CHAPTER THREE

Popular agency oversight of digital surveillance of communications and personal data for intelligence purposes: The case of Botswana

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Introduction

This chapter interrogates popular agency oversight of digital communications and personal data over the intelligence sector in Botswana. The term popular agency oversight in this chapter refers to public involvement through civil society organisations (CSOs) and the media in the oversight of the intelligence sector. CSOs are the sphere of voluntary collective actions by citizens that develop around shared interests, purposes and values (Cole et al., 2008, p. 14). Popular agency oversight allows the public and CSOs acting on their behalf to scrutinise and monitor actions and decisions of intelligence agencies to ensure responsible use of power and accountability. Popular agency oversight is distinguished from traditional formal oversight mechanisms over the intelligence sector through arms of government such as the executive, legislature and judiciary. Intelligence services play a key role in ensuring the security and stability of a state by preventing internal and external threats to the state. Many of the threats to the security of a state are often covertly organised, and intelligence services need intelligence to counter such threats. This may call for intelligence services to resort

to covert means to prevent threats to the security of the state. Some of the methods used by intelligence services in countering threats to the security of the state are intrusive and may infringe upon human rights. The apparent tension between the protection of human rights and the security of the state has led to a view that the two interests are diametrically opposed. Burke-White (2004, p. 249) argues that US foreign policymakers tended to view the promotion of human rights and the protection of national security as mutually exclusive. He notes that the approach has been either to promote human rights at the expense of national security or protect national security while overlooking human rights. The House of Lords has, however, observed that, although there may appear to be a tension between the protection of the security of a state and civil liberties, the two are on the same side. The court further observed that '. . . in accepting as we must, that to some extent, the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties' (*R v Secretary of State ex parte Cheblak,* 1992, p. 334).

What the House of Lords is saying is that the security of a state is worthy of protection in a derivative sense, because of its purported necessity for the well-being of its citizens. Covert means, especially those that intrude on human rights, must only be used where there is a pressing social need for their use, justified by an overriding public interest. Accountability of intelligence services in how they conduct their business becomes important to ensure that they do not unjustifiably infringe upon civil liberties.

Accountability is one of the hallmarks of a democracy. The expectation that government in a democratic state will be answerable to the people is a necessary condition for recognising a state as democratic and is also accepted as a standard for political legitimacy (Borowiak, 2011, pp. 6–9). Parsons and Molnar (2018, pp. 144–54) argue that 'accountability exists when there is a relationship where an individual or institution, are subject to another's oversight, direction or request that the individual or institution provide information of justification for its actions'. Accountability demands that an institution must be obligated to answer questions regarding its deci-

sions or actions and there must also be means for enforcing consequences for failing to be accountable. The traditional oversight mechanisms over surveillance of communications and personal data by security agencies include official institutions such as courts of law, legislatures and statutory bodies. In many countries where surveillance has been gaining traction, the development of appropriate oversight mechanisms has been noted to be lagging, resulting in a vacuum of democratic oversight of security services (Duncan, 2022, p. 2). It is noted further, that in some states which have in place official oversight mechanisms, they often lack the power and resources to perform their oversight role effectively and efficiently. The lack of effective oversight mechanisms in the security sector puts at risk the respect for human rights and may also undermine the consolidation of democracy.

Duncan (2022, pp. 37–9) argues that security-intelligence authorities in the Southern African region are susceptible to state capture, and often protect the sitting Heads of State and not the citizenry. She observes that security services in the region often resort to harassment, persecution and violence against critics of the incumbent political party or faction of the ruling party. In Botswana, there have been concerns over the years that security services use surveillance in an arbitrary and unlawful manner (Mogapi, 2024). The prevailing situation is partly attributed to weak and/or ineffective traditional oversight mechanisms, which include courts of law, the legislature and statutory bodies. The weakness of the traditional oversight mechanisms makes it necessary to explore other oversight mechanisms to complement the traditional ones, such as popular agency (Interview with Mogwe, 2024). Popular agency oversight of the intelligence sector can contribute significantly to good governance and accountability in the sector. Popular agency acts as a watchdog against government through, inter alia, monitoring government performance, contributing to policy formulation and monitoring compliance with law and human-rights observance (Cole et al., 2008, p. 11).

This chapter explores popular-agency oversight of the security sector in Botswana. To appreciate the call for the strengthening of popular oversight, the chapter shall give an overview of intelligence

oversight in the country, highlighting the oversight deficit. The chapter will also give a case study of what is arguably a success story of public oversight and will assess the strengths and weaknesses of popular agency in the country. In January 2023 the combined efforts of CSOs and the media forced the Minister of Defence, Justice and Security to amend some controversial clauses in the Criminal Procedure and Evidence (Controlled Investigations) Bill No. 1 of 2022. This chapter draws from published primary and secondary sources, as well as interviews with targeted interviewees. The writer targeted people who have knowledge of operations of intelligence services, media practitioners who have been targets of surveillance and those that have written stories on the subject, practising attorneys who have represented targets of surveillance and civil society activists.

Overview of the intelligence sector in Botswana: Development of the sector

There are several security-sector agencies in the country that are tasked with the role of ensuring the security and stability of the state by preventing internal and external threats. These agencies include the Directorate of Intelligence and Security (DIS), the Directorate of Corruption and Economic Crime (DCEC), the Special Branch of the Botswana Police Service (BPS) and the Military Intelligence of the Botswana Defence Force (BDF). Commentators on the security sector point to a lack of accountability of these agencies in the execution of their mandates, a factor attributed to how these agencies are governed and their perceived politicisation (Gwatiwa and Tsholofelo, 2021, pp. 190–1). This raises the question of the effectiveness of oversight mechanisms for these agencies. For one to appreciate the governance and culture of the security sector in Botswana, it is imperative to understand the evolution of the sector.

The country now known as Botswana was declared a British Protectorate, Bechuanaland Protectorate, in 1885. It was ruled directly by Britain through a High Commissioner until it was granted inde-

pendence on 30 September 1966. Gwatiwa and Tsholofelo (2021, p. 192) posit that the culture of politicisation of security services dates to the colonial days. At that time, intelligence collection centred around Pan-Africanist activities at a time when colonies were agitating for independence. Colonial authorities considered efforts by Pan-African activists in their quest to gain independence a threat to the establishment, hence a threat to state security. National security interests were centred around the preservation of the colonial administration. Activities of nationalist movements to gain independence were thus viewed as national security threats as they threatened the continued existence of the colonial administration. In 1956 the United Kingdom Colonial Office under the Home Office (through the UK Security Office), issued a circular to all colonies and protectorates calling for the development of strong, organised intelligence structures (Kgosi, 2006, pp. 47–9). The circular required territories to furnish the UK Security Office in London with monthly intelligence reports containing regular and comprehensive collation of information, including, among others, activities of nationalist movements, local societies and organisations and, in particular, communist activities (Colonial Office, 1956). The circular further elaborated that typical points to be covered in the reports were to include:

- Communism – the Communist Party or local communist group, policy, influence, finances and external links, party's penetration of labour, education, government departments, essential services and security forces.
- Extremist nationalism – policy and influence of parties, subversive agitation, external links and terrorism.
- Labour and agrarian unrest – general economic conditions, labour disputes and grievances and exploitation by political groups.
- Radical, religious and tribal tension – xenophobia and anti-colour bar agitation, religious cults and disputes, and intertribal disputes.
- Frontier and border incidents – trans-frontier raids, grazing disputes and frontier incidents.

The Bechuanaland Protectorate established a Special Branch in 1963 as a unit of the Protectorate police force. This was to be the intelligence department of the police and an instrument for the collection and assessment of any information that may affect the security of the territory. The main duties of the Special Branch included:

i) Collecting, processing and assessing information on subversive and potentially subversive organisations and connected personalities from all available sources.
ii) Planning, acting and advising on counter-subversive and counter-espionage operations.
iii) Advising government, where appropriate, through the Intelligence Committee on matters relating to protective security and the use of security intelligence.
iv) Assisting the Criminal Investigation Department of the police in the investigation of any criminal offence having a political or subversive complexion and to work closely with the district administration (Bechuanaland Protectorate Police Special Branch Directive No. 2, 1964).

It is apparent from the circumstances surrounding the formation of the Special Branch and its mandate that during the colonial period, the threat perception was mainly domestic and regional and/or international threats were important only if they threatened the strategic ambitions of the colonial establishment (Gwatiwa and Tsholofelo, 2021, p. 193). The head of the Special Branch was responsible to the Commissioner of Police. He/she was a member of the Central Intelligence Committee (CICC) and had access, as required, to heads of departments. The government secretary was, however, the main channel for the provision of intelligence reports to the government. The use of the Special Branch as an intelligence agency meant that as a branch of the police, it combined both mandates of intelligence gathering and executive powers of enforcement through arrests (Tsholofelo, 2014, p. 6). Assigning both powers to a single entity is not ideal, as it does not provide for checks and balances in the authority's use of the powers. There were no clear mechanisms put in place to provide oversight of the Special Branch.

When Botswana gained independence in 1966, the Special Branch was retained as the main intelligence agency, and in January 1968, the government issued a directive formulating a Charter of the Botswana Police Special Branch. Directives are not legislation or subordinate legislation; they belong to a body of rules which are of great practical importance to guide the conduct of officials in the exercise of their powers (Baxter, 1991, p. 200). The Charter laid down in general terms the duties of the Special Branch as follows:

a) Security intelligence – obtaining, collection, appreciation and dissemination of all intelligence relating to subversive movements, organisations and individuals that may assist the government in the maintenance of national security.
b) Protective security – protection of information, material, personnel and, where necessary, operations. This included such matters as the proper handling of classified information, counter-sabotage, the protection of vital points, security and similar matters and the tendering of advice to the government.
c) Counter-espionage – detection, penetration and control, in cooperation with the security service, of foreign intelligence organisations that may operate within or against the country.
d) In cooperation with government departments concerned, arrange for the collation, appreciation and dissemination of intelligence regarding the activities of political, commercial and other organisations, and associations or persons that may be of security interest.
e) Liaise with other government departments and stay connected with public opinion on matters that are likely to cause general discontent among the public and dissatisfaction with government measures or government policy (Kgosi, 2006, pp. 51–2).

The Head of the Special Branch, usually a Deputy Commissioner of Police, was responsible to the Commissioner of Police for the effective discharge of his/her duties. The Head of the Special Branch

had a deputy and other officers and personnel working under him/her. At district level, the country was divided into regions headed by an Assistant Commissioner of Police, who reported to the head of the Special Branch. In 1998 the Special Branch changed its name to the Security Intelligence Services. It is, however, said that the change was mainly only in name and did not affect its mandate (Gwatiwa and Tsholofelo, 2021, p. 194). A conspicuous omission in the Charter on the Special Branch was that nothing is said on oversight of the agency.

Security threats to the state post-independence were perceived to comprise, inter alia:

- Communisms and communist-inspired activities.
- Pan-Africanist activities.
- Labour unions as well as opposition by local chiefs who resented the erosion of their traditional powers.

Mogalakwe (2013, pp. 12–27) argues that the security threats perception was not surprising as it reflected the realities of state-making and nation-building in the then nascent state. It is also observed that while post-independence domestic dissent was no longer considered a national security matter, it did not stop the security agencies from subjecting those who were not in agreement with the ruling party or faction of the ruling to surveillance. The late Dr Kenneth Koma, a leading opposition leader, was kept under surveillance throughout his political life (Magang, 2008, p. 471). It is further noted that the Special Branch used to keep a faction of the ruling Botswana Democratic Party which had fallen out of favour with the party leadership under surveillance. The faction was not engaging in anything subversive or unlawful or which could be said to be posing a threat to the security of the state, as they were canvassing for support for their preferred candidates, a normal democratic activity (Magang, 2008, p. 388 and p. 593). The practice was clearly a relic of a culture that had developed during the colonial administration where dissent with the powers that be was considered a threat to the security of the state.

The overview of the development of the security sector reveals

that the issue of oversight was neglected both pre- and post-independence. Given the nature of security agencies and the work they do which often require them to resort to covert and intrusive means that may infringe upon civil liberties, oversight of the sector is critical for ensuring that these institutions both contribute to the protection of the populations they serve and respect the rule of law and human rights. Post-independence, one would have expected a change of attitude and culture in the governance of the security sector influenced by the democratic ethos that the State of Botswana had embraced at independence. The State of Botswana has been affirmed as a civilised state established under democratic principles whose bedrock is the rule of law (*Good v Attorney General (2),* 2005, p. 357). Unfortunately, until the establishment of the DIS, the issue of oversight of the security sector was not formally addressed even for the DCEC, which is established by statute.

Oversight is important as it provides an assurance of legality, proportionality and propriety for activities of the security sector. Lack of oversight of the security sector in Botswana has made it susceptible to state capture, where the agencies tend to protect the interests of the sitting Head of State, rather than the citizenry. The situation is not helped by the general attitude of the courts when national security is raised. The traditional approach of the courts has been that it is the responsibility of the executive to determine what constitutes a threat to national security and, when the executive has exercised its discretion, it is not the business of the courts to second-guess it (*Good v Attorney General (2),* 2005, pp. 357–62). Recent decisions of the Court of Appeal, however, give optimism that the apex court may be drifting away from the conservative approach. In a recent decision, the court has held that 'Whether or not an investigative functionary entertains a belief, on reasonable grounds, as to the commission of a crime is a justiciable matter to be objectively tested by the courts' (*Director General of the Directorate of Intelligence and Security and others v Seretse Khama Ian Khama*, 2022, para. 46). The essence of the judgement is that where an investigative authority wishes to obtain a warrant from the courts to investigate a matter relating to national security, it must furnish the court with proof of the existence of such belief. An investigative authority will be required

to establish facts or state of affairs, which, objectively viewed, must exist before a court can grant a warrant (*Attorney General v Paul,* 2019, p. 435). If a court finds that, objectively, the facts relating to national security do not exist, it will not issue a warrant. While the developments are welcome, the major concern remains the lack of a clear definition of national security in the country. This leaves courts without clear national norms upon which they can objectively determine whether national security is at stake.

In the mid-90s, in response to new security challenges such as terrorism and readiness to deal with contemporary security threats in the country and globally, discussions within government commenced on the setting-up of an independent intelligence organisation (Kgosi, 2006, p. 53). The security environment had evolved globally, and the Security Intelligence Services was finding it difficult to forge partnerships with international counterparts as it was only a police service (Tsholofelo, 2014, p. 5). The discussions culminated in the birth of the DIS, which was supposed to be an independent institution. The functions of the DIS include:

a) Investigate, gather, co-ordinate, evaluate, correlate, interpret, disseminate, and store information, whether inside or outside Botswana, for the purposes of: –
   i) detecting and identifying any threat or potential threat to national security,
   ii) advising the president and the government of any threat or potential threat to national security,
   iii) taking steps to protect the security interests of Botswana, whether political, military or economic;
b) Gather ministerial intelligence at the request of any government ministry, department or agency and, without delay, evaluate and transmit as appropriate to that ministry, department or regulate, in cooperation with any government ministry, department or agency entrusted with any aspect of the maintenance of national security, the flow of intelligence and security, and the co-ordination between the Directorate and that ministry, department or agency of functions relating to such intelligence;

c) Advise government, public bodies, and statutory bodies on the protection of vital installations and classified documents;
d) Make recommendations to the president in connection with: –
   i) policies concerning intelligence and security,
   ii) intelligence and security priorities, and
   iii) security measures in government ministries, departments or agencies.

It is worth noting that, like the Special Branch, the DIS performs both intelligence and executive functions. The agency is tasked with the gathering, evaluation and dissemination of information and, at the same time, has the executive powers of arrest and searches.

The Intelligence Security Service Act, 2007 (ISS Act) adopts a broad definition of national security, which includes political, societal and economic threats. Tsholofelo (2014, p. 6) warns that we should be wary of the broad definition of 'national security', as it has tended to be abused in the past. He further cautions that defining threats to national security by reference to acts relating to subversion and terrorism may pose challenges as the parameters of these two terms are problematic. Gill (2005, pp. 12–33) also warns that the term subversion if not properly qualified can mean anything, including political and labour movements' activities that are both lawful and peaceful. Furthermore, the definition of terrorism remains contested globally, which could lead to the easy abuse of the concept. In Botswana, it has been recorded that in the past; the Special Branch engaged in the surveillance of a prominent opposition political figure and a faction of the ruling part that had fallen out of favour with the party leadership. In June 2024 a local newspaper reported that the DIS was monitoring some ruling party Members of Parliament who were planning to oppose a controversial government-sponsored constitutional amendment bill (Weekend Post, 1–7 June 2024). These activities were presumably monitored by the security services under the veneer of being subversive, but these are clearly lawful exercises of rights guaranteed under the Constitution.

Oversight deficit in the security sector

The ISS Act establishes some mechanisms that are supposedly intended to provide oversight, direction and guidance to the DIS. In a democratic dispensation, intelligence governance spreads responsibilities of control and oversight between the various arms of government (Bruneau and Boraz, 2007, p. 14). These include executive control, legislative oversight, judicial review and internal control (Tsholofelo, 2014, p. 8). The ISS Act attempts to embrace these measures.

Executive control of the DIS is provided by the CIC. This is a 13-member committee chaired by the President and includes, among others, the Vice President, ministers responsible for intelligence and security, and foreign affairs, respectively, and heads of both the BPS and the BDF. The function of the CIC is to guide the DIS on matters relating to national security and intelligence interests and advise the President on policy and policy formulation in the interests of national security. Members of the CIC are all presidential appointees, which has raised concerns over its independence. Another contentious issue is the unilateral appointment of the Director General (DG) of the DIS by the President, which has led to concerns that he/she may appoint someone at his/her own personal bidding instead of the national interest (Tsholofelo, 2014, p. 9). These concerns have arguably been confirmed when the Court of Appeal found that the DIS had unlawfully attempted to usurp the powers of the DCEC in investigating corruption (*Attorney General v Katlholo*, 2024, p. 21). In this case, the DIS had attempted to get access to confidential files of an investigation into alleged acts of corruption in respect of a company linked to former President Ian Khama's brothers. The fallout between President Masisi and Khama is well documented, and the former is on a self-imposed exile in South Africa. It must be noted that the former DIS DG, Colonel (rtd) Kgosi, who is believed to be close to Khama, was unceremoniously dismissed from office by President Masisi and replaced with the current DG, Brigadier (rtd) Magosi. The rift between the incumbent President and his predecessor and its effect on the DIS and society at large is aptly captured by Judge Kebonang of the High Court in one of the several cases that the DIS has been brought against the former DG. In describing the case, the Judge said:

> It is one of mutual dislike and mistrust between a spy agency and its former spymaster. This has negatively affected the smooth functioning of the different agencies in the web of government. Every facet of public and private life has felt this impasse. The fallout permeates every layer of government, and many careers and lives have been unfairly destroyed as a result. With no end in sight, it weighs on the rule of law and the sanctity of institutions (*Attorney General and others v Kgosi,* 2024, p. 2).

These cases give credence to concerns that President Masisi is using the DIS to settle personal scores. The Court of Appeal has found that the DIS under Magosi has acted as a law unto itself in breach of the very foundational tenets on which the state was established, and the respect for the rule of law when it usurped the powers of the DCEC by taking over the investigation of corruption (*Attorney General v Katlholo*, 2004). The cases also cast serious doubt on the ability of the executive to guide and control the DIS to act in accordance with the law. Equally concerning is the silence of the executive on the governance of the DIS in the aftermath of the damning remarks by judges about the institution. It is reported that some Botswana Democratic Party elders tried to raise the matter of the DIS DG's perpetual negative public image with President Masisi, but he declined to discuss the matter with them (Weekend Post, 6–12, July 2024, p. 3).

Legislative oversight of the DIS comes in the form of the Parliamentary Committee on Intelligence and Security (PCIS). The committee consists of nine Members of Parliament who are not Cabinet members appointed by the President after consulting the Leader of the Opposition. The mandate of the PCIS is limited in that it is only tasked with examining the expenditure, administration and policy of the DIS. The committee does not have an oversight of the activities or operations of the institution. The independence of the PCIS is also questionable. Unlike other parliamentary committees whose members are appointed by the Parliamentary Selection Committee, members of the PCIS are appointed by the President and it reports to him/her annually on the discharge of its functions. The PCIS's limited mandate and lack of independence has led to opposition Members of Parliament refusing to be

appointed to the committee. After the 2019 general elections, the President attempted to constitute the PCIS and invited members of the opposition, but they declined with the then Leader of the Opposition, Dumelang Saleshando, saying the ISS Act was never intended to deliver an institution that is subjected to parliamentary scrutiny and oversight and, therefore, found it fruitless to be appointed to the PCIS as it does not play any meaningful oversight of the DIS (*The Botswana Gazette*, 12 November 2020).

The ISS Act provides for judicial oversight of the DIS in the form of a Tribunal. The Tribunal is established to receive and adjudicate complaints from any person who feels aggrieved by an act or omission of an officer of the DIS. Members of the Tribunal are appointed by the President after consultation with the Leader of the Opposition, and consist of three members: a judge or retired judge of the High Court, or a legal practitioner who qualifies to be appointed as a judge of the High Court, and two other persons, one of whom shall have considerable knowledge of the subject matter of the complaint and operation of security agencies. The independence of the Tribunal has been queried, with the major concern being the President's involvement in the appointment of its members (Tsholofelo, 2014, p. 11). The Tribunal suffers a credibility crisis, a factor that may have contributed to it receiving very few cases since its establishment. The Tribunal is not permitted to inquire into any complaint it considers prejudicial to national security. What constitutes national security has remained ambiguous and contentious in the country as there is no national security strategy or policy in place which can guide the Tribunal in determining whether a complaint would be prejudicial to national security.

Judicial oversight of the DIS further comes in the form of a requirement of a warrant in cases where there is need by the institution to use intrusive methods in the investigation of threats to national security. In such cases, the institution must apply to a Senior Magistrate or High Court for a warrant. There, however, continues to be persistent public concerns that, even though the Act requires the DIS to obtain a warrant to intercept communications, the institution is still monitoring activities of opposition politicians, journalists and civil society activists without authorisation. There is no information

publicly available on the use of this provision and there is need for transparency in its use to promote accountability of the DIS.

Internal controls are rules and processes within an institution aimed at ensuring that staff perform their mandate professionally and effectively within the limits of their authority and in compliance with the law (DCAF-Geneva Centre for Security Sector Governance, 2022, p. 6). Internal controls usually take the form of i) inspectors general, ii) professional ethos and institutional norms and iii) multiple intelligence organisations (Bruneau and Boraz, 2007, pp. 15–16). The DIS does not have an inspector general. The Intelligence and Security Council (ISC) established in the ISS Act appears to be somewhat playing the role. The functions of this committee include reviewing activities of the DIS and receiving and examining complaints lodged by members of the agency. Membership of the ISC consists of the Permanent Secretary to the President, the Attorney General, the DIS DG and the Deputy DG. It is reported that in the past, the ISC has reviewed punishments meted out to officers in terms of the disciplinary code of conduct (Tsholofelo, 2014, p. 12). The presence of both the DG and the deputy in the ISC is anomalous as the two may be conflicted when the committee is reviewing the activities of the institution or sanctions meted out to officers in breach of the code. It is reported that the DIS has in place a code of conduct for its officers; however, the code has not been made public (Tsholofelo, 2014, p. 12).

The security sector in Botswana has always been marred by controversy relating to its poor governance, resulting in them not being accountable for the performance of their mandate. While the DIS was supposed to be an independent institution when its formation was under discussion, since its inception it has been embroiled in controversy. The controversy emanates from its poor governance and politicisation and, thus, lack of accountability in the performance of its duties. This trait is a colonial relic and a legacy of the Special Branch. During the protectorate era, the colonial administration used national security surveillance as a tool for social and political control. The focus was on Pan-Africanist activities which were threatening the colonial interests, and communism. Post-independence, one would have expected a change of attitude in the determination of threats to the security of the state. Unfortunately, it appears that

intelligence agencies have not changed their attitudes resulting in them carrying out their functions in a manner that is not consistent with democratic ethos, thereby undermining civil liberties. The prevailing situation is exacerbated by poor and/or inadequate oversight mechanisms on the sector. In the case of *Attorney General v Katlholo*, referring to attempts by the DIS to encroach on the mandate of the DCEC, the court observed: 'This case concerns an egregious excess of authority and cry out for rectification and rebuke.' It is the responsibility of oversight mechanisms to perform the task of rectification and rebuking any rogue intelligence sector agency. The courts are playing their part, but it seems the other oversight mechanisms on the DIS established under the Act are failing. The status quo makes a compelling case for the strengthening of public oversight of the sector.

A case study of public oversight

Public oversight of the intelligence sector is performed by CSOs and the media. These institutions contribute to promoting good governance and accountability by acting as watchdogs against government, contributing to policy formulation and monitoring compliance with human-rights norms and standards (Cole et al, 2008, p. 1). The media is expected to disseminate and scrutinise information about governmental activities, including those of the intelligence sector, bringing issues into the public domain for debate. The media can draw public and political attention to human-rights infringements, abuse of power and lack of accountability (Hillebrand, 2012, p. 693). When the media exposes cases of malpractices and/or alleged malpractices in the intelligence sector, this may contribute to public debate. The media may also be a channel for whistleblowers to expose wrongdoing in the intelligence sector, especially where there are non-existent or weak oversight mechanisms on the sector. CSOs on the other hand play an important oversight role on the intelligence sector in several ways. These organisations may make submissions when the legislature is adopting or amending laws governing the sector by drawing attention to flaws and campaign

for inclusion of provisions that are consistent with international human-rights norms and standards in the proposed law. In some countries CSOs have taken part in initiating or intervening in litigation relating to the intelligence sector before national courts and international tribunals (Council of Europe, 2015, p. 59). Like the media, CSOs equally play a watchdog role by monitoring government actions and work of oversight mechanisms in the intelligence sector.

CSOs and the media in Botswana have and continue to play a meaningful public oversight role on the intelligence sector. Their success may be debatable, but one incident of significance where the combined efforts of CSOs and the media culminated in partial success is worth narrating. On 12 January 2022, the Minister of Defence, Justice and Security published in the *Government Gazette Extraordinary* (Vol. LX. No. 3) the Criminal Procedure and Evidence (Controlled Investigations) Bill, 2022, Bill No. 1 of 2021. The Bill was expedited through the National Assembly under a certificate of urgency. The justification for the expedited procedure was said to be the need for the country to meet requirements of the Financial Action Task Force (FTAF), which had blacklisted the State of Botswana, which had been found to be non-compliant with FATF standards. The Bill had six parts, with the pertinent ones being:

- Part II provided for an undercover operations framework and formalised the collection of information through undercover operations orders and assumed identities.
- Part III dealt with interception of communications framework, authorising the interception of communications by investigatory authorities, and set out the role of service providers in controlled investigations for the gathering of criminal evidence.
- Part IV introduced provisions for the handling of information in controlled investigations.

Introducing the Bill for the Second Reading in the National Assembly, the Minister said, among other things, that the Bill was in response to a recommendation of the FATF, which had identified that there was no explicit provision for the use of undercover operations in the country (Hansard, 2022, p. 63). Following the publication of the Bill and before

its Second Reading in the National Assembly, the Bill was met with shock and resistance from the media, CSOs and the public (Southern Africa Digital Rights, 2022). The Bill had several troubling clauses and omissions. It gave a head of an investigatory authority who believed, on reasonable grounds, that a delay in obtaining an undercover warrant would defeat the object of the undercover operation, to authorise an investigating officer to engage in undercover operation. Similar powers were also given to a head of an investigatory authority for the interception of communications. The Bill did not provide for adequate oversight mechanisms on the use of these intrusive investigation methods. For example, it did not provide for judicial oversight.

The Bill received widespread criticism from local media and CSOs such as the Media Institute of Southern Africa (Botswana Chapter), Botswana Editors Forum, and Ditshwanelo – the Botswana Centre for Human Rights. The concerns raised against the Bill were that its enactment would negatively impact the protection of fundamental rights such as privacy, freedom of expression and freedom of association. Furthermore, the Bill did not provide adequate oversight mechanisms to guard against abuse of powers given to investigatory authorities. It was argued that giving powers to heads of investigatory authorities to authorise the use of intrusive investigatory methods without court supervision was prone to abuse. The government was also criticised for opting to have the Bill taken through the National Assembly under a certificate of urgency, thereby depriving the public of sufficient time to interrogate and scrutinise the Bill. The strategy adopted by those opposing the Bill was, first they met Members of Parliament both from the ruling party and opposition to brief them on the dangers of the proposed law. They emphasised to the Members of Parliament that their opposition to the Bill was not a partisan matter but was motivated by the dangers the proposed law posed if it were to become law. After meeting the Members of Parliament, the activists published alerts locally, regionally and internationally, in which they highlighted the dangers the proposed law posed to the enjoyment of the fundamental rights and freedom of the individual. The campaign against the Bill received regional and international support. The Botswana Editors Forum coordinated

activism against the Bill, and for about 1.5 weeks, it hosted experts from Lesotho, Namibia, Swaziland, South Africa and Zimbabwe to assist in strategising against the Bill. Statements against the proposed law were published in local media and protest letters were written to the President, the Speaker of the National Assembly and the Minister of Defence, Justice and Security. In its solidarity message, the African Editors Forum wrote, 'The Bill will allow the government to spy on citizens without a warrant and supervision from the courts. This is a direct move to subvert democracy and violate the rights of the media to do its work freely and the rights of Botswana to freely receive information' (Committee to Protect Journalists, 2020).

The combined efforts of opposition and protest against the Bill ultimately forced the Minister of Defence, Justice and Security to effect amendments that partly addressed the concerns over the Bill. The Minister's deference to public pressure was commendable and a significant victory for public oversight in a matter relating to governance of the intelligence sector. When presenting the Bill for the Second Reading in the National Assembly, the Minister conceded:

> I am aware that the Bill has caused uneasiness and bearing this in mind together with concerns raised by this Honourable House, I have re-examined the Bill. I will, therefore, be presenting some amendments during the Committee Stage. I wish to assure this Honourable House and Batswana that I have heard you and I would like to make it categorically clear that there is no intention to diminish the rule of law (Hansard, 2022, p. 63).

The Minister emphasised to the House that he was aware that intrusive investigation techniques must be used as a last resort. He assured the National Assembly that the amendments he was going to make to the Bill would be aimed at setting stringent standards by outlining matters that must be considered by a court before which there is an application for a warrant to conduct intrusive investigation methods. True to his word, the Minister did introduce some amendments to the Bill during the Committee Stage, some of which addressed the concerns raised against the original Bill. Notable amendments were:

a) The Bill was amended by deleting a clause that permitted a head of an investigatory authority to authorise an undercover operation without a warrant. The amendment went further to prohibit the use of undercover operation without a warrant and making it a criminal offence to conduct an undercover operation without a warrant. In recognising the intrusive nature of using undercover operation, and the need that it must only be done as a last resort, the Bill was amended by inserting a clause that requires that in an application for undercover operation, it must be demonstrated to the court that what is sought to be achieved by the warrant could not reasonably be achieved by other less intrusive means.
b) Amendments to the Bill were also effected to address concerns raised on powers given to heads of investigatory authorities in conducting interception of communications without a warrant. A new clause was inserted prohibiting the interception of communications without a warrant. Interception of communications without a warrant was made a criminal offence. Further amendments to the provisions relating to interception of communications were made to ensure that prior to the issuance of a warrant, a court must be satisfied that there is an actual threat to national security, or a serious crime-related activity is being or will be committed, or that there is potential threat to public safety. In making these amendments, the Minister highlighted that the issuance of a warrant of interception of communications is a method of investigation to be used under the most exceptional circumstances and as a last resort (Hansard, 2022, p. 65).
c) To strengthen oversight mechanisms, the Bill was also amended to include the establishment of a Controlled Investigations Coordinating Committee (CICC), chaired by a judge or retired judge and comprising people with knowledge and relevant experience. The functions of the CICC include protection of interception subjects and targets and to receive and determine complaints in respect of the use of warrants issued under the proposed law.

The Criminal Procedure and Evidence (Controlled Investigations) Bill was passed by the National Assembly on 4 February 2022. The amendments which the Minister had promised were incorporated into the Bill at the Committee Stage in the National Assembly. While the final law may not be perfect, an important lesson is the impact public oversight had in shaping the law that was finally passed by Parliament. The amendments made to the Bill owing to public intervention brought about important oversight measures on the intelligence sector. There is, however, still more work to be done by both the media and CSOs to ensure accountability in the intelligence sector. There is still a cloud of secrecy on the extent to which intrusive investigatory methods are used by the agencies. Although the Criminal Procedure and Evidence (Controlled Investigations) Act, 2022, prohibits the use of intrusive investigation methods without a warrant, there continues to be concerns that intelligence agencies are still using these methods unlawfully. Unfortunately, it is not possible to verify the concerns as the law does not provide for post-surveillance notification. Post-surveillance notification is an important oversight mechanism as it will show the prevalence of the use of intrusive methods and the subjects or targets of such measures. Armed with this information, one will be able to determine whether these measures are used reasonably or arbitrarily. For example, if information shows that most targets are media practitioners, this may raise concerns. There must be some level of transparency in the way intelligence agencies operate to allow the media and CSOs to perform their public-oversight functions. More worrying are findings that some intelligence agencies disregard the law which undermines the rule of law and democratic tenets.

For the media and CSOs to effectively perform their public-oversight role on the intelligence sector, there must be in place an environment in which they can challenge governments on sensitive matters without fear of harassment or retaliation (Council of Europe, 2015, p. 60). Public-oversight agencies in Botswana face several challenges which render their operating environment not ideal for the performance of their oversight role on the intelligence sector. There is apprehension among media practitioners and civil society activists that their digital communications and personal data are

routinely monitored by the DIS. Two journalists interviewed by the writer said they were warned by whistleblowers within the DIS that the agency was monitoring their communications. They were not told whether such surveillance had been duly authorised, nor the purpose of such surveillance. The fear of being under surveillance by the DIS is also echoed by some civil society activists. The dark cloud of surveillance by intelligence agencies, whether real or perceived, has a chilling effect on the enjoyment of rights such as freedom of expression and association which are necessary to enable the media and CSOs to play their oversight role on the sector.

Surveillance of communications and personal data of members of popular agencies further poses threats to media freedom because it threatens the protection of confidential journalistic sources. In the execution of their public-oversight mandate, the media usually employs investigative journalism which often relies on confidential sources. Unlawful surveillance of journalists may undermine protection of sources as intelligence agents may be able to establish whom journalists have been communicating with, thereby leading to source identification.

There is a culture of secrecy surrounding the intelligence sector in Botswana which makes it difficult for CSOs and the media to access information on the sector, including policies. While some information on the intelligence sector must necessarily remain secret to ensure the efficiency of the services and protection of informants, it does not follow that all information about the sector must be withheld from the public. Information on the sector such as policies should be accessible to the public. The Constitution of Botswana does not guarantee a right of access to information and there is no law on the right. Public bodies, including intelligence agencies, are thus not obliged by law to disclose information on their policies or activities. The culture of secrecy in the intelligence sector is reinforced by a lack of a clear definition of the concept of national security. The Court of Appeal has held that it is for the executive to decide what national security is. It appears that security agencies are taking full advantage of this and treat almost any information on the sector as a national security matter. The DIS is leveraging on the loophole and has been using the national

security mantra in matters that have no bearing on the security of the state as demonstrated in the *Attorney General v Katlholo* case. It would not be far-fetched to assume that surveillance of journalists, civil society activists and opposition politicians was/is done under the guise of protecting national security when, in essence, it was or is just for the protection of the interests of the sitting President.

In the fight against the Criminal Procedure and Evidence (Controlled Investigations) Bill, local CSOs and the media brought in regional and international partners. Part of the reason for bringing in outside partners was because it was felt by the coordinators of the resistance campaign that Botswana does not have non-governmental organizations (NGOs) with requisite skills, competencies and expertise to play an effective oversight role on the intelligence sector (Mogapi, 2024). Currently, Distshwanelo – The Botswana Centre for Human Rights – is the only one that engages in general human-rights advocacy. The organisation, however, has not been active in intelligence-sector oversight, except in isolated cases, where it has issued statements when a major event in the sector had occurred, like when the Criminal Procedure and Evidence (Controlled Investigations) Bill was published. The Botswana Centre for Public Integrity, while its mandate is the promotion of accountability in governance, is yet to expand its scope of activities to cover the intelligence-sector oversight (Interview with Seabo and Gaolebale, 2024). The NGO sector is mainly dependent on donor funding. The programmes that NGOs engage in are shaped and driven by interests and priorities of the donors. The Executive Director Ditshwanelo explains this point further: 'Because the funding comes from outside, it means we are often faced with having to make decisions about the relevance of the topic which is being funded or issues which are being funded or being prioritised by the funder' (Interview with Mogwe, 2024). Donor funding in the country is dwindling as Botswana is classified as an upper-middle-income country, leaving many NGOs dependent on government funding through the Botswana Council of Non-governmental Organisations (BOCONGO). Dependence of NGOs on state funding may compromise their independence, as it may make them shy away from criticising the state and its organs out of fear of losing funding. The possibility of state capture of NGOs

that comes with funding of these institutions by government has led one civil society activist to vehemently oppose government funding (Interview with Mogwe, 2024).

The media in the country face hurdles on their ability to play an oversight role on the intelligence sector. The oversight comes, among others, in the form of investigative stories that expose malpractices in the sector. Quality investigative journalism requires resources and experienced journalists. Unfortunately, many of them are deserting the profession for better opportunities, leaving the industry with inexperienced journalists (African Media Barometer, 2023, p. 52). Media houses also face sustainability challenges arising from dwindling advertising revenue. The decline in advertising revenue means that traditional media have limited resources to invest in the production of quality news. They have resource constraints making it difficult for them to retain experienced journalists. Technological evolution has radically changed how news and other media content are produced and disseminated. The evolution has, in turn, affected the economic reality of journalism (Council of Europe, 2022). Advertising spending, which is an important source of revenue for the media, has shifted from traditional media to online platforms. The media in Botswana has not been spared this development. The media scramble for the few advertisers left, with the public sector being the largest. A media that is dependent on public advertising tends to avoid reporting on sensitive subjects like the surveillance sector because they do not want to earn the wrath of the government, resulting in a possible loss of advertising (African Media Barometer, 2023, p. 35). The predicament of a media that is overly dependent on advertising revenue is eloquently captured by the chairperson of the Botswana Editors Forum in the following words: 'Journalists are scared of repercussions, not only repercussions of surveillance, but repercussions of being isolated and targeted in terms of financial sanctions' (Interview with Mutapati, 2024).

A combination of the above two factors is depriving the media the use of an important oversight tool in the form of quality investigative journalism. The lack of experienced investigative journalists, and limited resources (if any) allocated to investigative journalism has an adverse effect on the quality of content we receive from the media.

The absence of clear legal protection for journalistic confidential

sources of information discourages the media from investigating and writing stories on the intelligence sector because their sources can be easily identified. Protection of journalistic sources of information is now considered to be an aspect of media freedom (ACHPR, 2019, principle 25). Media freedom is guaranteed in the Constitution of Botswana, but there is no law that deals specifically with protection of sources. In view of the prevalence of the use of surveillance by intelligence agencies on the media and the absence of a law addressing protection of sources, this has a negative effect on the media's ability to play an oversight role on the intelligence sector. There is also a worrying trend in the country where intelligence agents raid newsrooms and confiscate journalists' communications and information-storage devices like computers, laptops and mobile phones. For example, in July 2023 agents from the DIS raided the offices of *Mmegi* newspaper, confiscating laptops and phones of the editor and a reporter, and took them for questioning (Committee to Protect Journalists, 2023). The two were later released without any charges laid against them and their gadgets were returned, but the journalists refused to take back the gadgets, resulting in the DIS giving then money to buy replacements. To compound matters, several newsrooms report that intelligence agents have infiltrated them. The absence of a law protecting sources and raids on newsrooms make investigative journalists an elevated risk to use as an oversight tool. The chairperson of the Botswana Editors Forum makes the following observation regarding the prevailing operating environment of the media in the country:

> Journalists tend to shy away when it comes to serious investigations. They tend to be scared to tackle those. You end up just writing simple things that are not going to put you in trouble because you know that at any time your gadgets can be grabbed. And, also, journalists know that they can be watched, they can be tracked, so, they know that intelligence officers at any given time, can know where they are, who they are meeting (Interview with Mutapati, 2024).

The ability of popular agencies, CSOs and the media to play an effective oversight of the intelligence sector further depends on

their independence and integrity. The discussion above points to the compromised independence of both the media and NGOs in the country. The lack of independence stems mainly from financial vulnerabilities of both sectors and their dependence on the state. The media also suffers from credibility issues. The print media, in particular, has been said to be unprofessional and biased. Joel Konopo, a former editor, and co-founder of the INK Centre for Investigative Journalism, makes the following observation:

> There are constant complaints about bias, from readers and politicians alike. These complaints are not groundless. As director of Botswana's only independent investigative journalism unit, and a former newspaper editor, I have seen first-hand how the narrative offered by journalists in Botswana is all too often directly influenced by politicians; and how the close relationship between politicians and journalists leave the media too weak to hold the powerful to account (*Mail and Guardian*, 29 January 2020).

It will be anomalous to expect the media to play an oversight role on the intelligence sector when the media itself is not accountable and credible. If the media is not accountable, it has no moral ground to act as a watchdog over the intelligence sector.

Conclusion

The oversight deficit in the intelligence sector clearly makes a case for the strengthening of popular agency on the sector in Botswana. The recent Court of Appeal ruling that the DIS has been abusing its powers and encroaching on the mandates of other security-sector agencies under the guise of protecting national security, and the fact that all this took place under the nose of the formal DIS oversight mechanisms, makes the case for popular agency more urgent. The success of popular agency in the campaign against the Criminal Procedure and Evidence (Controlled Investigations) Bill is testimony to the power that these agencies have in promoting

accountability in the intelligence sector. Had it not been for popular agency intervention, the legislature could have enacted a law giving unlimited powers to heads of investigatory agencies to authorise use of intrusive methods of investigation without adequate safeguards. But for popular agencies to perform their role effectively, the operating environment must be conducive. This chapter has identified some of the challenges facing popular agencies, which need to be addressed to create the right environment for these agencies to perform their mandate:

- They need to be assured financial sustainability to ensure that they are not overly dependent on the state for survival. Financial stability will enhance the popular agencies' independence from the state. There are several options that can be used. NGOs can be funded directly by the legislature in a way that will insulate them from political meddling. Measures can also be put in place to promote media sustainability, like according preferential tax rates to media companies and putting in place support measures for investigative journalism.
- The right to information must be protected in law and practice. A law protecting this right must create a duty to proactively disclose information in the custody of public bodies and relevant private bodies. The law must apply to the intelligence sector and exemptions to disclosure should only be legitimate where the harm to the interest protected demonstrably outweighs the public interest. A right to information law would reverse the culture of secrecy in the intelligence sector.
- The legislature should enact a law that defines national security. The lack of a definition of this concept has allowed intelligence-sector agents to abuse the concept at the expense of protection of human rights. The definition of the national security should be anchored on international norms and standards to ensure that an appropriate balance is achieved between protection of genuine-national security interests and human rights.
- The legislature must pass a law protecting journalistic sources of information. A related issue is for a court to satisfy itself

before granting an order for a warrant of interception of communications of a journalist, that the interception will not unjustifiably lead to source identification.

- The media, especially the print media, need to rebuild its credibility so that they regain public trust. This will be achieved if the media puts in place credible and effective self-regulatory mechanisms that will enforce high ethical standards in the sector.

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