed on for awareness purposes so that they could critique it from an informed perspective and agitate for the Act's amendment as necessary. As it is now, the resignations have not delivered anything but a blank cheque to the ruling BDP on intelligence matters in that the sector remains almost solely in the hands of the ruling party. This further cements perceptions of partisanship which would have been tempered by the presence of the opposition members within the committee.

Another challenge in relation to the PCIS's oversight role is that of support staff and resources. Intelligence as an arcane field needs dedicated experts if any meaningful work is to be done inspecting the DISS. Members of the PCIS point to this as one of the challenging factors in their scrutiny of the DISS. The Chairman, Kagiso Molatlhegi observes that when they embarked on a benchmarking exercise abroad, they realised that some committees work hand in

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hand with an IG who is usually well versed on intelligence matters. Currently, the committee has only Major General Moeng Pheto, who may be deemed conversant with security matters given his military background. Even though PCIS Chairman Molatlhegi maintains this has not adversely hampered their work, one cannot downplay the difference that dedicated subject matter expertise would make to an oversight institution.

With regard to resources, it has been a learning curve for all concerned. The uniqueness of the PCIS has meant that the clerk of parliament does not cater for the committee in the parliamentary budget as it does not 'belong' there.<sup>[151]</sup> As a result, the PCIS has had to be funded from the ministry which the DISS falls under.<sup>[152]</sup> This clearly presents a challenge to the committee's independence as it has to rely on the entity that it is supposed to police to allocate to it resources to fulfill its mandate. It is currently not clear when this will be resolved and as such remains a limitation in pursuance of the PCIS mandate in light of the importance of independence in oversight institutions.

The exclusion of other intelligence gathering institutions from the oversight regime that is currently in place for the DISS presents another major challenge in Botswana's intelligence governance. The BPS, BDF and the DCEC have intelligence units within their structures but the ISS Act is silent on how their secret activities are overseen and controlled. By passing the ISS Act with its accompanying oversight structures like the PCIS and the Tribunal, the government was in effect acknowledging the gap that had hitherto existed in the country's intelligence governance and oversight. That the same was not replicated in relation to the above institutions or covered in the ISS Act means that the oversight gap still exists. In other jurisdictions for instance, the activities to be scrutinised by oversight structures are defined functionally and not by reference to agencies.<sup>[153]</sup> Hence, the same oversight structures could be employed to oversee the rest of the agencies that engage in the function of intelligence collection. In Botswana's case the ISS Act singles out only the DISS for oversight scrutiny but the Acts of the other agencies with intelligence function are not endowed with the same or similar provisions. However, these agencies' activities are rarely, if ever, viewed with the same suspicion extended to the DISS and its operations.

When the SIS ceased to exist with the coming in of DISS, the Criminal Intelligence Bureau (commonly known as CRIB) was established within the police.<sup>[154]</sup> The CRIB is responsible for collection and analysis of intelligence in support of the police in combating sophisticated crime. In 2010 the BPS was involved in a legal wrangle with a local businessman over some electronic interception equipment that had reportedly become obsolete shortly after its purchase.<sup>[155]</sup> The suit prompted a question in parliament by the BCP MP Dumelang Saleshando who wanted the Defence, Justice and Security Minister Dikgakgamatso Seretse to disclose the agencies with the capability to intercept electronic and telephone conversations in Botswana.<sup>[156]</sup> The minister declined to provide an answer "in the interest of national security."<sup>[157]</sup> The case brought to the fore the extent of intrusive measures available to CRIB, which are not subject to the checks and balances codified in the ISS Act.

The BDF on the other hand, has the Military Intelligence (MI) unit for intelligence related to defence matters. Although only a few democracies worldwide legislate for their military intelligence,<sup>[158]</sup> the BDF has its own peculiarity which, on closer observation, requires an oversight regime akin to domestic intelligence entities. For example, section 175 of the BDF Act provides for "the use of the Defence Force in aid of civil power."<sup>[159]</sup> Pursuant to this section, the BDF is often deployed in policing roles jointly with the police. Additionally, since 1987, the Defence Force has been charged with anti-poaching missions throughout Botswana's wildlife areas.<sup>[160]</sup> Even though the poaching threat is mostly from organised syndicates coming from outside Botswana's borders, there are also citizens involved.<sup>[161]</sup> It follows then that as these areas have become an almost permanent feature of some of the BDF's duties, the Defence Force inevitably devotes some of the MI's capability to the fulfillment of these missions. In light of this reality, it is crucial that over and above the Parliamentary Committee on Foreign Affairs, Trade and Security (PCFATS) that oversees the BDF,<sup>[162]</sup> robust oversight mechanisms specifically related to intelligence are extended to the Defence Force.

The anti-corruption agency, the DCEC, came into being through an Act of parliament in 1995. The agency is charged with investigating corruption and economic crimes related offenses. Its Operations Division includes amongst others, an Intelligence and Technical Support Group (ITSG) whose function is to "produce, analyse, and synthesise, from a range of sources both overt and covert, information about suspect activities, persons, agencies, branches or even departments of state."<sup>[163]</sup> According to Robin Theobald, the unit also carries out covert surveillance activities for the agency.<sup>[164]</sup> As a consequence of this, the ITSG is affected by the same potential perils that are associated with any



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secret intelligence agency operating amongst its fellow citizens.

Currently, both the PCIS's and Tribunal's role do not extend to these three agencies despite their elaborate involvement in covert operations. This not only leaves a gaping hole in the oversight regime, but may also present further challenges to the practice in place pursuant to the ISS Act. As Leigh observes, "where some agencies are under close scrutiny and others are not, there may be a natural tendency for dubious activities to gravitate towards the less-regulated part of the sector." In Botswana's case the National Intelligence Community (NIC) established under section 27 of the ISS Act may provide an opportunity for such exploitation.<sup>[165]</sup> The NIC provides for coordination by the country's intelligence agencies under the auspices of the DISS. The DISS may therefore use this platform to delegate those activities that would not be acceptable under the ISS Act oversight mechanisms to the other institutions within the NIC.

The divergence in oversight could also lead to turf wars between the regulated and the unregulated intelligence agencies. In South Africa for instance, the intelligence community were perturbed by the involvement of the Directorate of Special Operations (DSO), popularly known as Scorpions, in covert intelligence operations despite their exclusion from the oversight regime.<sup>[166]</sup> In a subsequent inquiry by Judge Sisi Khampepe, it was found that the DSO had illegally conducted intelligence operations.<sup>[167]</sup> If the Government of Botswana's intention when establishing the DISS was to overcome the challenge posed by unregulated intelligence work, they fell short owing to the exclusion of these other entities. Whilst the DCEC and the BPS follow some legal protocols in effecting intrusive measures such as searches and obtaining telephone logs for the purpose of their investigative function, the same can certainly not be assumed in relation to intelligence work. An argument to the contrary would imply that there was no need to place intelligence on legal footing, as is the case with the ISS Act.

Lastly, the arcane nature of intelligence leads to limited knowledge which presents a perpetual challenge permeating almost all mechanisms dealing with its oversight. This limited awareness on intelligence matters results in uncertainty on what to look for and what needs to be kept secret versus what could be released on public interest. The result is the tug of war between those in custody of information and those in need of it for their oversight role. In the ensuing confusion, the line between 'embarrassing' to government and 'damaging' to national security ultimately gets blurred.<sup>[168]</sup> Failure to resolve this may lead to the effectiveness of either the intelligence service or the oversight institution being compromised.

Lack of awareness could also affect the role played by the external oversight players like the press and by extension the public in their discourse about matters of national security. As David Omand argues, popular culture has had a profound effect on how intelligence is perceived, which in most cases is divergent to the actual craft. He cites a UK research that found that "drama series like *spooks* have a disproportionate effect on viewers' perception of how intelligence services operate."<sup>[169]</sup> The media reports on intelligence therefore tend to be premised on mystique and intrigue as opposed to what may be a rather mundane picture. While such an approach may for some be motivated by writing what is intriguing and therefore sellable, for others it is down to lack of understanding of the actual nature of intelligence brought about and punctuated by the inherent secrecy that surrounds the subject. In such cases, the ultimate casualty is the uninformed public in their discourse on matters of national security affecting them.

Challenges like politicisation and the secrecy and transparency dichotomy, as discussed above, will never be definitively dealt with in the ever complex exercise of intelligence governance and oversight. As a political construct, which remains under the control of politicians in democracies, intelligence will always be threatened by undue politicisation. A solution that seeks to completely detach it from the peoples' elected leaders is not an option either, as intelligence might become irrelevant to incumbent government policies, or the services once left to their own devices, may become a threat to democracy. The same goes for all the challenges associated with secrecy. For as long as there exists the need to pursue and protect secrets in the interest of nation states, such challenges shall remain. Therefore, what remains is the cognisance of the existence of these challenges and their significance in oversight so that a working balance can be sought.

However, problems related to inadequate resources for oversight structures, absence of expert advice and awareness about intelligence can be resolved. For instance, the resource issue in relation to the PCIS can be dealt

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with by having the committee appointed and operating under the same processes as the rest of the parliamentary committees. Such a move will not only address the resource issue, but also deal with the committees' perceived lack of independence.

## CHAPTER FIVE: Conclusion

*"There is one evil I dread and that is their spies...I think it a matter of some importance to prevent them from obtaining intelligence about our situation."*

– George Washington, (1776).<sup>[170]</sup>

*"Intelligence has never been more important in world politics than it is now at the opening of the twenty-first century."*

– Len Scott and Peter Jackson.<sup>[171]</sup>

The importance of intelligence in the livelihood of a nation-state cannot be overemphasised. This is regardless of whether they are democratic or a dictatorship. Timely and effective intelligence to governments are vital for economic, defence, domestic and foreign policy decisions by policymakers. In collecting and analyzing this information into an intelligence product, the Intelligence Community (IC) relies on secrecy to deliver on their mandates. Yet the need for this secrecy can also be abused by both the services and those who have authority over the IC. In addressing these conflicting needs, a strong but balanced oversight regime is crucial. In its current form, the Botswana intelligence oversight regime falls short.

The enactment of the ISS Act, 2007 was a laudable decision as it acknowledged that Botswana's IC had hitherto operated freely without a legal oversight framework. Despite being a late entrant into legislating for intelligence, it is apparent that the country did not exploit the widely available lessons from those that had walked the ground before them. This was undoubtedly demonstrated by the tabling of the initial Bill with neither the legislative oversight nor the judicial review structures when this was already a norm in Security Sector Reform (SSR) globally. When the government ultimately bowed to pressure and had these oversight structures included, they fell short on numerous key aspects consistent with best practice. These amongst others include political neutrality in intelligence matters, independence of oversight structures, inadequate access to the IC and lack of resources to undertake the oversight role.

Whilst the world over the executive normally enjoys control on the direction of the IC in line with aligning it to the needs of the incumbent government policies and thereby ensuring relevance, too much control can be problematic.<sup>[172]</sup> The Botswana context seems to gravitate towards this situation. The President's control role in the IC as the head of the executive branch also extends to the other oversight structures with his appointment of the PCIS and the Tribunal, both of which should ideally be independent. This is in addition to his appointment of the DISS Director General. A more transparent approach for the appointment of these structures would go a long way in bringing about some public trust in them.

Politicisation has crept in with regards to the Tribunal. Its Chairman is still mired in credibility controversy owing to his active affiliation to the ruling BDP. Questions have thus arisen on the impartiality and independence of this judicial structure.<sup>[173]</sup> The failure of the Tribunal in delivering a single report since it was appointed has added credence to skeptical perceptions about its relevance in its current form. Given the importance of independence and impartiality in any judicial structure, this situation therefore, does not augur well for a desirable oversight mechanism. A politically neutral Chairman would therefore be more ideal if the Tribunal is to command some credibility.

Similarly, the PCIS also suffers from credibility doubts since the resignation *en masse* of the opposition representation, save for one member, from the committee.<sup>[174]</sup> All the resigned members are yet to be replaced and

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like the Tribunal it has failed to comply with the ISS Act on the submission of a report for onward tabling in parliament.<sup>[175]</sup> Independence from the executive, as an important variable in a parliamentary oversight, is lacking owing to the appointment of the committee by the President. Exacerbating this, is the committee's lack of access to the Directorate's core activities. Additionally, the PCIS's lack of resources and support staff further undermines any significant oversight role on its part. Making the committee selection the same as other parliamentary committees would not only ameliorate the resources problem but also restore the public confidence enjoyed by other parliamentary committees such as the PAC.

Civil society has been vigilant in the past under the circumstances, with perhaps its most significant contribution being the persistent calls for oversight that led to the inclusion of the parliamentary committee and the Tribunal in the final ISS Act. Whilst the media were also part of civil society grouping calling for oversight, on their own they have mostly resorted to the sensational kind in their intelligence coverage as opposed to asking pertinent questions.<sup>[176]</sup> Despite the peremptory language of the ISS Act on the submission and tabling of both the PCIS and the Tribunal report in the National Assembly, the media has not asked why such reports have not come forth. In the absence of any meaningful contribution from the media, the public remains uninformed in their discourse on intelligence matters.

Whilst the above are deficiencies present in the current ISS Act, perhaps the biggest challenge is what has been left out of it. With its exclusion of all other Botswana's intelligence gathering entities like the BDF, BPS and the DCEC, the ISS Act has in effect defeated the whole purpose of legislating for intelligence. In the current arrangement, these three entities still exist in the pre-DISS era, when there were no intelligence specific oversight measures in place. An ISS Act that is more encompassing and requiring of intelligence oversight by function would be desirable. Attending to these key aspects of intelligence oversight would without doubt go a long way in edging closer to an ideally envisaged equilibrium in the intelligence democracy dichotomy.

## **List of Abbreviations and Acronyms**

ANC	African National Congress
BCP	Botswana Congress Party
BDF	Botswana Defence Force
BDP	Botswana Democratic Party
BNF	Botswana National Front
BPS	Botswana Police Service
CIA	Central Intelligence Agency
CIC	Central Intelligence Committee (Botswana)
CRIB	Criminal Intelligence Bureau (Botswana)
CSIS	Canadian Security Intelligence Services
DC	Disciplinary Code (DISS)
DCEC	Directorate on Corruption and Economic Crime (Botswana)
DG	Director General
DISS	Directorate of Intelligence and Security Service

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DSO	Directorate of Special Operations (South Africa)
FBI	Federal Bureau of Investigation
IG	Inspector General
ISS	Intelligence and Security Service
ITSG	Intelligence and Technical Support Group (Botswana, DCEC)
MI	Military Intelligence (BDF)
MP	Member of Parliament
NGO	Non-governmental Organisation
NIC	National Intelligence Council (Botswana)
NSP	National Security Policy
NSS	National Security Strategy
PAC	Public Accounts Committee
PCFATS	Parliamentary Committee on Foreign Affairs, Trade and Security Committee
PCIS	Parliamentary Committee on Intelligence and Security
PSC	Parliamentary Selection Committee
RCMP	Royal Canadian Mounted Police
SB	Special Branch (Botswana)
SIS	Security Intelligence Services (Botswana)
SSR	Security Sector Reform

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Written by Lesego Tsholofelo

*Written by: Lesego Tsholofelo  
Written at: Brunel University  
Written for: Professor Philip H. J. Davies  
Date written: September, 2013*