

WHERE HAVE ALL THE DEMOCRATS GONE?

The case for dissolving the Scorpions

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Those who lament the imminent dissolution of the Scorpions are blinded to the shortcomings of the unit and fail to see the role they have played in entrenching patronage. Not only have they fallen short of delivering justice, they have been given the freedom to act as intelligence gatherers without the responsibility of having to account to oversight structures. This is a shortcoming of the legislation that created the unit, but has irreparably tarnished the unit's reputation. Locating a new investigative unit in the SAPS is the best solution to overcome these problems and avoid them in the future.

South Africa has spent the past decade in an environment of patronage. The politics of patronage became a defining characteristic of both public and private spheres of power. Those with power, either public or private, unashamedly distributed their patronage to those that they believed were either 'in' or 'out' of favour.

The alliance of the powerful² - government, banks and the corporate elites - excelled in the exercise of their power. Their actions had the effect of creating targeted favour or prejudice and in so doing they either 'made' or 'broke' those who were the subject of their patronage or scorn. In this environment, the abuse of power took root, fostering the use of democratic means to produce undemocratic outcomes.

Tarnished: the NPA and the DSO

The National Prosecuting Authority (NPA) and the Directorate of Special Operations (DSO) cannot escape the charge that they too were instrumental in the distribution of this patronage. They did so in

direct violation of the constitutional imperative that they exercise their power impartially. Important court judgements and the various Commissions of Inquiry³ into the affairs of the DSO attest to this. For example, the Hefer Commission of Inquiry – established to look into allegations that former national Director of Public Prosecutions, Bulelani Ngcuka was a former apartheid spy – stated in its final report in relation to allegations made in the press about Mac Maharaj and his wife that

In a country such as ours where human dignity is a basic constitutional value and every person is presumed to be innocent until he or she is found guilty, this is wholly unacceptable. Section 41(6)(a) of the Prosecuting Act was not enacted for nothing and as long as someone in the National Director's office keeps flouting the prohibition against the disclosure of information, one cannot be assured that the Prosecuting Authority is being used for the purpose for which it is intended... matters do not appear to be what they should be in

Mr Ngcuka's office as far as the observance of section 41(6)(a) is concerned... (Hefer 2004: para 79-79)

In addition the Public Protector (Special Report of the Public Protector on an investigation of a complaint by Deputy President J Zuma against the NDPP and the NPA 2004) found amongst other important constitutional issues, that the statement made by the National Director on the 23 August 2003 unjustifiably infringed Mr Zuma's constitutional rights to human dignity and caused him to be improperly prejudiced. The statement was found to be improper and unfair. He found further that Mr Zuma was not properly informed about the criminal investigation against him. The Public Protector recommended that Parliament take urgent steps to ensure that the National Director and the NPA are held accountable, in terms of the law, for these violations. He also recommended that Parliament should convene as a matter of urgency to determine policy guidelines in respect of the functioning of the DSO that would prevent a recurrence of these violations. In response to this the Executive intervened to prevent Parliament from dealing with this important report. In the end, Parliament watered down its enquiry to the effect that no action was taken against either the National Director or the NPA. Those who criticised this behaviour and style of work of the DSO were ridiculed and marginalised.⁴

Over time, as the DSO continued to conduct its activities in the same way, the abuse of power, and the politically motivated nature of this abuse and patronage, became increasingly clear. So too did the conflicts between the DSO and the SAPS, as these two national structures pursued similar goals. It is in this context that the decision was made to implement the constitutional imperative to establish a single national police service within a criminal justice dispensation that provides for the clear separation of investigative, prosecutorial and intelligence powers.

The ordinary membership of the ANC became aware of this situation many years ago. Traces of disquiet, albeit in a generic form, alluding to this misalignment can already be seen in the resolutions

of the Stellenbosch National Conference held in 2002. The disquiet grew as the abuse of power continued without any corrective action on the part of the Executive. With time this unhappiness worked its way through the branches of the ANC and eventually found formal expression in the call for the disbandment and relocation of the DSO at the policy conference that predated the ANC's 52nd National Conference decision to disband the DSO.

Much has been said about the ANC's decision and the subsequent effort of government to implement legislative amendments to disband and relocate the DSO into the SAPS. At the centre of this effort is the desire of ordinary members of the ANC to address the abuses that have been associated with the actions of the NPA and the DSO. This is what should happen in an evolving democracy such as ours. It may be argued that this effort is a knee-jerk reaction to the abuses of power of the DSO, but a necessary one nonetheless.

Those opposed to this decision say that it was taken to protect powerful ANC politicians from current and future investigations by the DSO. They also argue that to keep the ANC from exercising unbridled power, the DSO must be left alone. Strangely, they remain silent on the exercise of unbridled power by the DSO in the pursuit of patronage. The abuses of the DSO cannot be explained away as collateral damage in the 'just' fight against 'evil'.

The DSO was formed as an organ of government to combat organised crime. To that end the Executive enacted the founding legislation of the DSO that combined the power of prosecution, investigation and information gathering. However, with the value of hindsight it needs to be acknowledged that the legislation did not pay proper attention to the democratic checks and balances required by our Constitution.

Justice Brandeis, in a dissenting US court judgement wrote, in 1928:

Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the

administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the convictions of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

In the matter of the abuse of power and the use of state organs as an instrument of patronage, all democrats must resolutely set their face. The challenge is to identify and remedy these abuses when and where they occur.

Those who oppose the disbandment and relocation of the DSO offer in support of their argument the interpretation of the judgement handed down by Judge Kriegler in the Constitutional Court (CC) matter between the Minister of Defence and Potsane (Constitutional Court judgment. Minister of Defence vs. Potsane. CCT 14/2001). In this matter, the Constitutional Court reversed a High Court decision and upheld the constitutionality of military prosecutions as introduced by the Military Discipline Supplementary Measures Act (MDSMA).

The CC found that a separate and independent military prosecution system as provided for by the MDSMA was not prohibited by the existence of a single, civilian national prosecuting authority as provided for in section 179 (1) of the Constitution. The CC reasoned that a single, national prosecuting authority, in the context of 'many' such authorities that existed in the apartheid era, served to consolidate into one national prosecuting authority the various offices of attorneys-general that existed before. The court in explaining its decision wrote that 'single authority' does not intend to mean 'exclusive' or 'only' but simply serves to denote the singular 'one'.

Accordingly it is argued that the concurrent jurisdiction of policing functions by the DSO as a separate service from the South African Police Service is not in conflict with Section 199(1) of the Constitution. Judge Khampepe, in her Commission's report, also argues this position. Following on from this finding, the Khampepe Inquiry should have determined whether the DSO,

as a separate service, is subject to all the restraint provisions of the Constitution that govern the country's other security services.

In a democracy such as ours, it would be difficult to argue that the powerful DSO should be free of these restraints. On this, the Khampepe Report is at best ambiguous. As regards Judge Khampepe's findings of the abuse of power by the DSO, she should have been more courageous and categorical in her recommendations. All authority that the Executive accrues to itself in the exercise of governance must be restrained and checked.

The Constitution and the security services

Judge Johann Kriegler noted that Chapter 11 of the Constitution, which establishes and governs the country's security services, clearly prescribes that there be 'a healthy blend of democratic aspiration and practical safeguards' against any abuses of the security services. He argued that this chapter provides appropriate measures to deal with any misdirection of any of these services.

Given the history and the role of the security services in apartheid South Africa, this was how it had to be. The particular chapter was written to provide the constitutional basis for ushering in a new era for the security services. The drafters of the constitution sought to construct a democratic framework for the establishment, structuring, legislative sanction, accountability, political control, and parliamentary control of the security services.

The drafters intended to make all of the security services subject to national legislation, to the rule of law, to the authority and oversight of parliament, and to the command, control and oversight of the executive. It was intended that the security services be subject to a strict and enforceable code of conduct ensuring that their activities are non-partisan in respect of political parties; to coordination, judicial scrutiny and monitoring in respect of interception and monitoring intelligence activities; and to civilian monitoring of security services activities by an Inspector General appointed by parliament. These important democratic safeguards were not enacted for nothing. They were enacted in order to prevent the

abuse of power by our security services, and in the event of such abuse, sanction was to occur.

Defining the DSO

Central to the problems of the DSO is the difficulty of defining its nature. What exactly is the DSO? Is the DSO part of South Africa's 'security services', as defined by the constitution? Should the DSO be characterised as a 'police service', an 'intelligence service' or an 'armed organisation or service'? Is the DSO the intelligence division of the national prosecuting authority established by national legislation?

Or is the DSO a hybrid of all of the above? And, if so, is it subject to the 'healthy blend of democratic aspirations and practical safeguards' to which the Constitutional Court referred? If not, why not? The Khampepe Commission argues that the DSO is neither a police service nor an intelligence service and describes the DSO as a law enforcement agency. This is a useful description and would suggest that as such the DSO is part of South Africa's security services.

The NPA Act combines the powerful functions of prosecutorial, investigative and information gathering all in one entity. Unfortunately it does so free from the constitutional checks and balances that are the bulwarks against the misuse of any of these combined and powerful activities. In this regard the founding legislation of the DSO fails the stipulations of the Constitution.

Judge Khampepe found that the DSO established an intelligence gathering capacity beyond the 'information' gathering mandate provided for it in law. These intelligence gathering activities of the DSO ought to have been subject to the provisions contained in Section 210 of the Constitution, which provides for the oversight of such activities. The current NPA Act circumvents these constitutional requirements and allows for the DSO intelligence gathering activity to be free from any democratic oversight.

The Constitution entrusts the NPA with 'the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions

incidental to instituting criminal proceedings', and for it to do so 'without fear, favour or prejudice'. The latter is the basis on which the NPA and the DSO argue that they have a constitutional right to prosecutorial independence, free from the control and direction of the Executive. This matter is amongst the current deliberations of the Ginwala Commission, appointed by the President to enquire into the conduct of the National Director of Public Prosecutions.

With favour and prejudice

However, the issue that lingers in all of these commissions is what happens when the DSO or the NPA perform their functions with favour and prejudice (partiality) in the exercise of their power. Under the doctrine of prosecutorial independence the DSO can claim freedom from executive control and sanction in all that they do, even when they are knowingly abusing their powers. Evidence (legal counsel submissions on behalf of the NDPP) within the Ginwala Commission confirms the readiness of the NPA and the DSO to evoke this claim when it suits them to do so. At the same time, the failure or refusal of the NPA and DSO to evoke this claim in all cases devalues it.

Prosecutorial independence cannot mean the freedom to act unlawfully, nor the exercise of investigative and prosecutorial power in a partisan manner in the pursuit of political patronage. Neither can the workings of a democracy be left to the assurance that the NPA and DSO are staffed with 'good' people that can do no wrong. It is simply not reasonable to expect that the DSO will be prosecuted by the NPA, or that the NPA will be investigated by the DSO for unlawful activities. It has not happened and will simply not happen. The compilation of the Special Browse Report by the DSO is a case in point. The NPA did not prosecute the DSO for its illegal activity. In fact, the NPA became part of the DSO's cover-up.

As a result of the shortcomings of the NPA Act the DSO has managed, during the decade of its existence, to resist every attempt to subject its activities to the requirements of Chapter 11 of the Constitution. It has done so to its detriment, in a short-sighted approach to cling on to its unchecked

power. The reality is that such shortcomings can be readily exploited for political purposes by an Executive willing to do so.

The NPA Act does not define the mandate of the DSO as organised crime, as the term is commonly understood, but as 'offences or any criminal or unlawful activities committed in an organised fashion'. Organised fashion in turn is defined to 'include the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that have the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics'.

This extremely vague and wide mandate can be used to bring the full weight of the NPA to bear on almost any crime. In the absence of any checks and balances, this wide mandate, in concert with the even wider powers given by the NPA Act to the head of the DSO, can be easily abused and, unfortunately, has been – as findings of the Public Protector and the Khampepe Commission of Inquiry have shown.

Judge Khampepe in her Report argues that this wide mandate is prudent and that 'an overly prescriptive legal mandate would render itself open to constant jurisdictional and other legal technical attacks and frustrate the objective for which the DSO was established'. With all due respect to the learned Judge, this is exactly what should happen in a democracy, especially when the NPA and DSO wield such enormous unchecked power. It is the basis for the institution of an independent judiciary.

Again, Judge Kriegler's wisdom is insightful: 'The NDPP is part of the executive branch of government, not the judiciary, which is the recognised protector of the private individual against the abuse of power... [it is] one of the purposes of judicial independence under the doctrine of separation of powers and an important bulwark against abuse of power by the executive that independent judges are "well-placed to curb possible abuse of prosecutorial power"' (Constitutional Court case CCT 14/01). It is the task

of the judiciary to scrutinise the exercise of prosecutorial power and to ensure that it has been lawfully exercised. Legislation must never be used to limit judicial scrutiny and certainly not in the name of democracy.

Over the years we have witnessed the leakage of information from the DSO to influence the public mindset – smear campaigns, off-the-record briefings, reports of misuse of funding, abuse of authority, the unauthorised disclosure of information, acts of corruption by members of the NPA, selective investigation and prosecutions, attempts by the DSO's senior management to influence political parties, and skewed plea-bargain arrangements (Mrwebi 2008).

Some of these violations have been the subject of the various abovementioned Commissions of Inquiry into the workings of the DSO. These commissions have all been scathing in their criticism of the NPA and DSO, yet nothing has been done to date to correct this pernicious doctrine of the abuse of power. Such abuses of power should not go unprosecuted, left as a festering sore that infects only the victims of this abuse. But then, who prosecutes the National Director of Public Prosecutions and the head of the DSO for the abuse of power?

On another front, the DSO has been rather successful in the media spin game. The impression has been created that South Africa's democracy is under the real threat of rampant corruption and organised criminality. Indeed, these are serious crimes that plague our society. We are justified to feel aggrieved about these crimes. However, as a society based on the rule of law we must not in our haste give in to the temptation to suspend the requirements of the law to which we are all bound – and none more so than the DSO.

Much is said in praise of the successes of the DSO, and indeed it may have a high rate of successful selective prosecutions. But the question must be asked whether an independent assessment has been conducted to measure the DSO's success against its overall stated objectives. What has been the true impact of the DSO's work on organised crime?

Unlike the SAPS, the NPA's stated policy is to prosecute only those cases that it believes it has a reasonable chance of winning in a court of law. In this context, the success rate of the DSO is exaggerated. The head of the DSO was recently forced to concede this point in public.⁵

We hear much of the high-profile cases involving ANC political figures, but are told nothing of the cases the DSO chooses not to investigate. We see no publicised take-downs of drug barons, bosses of violent criminal syndicates, CEOs of companies involved in price fixing, or senior bankers involved in organised off-shore tax-evasion banking scams. There is no independent review of those cases that the NPA loses or botches up, like the reported Saambou case, and it offers no explanation for these failures. Such blatant inconsistencies cannot go unchecked, protected and explained away within the doctrine of 'prosecutorial independence'. Uniform adherence to policy in all cases will ensure consistent outcomes.

Conclusion

Clearly, all is not well within the SAPS and its public service delivery record leaves much to be desired. The prevalence of violent crime in our society can no longer be denied and it affects all of us. The poor performance of the SAPS must be located within the broader challenge, which is the efficacy of the public service as a whole. No effort must be spared in improving the performance and efficiency of the police service at all levels. There is no simple answer to the problems we face in policing, and the DSO cannot be the substitute for good policing. There is no doubt that we need to have the important debate about the future structure of our criminal justice system, inclusive but not limited to policing. This debate should pay particular attention to the kind of society we seek to build in South Africa and to the real threats that we face in society.

Within this debate, a case can be made for the establishment of a well-resourced law enforcement agency akin to the USA's FBI. However, such an agency must be established with a clear mandate subject to the rule of law, the requirements of our constitution, and to civilian review in the conduct

of its functions. Further, it must be a part of a co-operative criminal justice system paying due attention to the jurisdictional authority of other law enforcement agencies. It is interesting to note that in the USA, the FBI is the 'only' national law enforcement agency. The rest of the policing services are decentralised. And the FBI is a law enforcement agency, not the national prosecuting authority.

The relocation of the DSO into the police should not be seen as an end in itself, but rather as a step in a new direction. The final direction will be informed by a honest debate about the desired future shape and structure of South Africa's criminal justice system. The sooner we have this debate, the better.

References

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Endnotes

- 1 Moe Shaik was a former Deputy Intelligence Coordinator of the National Intelligence Coordinating Committee but writes in his personal capacity.
- 2 John Perkin introduces the term 'Corporatocracy' to describe the alliance of the powerful in his book, *Confessions of an Economic Hit Man*. Penguin. 2004.
- 3 Judge Khampepe's Commission of Inquiry Report into the mandate and location of the directorate of Special Operations. Final report February 2006. Para 21.2, 21.4, Page 64.

'The DSO in its afore-stated conduct does not seem to have acted properly and lawfully in exercising its powers and has failed to construe those powers in the light and spirit, purport and objects of the Bill of Rights.'

'The improper media sensation associated with the investigation and/or arrest of some individuals resulting from leaks in the DSO may open a practice that is inconsistent with the right to a fair trial guaranteed under section 35 of the Constitution.'

- 4 (a) Note the various amendments to the terms of reference of the Hefer Commission. The nett effect of these amendments was that the Hefer Commission had to first determine whether Mr. Ngcuka had in fact been an agent of the pre-1994 security services, and, in the event of a positive finding, whether, because he had been such an agent, he had misused the prosecuting authority. It was clear, therefore, that the new terms of reference were phrased in such a way that in the event of a negative finding on the first question, the second more important question dealing with the abuse of power would fall away. Why these amendments were made, was never explained. A possible explanation is offered by Mark Gevisser in his book *Thabo Mbeki, the Dream Deferred*, page 401: 'it humiliated Maharaj and Shaik.'
 - (b) Following the Public Protector's report, both Ngcuka and Minister Maduna publicly attacked the integrity of the findings. See *Sunday Times*, 30 May 2004: *Ngcuka hits back at Public Protector*.
- 5 Submission of the head of DSO to parliamentary JSCI as reported in the media, February 2008.