Critiquing South Africa's General Intelligence Laws Amendment Bill: Drawing Lessons from Germany's Comprehensive Surveillance Oversight[1]

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SUMMARY

Governments have a responsibility to manage intelligence surveillance oversight without overreach as a fundamental principle of democracy. This delicate equilibrium can only be achieved through collaboration with civil society and a strong allegiance to the rule of law. The article delves into and underscores the chasm that has opened between a weak oversight function and an unchecked, inadequately regulated overreach in South African intelligence surveillance, a remnant of the Zuma era. It commences with an overview of South Africa's General Intelligence Laws Amendment Bill 40 of 2023 and goes on to provide a synopsis of Germany's oversight function. A comparative analysis of the German intelligence oversight model is undertaken, examining its strengths and vulnerabilities. Principled, measured and calibrated recommendations are proposed, based on best practices related to the German oversight model.

> "South Africa faces no significant threats to national security, especially terrorist threats, although the presence of terrorists in the country has been an enduring source of speculation. So, it could be assumed that the region should have little reason to invest in the building of surveillance states. Evidence is emerging that suggests this assumption is incorrect."
>
> *Jane Duncan*[2]

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[1] This contribution is dedicated to Amanda Emmanuel, whose guidance and mentorship were instrumental in the development of the author's first three papers on the regulatory frameworks for cyber criminology – viz. the Cybercrimes Act, the Social Media Bill and GILAB ([General Intelligence Laws Amendment Bill], the focus of this article). The author is profoundly grateful for her patient and insightful guidance.

[2] Duncan *Stopping the Spies: Constructing and Resisting the Surveillance State in South Africa* (2018) 12.

> "With this reform [the 2021 reform of the BND Act], it [Germany] cements its position among the few democracies in the world that offer comprehensive legislation and important safeguards regarding the use of bulk powers for foreign intelligence collection."
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> *Thorsten Wetzling*[3]

> "Those who cannot remember the past are condemned to repeat it."
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> *George Santayana (1863–1952), contemporary Spanish philosopher*

1 INTRODUCTION

In the preface to her informative book, *Stopping the Spies: Constructing and Resisting the Surveillance State in South Africa*, Duncan poses the question whether surveillance technology in South Africa is "being used for the democratic purpose of making people safer, or for the repressive purpose of social control, to pacify citizens and to target those considered to be politically threatening to ruling interests?"[4] In continuing her research trajectory, this article examines the background to the General Intelligence Laws Amendment Bill[5] (GILAB) and the rationale behind its (recent) tabling in Parliament some five years after the publication of her book. Although the author of this article set out to consider GILAB, it became clear early on that looking only at this one legislative instrument would not suffice, as legislation on digital surveillance and its oversight is spread across multiple Acts of Parliament and even presidential proclamations. In this respect, South Africa mirrors the situation in Germany.

Duncan suggests that her book "should therefore be considered a single case study of surveillance in South Africa, rather than a comparative study of several countries".[6] In contrast, this article's contribution is precisely what hers is not – a comparative study of the German case aimed at gauging what lessons South Africa might draw from the German experience to achieve a fair and legitimate balance between oversight and overreach. As justification, the article refers to Wetzling's contention, written within a European context, that "there still remains a notable dearth of comparative research on intelligence oversight".[7] The reason Germany is chosen is that research suggests that the G10 Commission and parallel agencies (which oversee and approve all the German intelligence community's telecommunications surveillance measures)[8] represent a best-in-class

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3 Wetzling "Intelligence Oversight Collaboration in Europe" in Bigo, McCluskey and Tréguer (eds) *Intelligence Oversight in Times of Transnational Impunity: Who Will Watch the Watchers?* (2024) 247 253.

4 Duncan *Stopping the Spies* Preface xvii.

5 40 of 2023.

6 Duncan *Stopping the Spies* 16.

7 Wetzling in Bigo *et al Intelligence Oversight* 248.

8 Miller "Intelligence Oversight – Made in Germany" in Goldman and Rascoff (eds) *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (2016) 257 259.

model.[9] The next step is to introduce Germany's oversight function (G10 and related agencies).

Miller summarises the salient features of Germany's G10 (a quasi-judicial body that controversially excludes the jurisdiction of the ordinary courts), saying that this commission "provides a comprehensive framework for the German intelligence community's efforts to collect telecommunications information".[10] This framework is sometimes challenged in the Constitutional Court to ensure its effectiveness in achieving an appropriate balance between public safety, personal autonomy and privacy, and guarding against abuse of power. The initial motivation for this article stemmed from the thought that the G10 Commission and Parliamentary Control Panel define levels of pre-approval and monitoring of surveillance that may be lacking in South Africa. Accordingly, South Africa may find value in adopting Germany's proportionality-driven oversight model in oversight mandates in order to guard against excessive monitoring under GILAB. This implies that justification of surveillance measures is sought on a case-by-case basis rather than bulk monitoring.

Although intelligence agencies are loath to admit that surveillance should be balanced with the public's need for privacy, the danger inherent in self-censorship is not new. Duncan observes wisely:

> "Being watched, or the fear of being watched, has a chilling effect in that it may dissuade people from expressing their innermost thoughts, and, when they do, they may alter what they have to say to please those who they think may be watching."[11]

Against this background, a brief roadmap for this contribution provides first, an overview of GILAB and similar legislation dealing with digital surveillance and its oversight, commenting on key provisions of these Acts, which may or may not be subject to the amendment; and secondly, an overview of Germany's oversight function. This will prepare the groundwork for a comparison between GILAB and Germany's oversight model (G10) to identify and consider critically the gaps in GILAB. Before proffering a conclusion, this contribution examines a wide range of thoughtful recommendations to fortify GILAB and (bearing in mind President Zuma's legacy) achieve the necessary balance between oversight and overreach.

2 OVERVIEWS OF GILAB

Recent legislative developments in South Africa have created a mosaic of legislation dealing with cybercrimes, social media and intelligence, generally. The author refers to the Cybercrimes Act,[12] the Films and Publications Act[13] and the General Intelligence Laws Amendment Bill[14] (GILAB), respectively. The Cybercrimes Act criminalises acts such as identity theft, hacking and

9 Wetzling in Bigo *et al Intelligence Oversight* 253.
10 Miller in Goldman and Rascoff *Global Intelligence Oversight* 265.
11 Duncan *Stopping the Spies* 9.
12 19 of 2020.
13 11 of 2019.
14 40 of 2023.

malicious code, while the Films and Publications Act restricts the distribution of certain online content. Finally, GILAB permits monitoring of online content and networks for national security purposes. In this respect, intelligence oversight legislation in South Africa certainly resonates with the situation in Germany, which is fragmented in nature,[15] as noted above. For example, GILAB attempts to consolidate or amend no less than 12 Acts of Parliament.[16] The more-than-thirty Acts that Germany is looking to consolidate are referred to later in the article.

What interests the author in this contribution is the overlap between these different legislative instruments in respect of the interests they aim to protect or advance. It would be worth considering how these three laws align or conflict, and to examine the discrepancies and synergies that exist in their interaction. However, this contribution restricts its examination to what GILAB (and related instruments) can gain from a comparative investigation with Germany's intelligence oversight legislative framework. For instance, apart from Nigeria and Kenya (in the shape of Boko Haram or al-Shabaab, respectively), no sub-Saharan country (save for Mozambique) has been subject to terror threats.[17] Accordingly, the question pursued in this contribution makes the justification of more stringent provisions of GILAB (and related legislation) questionable. As for the rationale for the Bill, it "is meant to respond to major criticisms of the State Security Agency during Zuma's presidency".[18]

Nevertheless, Duncan reports:

> "In 2005, abuses of the NCC's [National Communications Centre's] surveillance capacities were confirmed by the statutory intelligence watchdog, the Inspector General of Intelligence, who found that the country's bulk scanning facilities had been used to keep South Africans under surveillance during the country's bruising presidential succession battle, including senior members of the ruling party, the opposition, businessmen and officials in the public service. So, the organ of state that has the greatest capacity to conduct mass surveillance is also the one that is least regulated by law. *This capacity is so intrusive that its use should be authorised by primary legislation*."[19] (own emphasis)

The last observation by Duncan, in the passage quoted above, is important since it refers to the fact that President Zuma centralised the four intelligence agencies in 2009 by *presidential proclamation* rather than by way of primary legislation that is subject to debate by and approval of Parliament.[20] It is criticism such as this by Duncan (widespread unlawful mass surveillance of the public's digital communications) that constitutes the rationale behind the

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15 Wetzling in Bigo *et al Intelligence Oversight* 250.

16 Duncan "South Africa's New Intelligence Bill Is Meant to Stem Abuses – What's Good and Bad About It" (11 January 2024) https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473 (accessed 2024-03-10).

17 Duncan *Stopping the Spies* 12.

18 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

19 Duncan *Stopping the Spies* 13.

20 Engelbrecht "SSA Takes Shape, Legislation To Follow" (6 June 2011) https://www.defenceweb.co.za/security/national-security/ssa-takes-shape-legislation-to-follow/ (accessed 2024-03-18).

proposed amendments to GILAB. This is so even though the National Communications Centre (NCC)'s unlawful activities overlap with the lawful interception function of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[21] (RICA).

Duncan makes a valuable differentiation between a set of three related concepts and it is worth understanding these differences at an early stage to be able to gauge the discussion that follows. First, she explains the difference between human intelligence and signals intelligence (SIGINT): the former refers to physical intelligence gathering (such as shadowing suspects or infiltrating criminal or terrorist organisations); the latter relates to "intelligence gathered from the surveillance of electronics networks, including telemetry intelligence, electronic intelligence and communications intelligence (or COMINT)".[22] In this contribution, the focus lies on the latter phenomenon.

Secondly, Duncan also draws a careful distinction between targeted surveillance and mass, untargeted surveillance.[23] The former involves a reasonable suspicion that a particular individual or group has committed a crime or is in the process of committing a crime or intends to commit a crime in the future, while the latter is self-explanatory.

Thirdly, she also makes a clear distinction between monitoring and surveillance:

> "Monitoring involves the intermittent observation of communications over a period of time without specific pre-defined objectives. Surveillance, on the other hand, involves much closer continuous and systematic observation for analysis with specific objectives in mind, and may involve the collection and retention of communications for these purposes."[24]

Like Duncan, this article is also more concerned with the surveillance of communications than with monitoring. The reason is that surveillance is more likely to be unregulated (as is the case with the NCC) than monitoring and carries with it the inherent risks associated with a lack of accountability.

In the case of the NCC, unlawful surveillance activities overlapping the lawful functions permitted under RICA seems to have been the norm in the run-up to the introduction of GILAB. Duncan comments on this phenomenon with the terse observation: "This capacity is so intrusive that its use should be authorised by primary legislation."[25] As a result of this and other criticism (notably the 2018 High-Level Review Panel on the State Security Agency (SSA) and the Zondo Commission of Inquiry into State Capture),[26] GILAB and the preceding concept Bill were introduced.

Five key features (critically considered) of the Bill (the General Intelligence Laws Amendment Bill[27] [GILAB]) are reviewed below.

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21 70 of 2002.

22 Duncan *Stopping the Spies* 5.

23 Duncan *Stopping the Spies* 9.

24 Duncan *Stopping the Spies* 10.

25 Duncan *Stopping the Spies* 13.

26 These are discussed at greater length and in detail below.

27 [B40-2023].

1. The Bill streamlines and refurbishes the National Strategic Intelligence Act,[28] the Intelligence Services Act[29] and the Intelligence Services Oversight Act[30] by undoing the State Security Agency.
2. The Bill "reconfigure[s] the intelligence services into the South African Intelligence Agency, the South African Intelligence Service, the National Communications Centre and the South African National Academy of Intelligence".[31]

Segell suggests that

> "[t]he uncovering of the misuse of state funds is known as the Infogate scandal. All subsequent reforms, including those to suit new operational environments and democratization, were all influenced by the trauma of this gross misconduct. The following reforms had the transparency in the use of state funds as their key element and aimed to make the intelligence sector more accountable for its actions and activities."[32]

By the same token, it is argued that President Zuma's misuse and repurposing of the SSA since 2009[33] was the primary mover for the reforms that resulted in GILAB. The SSA is the successor to the National Intelligence Service (NIS), which for its part succeeded the notorious Bureau of State Security (BOSS). BOSS was founded in 1968 and was accused of torture, assassinations and underhand tactics during the apartheid era.[34] As News24 reported in September 2021, the SSA came about in 2009 after a fusion of four government entities, namely the National Intelligence Agency, the Domestic Intelligence Service, the South African Secret Service and the Foreign Service.[35] In her assessment of the findings of the Zondo Commission of Inquiry into State Capture, insofar as these are relevant for intelligence oversight, Duncan argues:

> "In my view, the Zondo report is a globally significant example of radical transparency around intelligence abuses. But it lacks the detailed findings and recommendations to enable speedy prosecutions. It also fails to address the broader threats to democracy posed by unaccountable intelligence." [36]

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28 39 of 1994.

29 65 of 2002.

30 40 of 1994.

31 Paterson and Pretorius "South Africa: Controversial Intelligence Legislation Finally Introduced to Parliament" (23 November 2023) https://bowmanslaw.com/insights/data-protection/south-africa-controversial-intelligence-legislation-finally-introduced-to-parliament/ (accessed 2024-03-04).

32 Segell "Infogate Influences on Reforms of South Africa's Intelligence Services" 2021 20(1) *Connections QJ* 61 62 https://doi.org/10.11610/Connections.20.1.04.

33 Friedman "Zuma's Abuse of South Africa's Spy Agency Underscores Need for Strong Civilian Oversight" (3 February 2021) https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439 (accessed 2024-03-10).

34 Segell 2021 *Connections QJ* 64 68.

35 Felix "Merger of Spy Agencies Led to Cabinet Ministers Giving SSA Operatives 'Illegal Instructions'" (15 September 2021) https://www.news24.com/news24/southafrica/news/merger-of-spy-agencies-led-to-cabinet-ministers-giving-ssa-operatives-illegal-instructions-20210915 (accessed 2024-03-18).

36 Duncan "Zondo Commission's Report on South Africa's Intelligence Agency Is Important But Flawed" (12 July 2022) https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582 (accessed 2024-03-11).

Considering Duncan's remarks, the question still to be answered is whether GILAB manages to avoid the pitfalls of the intelligence (and intelligence oversight) legislation that has preceded it. In another words, is GILAB fit for purpose?

3. The definition of "national security" is amended but remains vague and potentially open to abuse by government. "National security" is defined as:

> "the capabilities, measures and activities of the State to pursue or advance – (*a*) any threat; (*b*) any potential threat; (*c*) any opportunity; (*d*) any potential opportunity; or (*e*) the security of the Republic and its people …"[37]

This mandate is so broad that, as Duncan aptly puts it: "[It] allows the intelligence services to undertake any activity that could advance South Africa's interests. This is regardless of whether there are actual national security threats."[38] This said, GILAB nevertheless represents a paradigm shift from state security (protecting those in power) to a human-security definition of national security (encompassing such threats as poverty, underdevelopment, deprivation[39] and freedom from marginalisation as well as unjustified discrimination).[40]

4. The right to citizens' privacy remains compromised.

Similar to what happened in Germany in May 2021, South Africa's Constitutional Court[41] ruled in February 2021 that sections of RICA were unconstitutional, and gave the government three years to rectify the flaws in the legislation. Once again, weaknesses in the RICA legislation were exploited by rascal elements in the intelligence community.[42]

The Constitutional Court judgment, referred to above, highlighted six serious concerns about RICA, namely:

a) Suspects under surveillance need not be told that they have been under surveillance[43] – that is, there is no so-called "post-surveillance notification regime". The position in Denmark and Germany is to notify the subject after the surveillance is concluded provided such notification

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37 Parliament of the Republic of South Africa "General Intelligence Laws Amendment Bill" (2023) B40_2023_General_Intelligence_Laws_Bill.pdf (parliament.gov.za) (accessed 2024-03-16).

38 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

39 Newman "Critical Human Security Studies" 2010 36(1) *Review of International Studies* 77–94, in general.

40 MacFarlane and Khong *Human Security and the UN: A Critical History* (2006), in general.

41 *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services*; *Minister of Police v Amabhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (4) BCLR 349 (CC); 2021 (3) SA 246 (CC).

42 Duncan "South Africa's Surveillance Law Is Changing But Citizens' Privacy Is Still at Risk" (8 October 2023) https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508 (accessed 2024-03-10).

43 *Amabhungane supra* par 45. The court held that "[b]ecause of its likely outcomes, post-surveillance notification will go a long way towards eradicating the sense of impunity which certainly exists. The concomitant will be a reduction in the numbers of unmeritorious intrusions into the privacy of individuals."

is viable under the circumstances.[44] Internationally, the test is whether such notification will jeopardise the purpose of the investigation.

b) The designated RICA judge lacks independence insofar as their appointment and renewal are concerned.[45]

c) The application process is skewed in favour of the surveillance and intelligence authorities: only one side is heard before the order is granted.[46] Amabhungane suggested during argument that a public advocate (with the necessary security clearance) be appointed to represent the unrepresented respondent during the proceedings.[47]

d) RICA cannot guarantee safe management of the data intercepted,[48] or the so-called issue relating to the "management of information". This is a reference to the way the surveillance data (or the data obtained through surveillance) is handled (examined, copied, shared, sorted through and used), stored, and eventually destroyed.

e) Lawyers and journalists have a duty to keep their sources and/or communications private and confidential, but this professional obligation is not recognised nor protected by the legislation.[49]

f) The State's use of section 205 of the Criminal Procedure Act[50] to access metadata (data about a person's communication),[51] is permissible as RICA allows for the use of procedures other than those provided for in the Act.[52] Section 205 of the CPA reads as follows:

> *"205 Judge, regional court magistrate or magistrate may take evidence as to alleged offence*
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> (1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely

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44 § 5 read with § 12(2) of the [German] Act on Restrictions on the Secrecy of Mail, Post and Telecommunications, June 26, 2001, BGBL. I at 1254, 2298.

45 *Amabhungane supra* par 92–94.

46 S 16(7)(a) of RICA provides that "[a]n application must be considered [,] and an interception direction issued without any notice to the person or customer to whom the application applies and without hearing such person or customer." In *Amabhungane supra,* the court held at par 96: "[T]he designated Judge is not in a position meaningfully to interrogate the information. For that reason, as evidenced by the example of the surveillance of Mr Mzilikazi wa Afrika and Mr Stephen Hofstatter, surveillance directions may be issued on unadulterated lies."

47 *Amabhungane supra* par 99.

48 *Amabhungane supra* par 107–108. The court emphasised that "there is a real risk that the private information of individuals may land in wrong hands or, even if in the 'right' hands, may be used for purposes other than those envisaged in RICA."

49 *Amabhungane supra* par 119.

50 51 of 1977.

51 Hunter *Cops and Call Records: Perspectives on Privacy, Policing and Metadata in South Africa* (2020) https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/cops_and_call_records_web_masterset_26_march.pdf.

52 *Amabhungane supra* par 129–135.

> to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.
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> [Sub-s. (1) substituted by s. 59 of Act 70 of 2002.]
>
> (2) The provisions of sections 162 to 165 inclusive, 179 to 181 inclusive, 187 to 189 inclusive, 191 and 204 shall mutatis mutandis apply with reference to the proceedings under subsection (1).
>
> (3) The examination of any person under subsection (1) may be conducted in private at any place designated by the judge, regional court magistrate or magistrate.
>
> (4) A person required in terms of subsection (1) to appear before a judge, a regional court magistrate or a magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in section 189 unless the judge, regional court magistrate or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.
> [S. 205 substituted by s. 11 of Act 204 of 1993.]"

The point to grasp is that section 205 of the Criminal Procedure Act contains a much lower privacy threshold than does RICA and is thus more susceptible to abuse. The key question is whether section 36(1) of the Constitution justifies the invasion and hence limitation of the rights to privacy and dignity mandated by RICA.[53] Unaccountable and unjustified intelligence poses a serious threat to democracy.

5. GILAB "seeks to broaden intelligence powers drastically but fails to address longstanding weaknesses in their oversight"[54] despite being intended as a response to the criticism levelled at the SSA under the tenure of Zuma. Abuses of intelligence mandates for illegal and nefarious motives motivated Duncan to recommend curtailing these mandates as well as trimming the powers allocated to exercise them.[55]

Against the backdrop of the foregoing, there exist several gaps or disconnects in both GILAB and RICA that need to be addressed. This is highlighted in the discussion under heading 5 where proposed enhancements to bolster GILAB and related legislation concerning digital intelligence gathering and the oversight cluster are explored. Before proceeding with a comparative analysis of the German digital surveillance and oversight framework vis-à-vis South Africa, the German oversight function is considered.

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53 *Amabhungane supra* par 37.

54 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

55 *Ibid*.

3 OVERVIEW OF GERMANY'S OVERSIGHT FUNCTION

The G10 Act[56] (the so-called *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses* enacted by the *Bundestag* in 1968) authorises the BND, the *Verfassungsschutzämter*, and the Military Counterintelligence Service (MAD) to participate in targeted telecommunications monitoring.

Even though article 10 of the Basic Law[57] (which serves as Germany's Constitution) guarantees that "the privacy of correspondence, posts and telecommunications shall be inviolable", the G10 Commission both constrains as well as permits the State's intrusion into telecommunications privacy. On top of this, the German Constitution may also, as is the case under section 36 of the South African Constitution,[58] curb the right to telecommunications privacy. For purposes of national security, this entails two further advantages afforded to the State.

First, there is no need to alert a subject to the fact that they were subjected to surveillance, and secondly, these surveillance activities may be conducted by "agencies and auxiliary agencies appointed by the legislature" and need not be carried out by members of the judiciary.[59] Miller argues, persuasively in the author's view, that the German Constitutional Court's 1970 ruling, which legitimised the G10 Commission, is in urgent need of reconsideration and possible overturning because of the singularity of "the digital-wireless era of pervasive telecommunication".[60]

Two Acts authorise the mass programmatic surveillance efforts of the BND. First, the *Gesetz über den Bundesnachrichtendienst*[61] (Law on the Federal Intelligence Service) does not permit any primary oversight by a "court" for foreign-to-foreign communications[62] – as we understand the concept of a court as an independent judicial forum under South African law. After the Federal Constitutional Court's ruling on 19 May 2020 that the foreign interception of communication must be split up into an administrative and a judicial arm, the *Unabhängiger Kontrollrat* (UKR)[63] (which has been in operation since January 2022) was born. In the words of Wetzling: "The Federal Government and the majority in Parliament saw in a unitary body a

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56 Federal Republic of Germany "Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses" (2001) G 10 – Act restricting the secrecy of letters, posts and telecommunications (gesetze-im-internet.de) (accessed 2024-03-17).

57 Federal Republic of Germany "Basic Law for the Federal Republic of Germany" (2022) https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0058 (accessed 2024-03-13).

58 The Constitution of the Republic of South Africa, 1996 (the Constitution).

59 Art 10[2] of the Basic Law https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0058.

60 Miller in Goldman and Rascoff *Global Intelligence Oversight* 284.

61 German Department of Justice, "Act on the Federal Intelligence Service" (1990) https://www.gesetze-im-internet.de/bndg/ (accessed 2024-03-11).

62 Felz "Judicial Redress and Foreign Intelligence Surveillance: The German Approach" (14 February 2022) https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/ (accessed 2024-03-11).

63 An independent oversight council.

better precondition for successful international cooperation."[64] Perhaps this model is workable in democratic post-war Germany, but, as is argued below, the legacy of intelligence abuse during the Zuma era has rendered this model inapplicable to post-Zuma democratic South Africa, at least for the time being.

In fact, oversight in Germany is exercised by so-called "auxiliary agencies", permitted by the German Constitution. Until 2016, no effective oversight whatsoever existed. Between 2017 and 2022, this function was in the hands of an "Independent Panel". The UKR mentioned above, once again a quasi-judicial body, took over this oversight function, limited as it was, in January 2022. The latter comprises six judges and, as an independent federal agency, has the legal authority and the requisite jurisdiction, to consider briefs submitted by and to the BND regarding foreign surveillance. In addition, there is considerable overlap in the review function of data protection by the German Data Protection Authority (which is legally authorised to investigate data processing and the establishment of databases) and the UKR.

Concerns raised centre on the UKR's lack of a public reporting obligation[65] and the *ex parte* proceedings (only the government is represented when the order is sought) habitually entertained by the panel, as well as the fact that the UKR's rulings are not published.[66] Since these bodies operate in parallel with one another, Wetzling has expressed reservations about their ability to form "a holistic understanding of the totality of surveillance activities" and foresees "unhelpful 'turf wars'".[67] Furthermore, individuals are not entitled or permitted to lodge complaints with the UKR, and there is no requirement for public transparency reporting. The Federal Constitutional Court held that the so-called third-party rule may not hinder or impede the UKR's effective and comprehensive oversight.[68] As is argued below, this consideration should not be applicable (which might well be the case in South Africa at this juncture) in the absence of a national security threat, either internally or externally. Intelligence agencies are fond of fueling the flames of imaginary threats to secure funding for their operations and to further their own vested interests.[69]

Secondly, primary oversight over surveillance (all collection, processing, and use of personal data of Germany-to-foreign or foreign-to-Germany communications relevant to statutorily identified "threat areas") authorised by the G10 Act[70] is indeed exercised by the "G10 Commission".[71] This is not an

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64 Wetzling in Bigo *et al Intelligence Oversight* 252.

65 Wetzling in Bigo *et al Intelligence Oversight* 250.

66 Felz https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/.

67 Wetzling in Bigo *et al Intelligence Oversight* 250.

68 Wetzling in Bigo *et al Intelligence Oversight* 252.

69 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

70 German Department of Justice "Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses" (2001) https://www.gesetze-im-internet.de/g10_2001/ (accessed 2024-03-11).

71 Felz https://www.crossborderdataforum.org/judicial-redress-and-foreign-intelligence-surveillance-the-german-approach/.

independent body but is instead an arm of the executive. As is the case with the UKR, individuals who might be affected by its decisions are not given the opportunity to be present when the body hears the government's case for surveillance. Even though its decisions are not published (in tandem with the practice of the UKR), unlike the former, individuals are allowed to lodge complaints regarding G10 surveillance with the Commission. However, it operates in secret and there is no avenue of appeal to a higher court.[72] Finally, Germany's Parliamentary Oversight Panel publishes limited transparency reporting on the Commission's activities, which is at least an improvement on the situation created by the *Gesetz über den Bundesnachrichtendienst* (Law on the Federal Intelligence Service), which, as noted above, allows no such transparency.

In the overview of the German intelligence oversight system, this article attempts to focus on both its strengths and weaknesses as seen from a South African constitutional perspective. Wetzling suggests that the reason for Germany's almost 30 laws and several by-laws on intelligence surveillance and oversight lies in its attempt to "obfuscate a dense web of provision from too much external scrutiny".[73] The author (Wetzling) highlights the fact that civilians almost certainly have a vested interest in shaping/inputting into policy, as the G10 and similar legislation/institutions have been successfully challenged before the German Federal Constitutional Court[74] (BVerfG). According to Wetzling, the court "had found several provisions in the previous legal framework unconstitutional".[75] This happened as recently as 2021. In a good assessment of the German intelligence oversight scene following the 2021 constitutional court ruling, Wetzling suggests that "[g]enerally, as regards delegated oversight, Germany to date has still the most fragmented landscape for intelligence oversight by comparison with France and the UK".[76]

Despite the drawbacks of the German model (secrecy, fragmented legal framework and lack of effective redress for foreigners, among other concerns), the lessons that the German experience holds for a post-Zuma, democratic South Africa are still valuable and worth considering.

4 COMPARATIVE ANALYSIS

Duncan argues that it is possible to change the current conditions of surveillance if such are deemed to be unacceptable:

> "A world in which privacy is truly respected will be impossible without successful struggles for justice and equality, as the ability to enjoy rights such as privacy will remain the preserve of a select few. Owners of the means of production will continue to define the conditions under which this right is enjoyed on a widespread basis. We must not resign ourselves to thinking that a world where privacy is invaded on a routine basis is the way things necessarily are and cannot be changed […] What is needed to mount an

72 *Ibid*.
73 Wetzling in Bigo *et al Intelligence Oversight* 250.
74 German Federal Constitutional Court – 1 BvR 2835/17 – (pronounced 19 May 2020).
75 Wetzling in Bigo *et al Intelligence Oversight* 251.
76 Wetzling in Bigo *et al Intelligence Oversight* 250.

> effective fightback is a thorough understanding of why the world looks the way it does at this current conjuncture."[77]

To complement Duncan's astute observations on the possibilities of change in an ISA (intelligence and security agency) setting or context, Wetzling argues:

> "[G]iven the widely shared observation that 'accountability now seems to flow from a globalised network of activists and journalists, not from parliamentary oversight committees' (Richard Aldrich), our IOI distinguishes between two primary subsets of oversight practice, namely, delegated and civic oversight."[78]

Miller suggests that Germany's *Bundesnachrichtendienst's* SIGINT mandate (BND or Federal Intelligence Service), which performs an analogous function to the US's Central Intelligence Agency (CIA), is the most appropriate forum and "likely of greatest comparative interest to non-German scholars of intelligence oversight because they can include foreign surveillance"[79] and most closely approximates the controversial NSA programmes of the recent past. The BND's SIGINT operations constitute the central concern of the G10 Commission. The latter is "neither fully parliamentary nor fully judicial in character",[80] but is, in fact, a quasi-judicial body.

Having elaborated on the substantial shortcomings and failings of the G10 Commission and UKR, the strength of this model is now highlighted, which also suggests the potential for a rational reconstruction of the South African model. This is made possible by using the technique of rational reconstruction made famous by the Frankfurt School for Critical Theory.[81] This technique rests on the idea of reshaping a theory (addressing the weaknesses of the G10 and UKR in question) by identifying the healthy, helpful elements and incorporating additional aspects suggested by parallel critiques to enhance its functioning. One exponent of this method is the well-known German philosopher Jürgen Habermas. For Habermas (as quoted in McCarthy),[82] rational reconstruction means

> "that one takes a theory apart and puts it back together in a new form, in order better to achieve that goal which it set for itself. This is the normal (in my opinion, normal also for Marxists) way of dealing with a theory that requires revision in many respects, but whose potential for stimulation has not yet been exhausted."[83]

As the German G10 potential and the South African digital surveillance government agencies have presumably not yet been fully realised, the author aims to combine them in a new form "in order better to achieve that goal which it set for itself". This contribution attempts to apply Habermas's rational reconstruction method to the South African surveillance framework in conjunction with the lessons learned from Germany. In fact, even the goal

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77 Duncan *Stopping the Spies* 17.
78 Wetzling in Bigo *et al Intelligence Oversight* 248.
79 Miller in Goldman and Rascoff *Global Intelligence Oversight* 260.
80 Miller in Goldman and Rascoff *Global Intelligence Oversight* 264.
81 Roderick *Habermas and the Foundations of Critical Theory* (1986).
82 Original source not available to me.
83 McCarthy *The Critical Theory of Jürgen Habermas* (1978) 233.

can be reformulated. Several problems are evident with the German model. Duncan, for example, contends, within the South African context, that "[a]s a matter of principle, findings should be made public. Secrecy cannot be used to hide illegality".[84] In *Amabhungane,* this idea was expressed as "facilitat[ing] the abuse of the process under the cloak of secrecy".[85] A former inspector-general of intelligence, Xolile Ngcakani (the incumbent from 2004 to 2009), created a worthwhile precedent by releasing a summary of findings periodically.[86] A provision requiring similar transparency, entrenched in primary legislation for South Africa going forward, cannot be recommended strongly enough.

Transparency equates to accountability, which is why the principle of proportionality (ensconced in German surveillance oversight law) may have to be adjusted for the South African situation. In light of this overview of German surveillance oversight legislation and practice, several recommendations to strengthen oversight in South Africa are made.

5 PROPOSALS FOR REFORM OF INTELLIGENCE LAWS IN SOUTH AFRICA

It is argued that, considering the shortcomings of so-called "state-mandated oversight" or delegated oversight, there is a definite need to build robust and resilient civic structures of intelligence surveillance oversight.[87] Wetzling defines civic oversight as "the scrutinising practices by the media, CSOs, and citizens who complement *delegated oversight* through an oftentimes more adversarial and more public mode of oversight"[88] (emphasis in the original). Three issues reported by civilian oversight practitioners/actors are lack of funding, the threat of becoming subject to surveillance themselves, and lack of trust in the judicial and technical safeguards of intelligence surveillance. In view of the valuable distinction between delegated oversight and civic oversight over mass, digital surveillance practices, it is recommended that civil society make an effort to build a robust and resilient civic oversight structure. This is because the former (state-mandated oversight functions) are absent or at least weak in South Africa, particularly considering past abuses during the Zuma administration. This perspective aligns with Duncan's suggestion, namely the notion of "a thorough understanding of why the world looks the way it does at this current conjuncture"[89] Segell suggests:

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84 Duncan "South Africa's Intelligence Watchdog Is Failing Civil Society. How to Restore Its Credibility" (30 November 2022) https://theconversation.com/south-africas-intelligence-watchdog-is-failing-civil-society-how-to-restore-its-credibility-195121 (accessed 2024-03-11).

85 *Amabhungane supra* par 44.

86 Office of the Inspector-General of Intelligence *Executive Summary of the Final Report on the Findings of an Investigation into the Legality of the Surveillance Operations Carried Out by the NIA on MR S Macozoma* (2006) https://www.scribd.com/document/424117688/Executive-Summary-of-the-final-report-on-the-findings-of-an-investigation-into-the-legality-of-the-surveillance-operations-carried-out-by-the-NIA-on (accessed 2024-03-08).

87 Wetzling in Bigo *et al Intelligence Oversight* 248–249.

88 Wetzling in Bigo *et al Intelligence Oversight* 249.

89 Duncan *Stopping the Spies* 17.

> "From the first non-military intelligence agency created in 1968, the Bureau of State Security, it was clear that the nature of intelligence requires striking a fine balance between security, secrecy, transparency, and accountability."[90]

This is of course easier said than done. Even after GILAB's introduction in 2023 to allay past concerns, substantial concerns about the weak oversight function remain. In this regard, Friedman identifies the media and citizen organisations participating in the debate as being not sufficiently critical of the security services' ability to pose a threat to democracy:

> "None of this is backed by a shred of evidence – security agencies are in the business of exaggerating both the threats to the country and their importance in thwarting them. But, since the default position of many journalists and campaigners is to believe the spies, loud voices will again insist that they be allowed to keep their secrets."[91]

This observation ties in with Duncan's reasoning, highlighted at the opening of this article.[92] Friedman also argues that weak governmental oversight is precisely the reason that civic oversight (underscored by the surprise and shock of the media at these revelations) is so vital and important to complement official failures (especially while the ANC is still the governing party):

> "Testimony shows that the State Security Agency, which is meant to provide the government with intelligence on domestic and foreign threats, was used to fight factional battles in the governing African National Congress (ANC) and to engage in corrupt activity. *The agency, the evidence suggests, served former president Jacob Zuma and his allies, not the country.*"[93] (own emphasis)

It would appear from this extract of Friedman's work that, within the context of the South African intelligence framework (perhaps distinguishable from the German template), there happen to be four interests worth weighing and balancing – namely, security, secrecy, transparency, and accountability. These arise out of government's security needs, privacy concerns and government's tendency to cover up wrongdoing. In the more sanitised German case, presumably, only the first two interests are at stake.

A further factor worth considering regarding the proposed reforms in the volatile, uncertain, complex and ambiguous (VUCA) world we live in, is the pace and motivation behind such initiatives. Segell contends in this regard that "errors can be avoided by not making uncoordinated, piecemeal changes".[94] However, the broad method proposed is of course easier said than done. Duncan, for her part, suggests: "The [Zondo] commission found that the [State Security Agency] project destabilised opposition parties and

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90 Segell 2021 *Connections QJ* 73.

91 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439. Consider, for example, the devastating findings of the Mufamadi Commission's Inquiry into the State Security Agency (completed in December 2018 but only released to the public in March 2019 by Ramaphosa) "Inquiry Into the State Security Agency" (2018) [electronic link not available to the author].

92 Duncan *Stopping the Spies* 12.

93 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

94 Segell 2021 *Connections QJ* 62 74.

benefited the Zuma faction in the ruling African National Congress."[95] Even more important, or as important, is her recommendation that the agency's infiltration (by SSA's so-called "special operations unit" planting agents who masqueraded as activists) and illegal surveillance of civil society organisations[96] should not go unexposed and unprosecuted. Duncan contends that if these concerns are not addressed, these abuses will persist into the future, as has been observed with certainty in other parts of the world.[97] This observation remains true for the revamped office (October 2022) of South Africa's Inspector-General of Intelligence, Imtiaz Fazel, who has not heeded the urgent need to investigate a range of civil-society complaints regarding illegal and unlawful surveillance as well as intelligence abuses in general. The latter (Fazel) was appointed by Ramaphosa on a five-year contract and his task is to "monitor the crime intelligence division of the police, the State Security Agency, and the intelligence division of the national defence force".[98]

It was pointed out by the High-Level Review Panel that having separate agencies for domestic and foreign intelligence is a non-negotiable as well as *avoiding centralisation of these agencies at all costs*.[99] Duncan remarks regarding the former consideration:

> "The fact that the State Security Agency has been absorbed into the presidency – which is also accumulating other government entities and functions – could be a gift to any president intent on repeating the abuses of the Zuma administration."[100]

This flaw (the high centralisation of the security agencies) led to South Africans being disappointed at every turn. Examples are the July 2021 civil unrest[101] in KwaZulu-Natal and Gauteng (ironically in the lead-up to Zuma's incarceration for a fairly petty crime) and the inability of crime intelligence to combat rising organised crime groups.[102] A further important issue Duncan

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95 Duncan https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582.

96 Metelerkamp "Civil Society Organisations Release Boast Report, Demand Accountability for 'Rogue' Spying" (01 July 2022) https://www.dailymaverick.co.za/article/2022-07-01-civil-society-organisations-release-boast-report-demand-accountability-for-rogue-spying/ (accessed 2024-03-18); High-Level Review Panel on the State Security Agency (2018) https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf (accessed 2024-03-19).

97 Choudry (ed) *Activists and the Surveillance State: Learning from Repression* (2019), in general.

98 Duncan https://theconversation.com/south-africas-intelligence-watchdog-is-failing-civil-society-how-to-restore-its-credibility-195121.

99 High-Level Review Panel on the State Security Agency https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf.

100 Duncan "South Africa's Intelligence Agency Needs Speedy Reform – Or It Must Be Shut Down" (24 February 2023) https://theconversation.com/south-africas-intelligence-agency-needs-speedy-reform-or-it-must-be-shut-down-200386 (accessed 2024-03-10).

101 Africa "South Africa's Deadly July 2021 Riots May Recur If There's No Change" (9 July. 2022) https://theconversation.com/south-africas-deadly-july-2021-riots-may-recur-if-theres-no-change-186397 (accessed 2024-03-18).

102 Haffajee "South Africa's Organised Crime Climbs to Italy's Levels, Racing Past Mexico, Somalia and Libya" (21 September 2022) https://www.dailymaverick.co.za/article/2022-09-

stresses is the fact that "[d]uring the Zuma years, the focus on protecting the president led to the intelligence agency prioritising domestic intelligence by spying on citizens at the expense of foreign intelligence".[103] The integration of both intelligence arms in Germany (even after the 2020 Federal Constitutional Court judgment on surveillance oversight) is plagued by this same problem. To quote Duncan yet again: "The Zuma administration merged the two branches and abused the centralised model to protect the president from criticism."[104] Weak governmental oversight (even if these are well-funded and independent) demands strong civilian oversight, as both Friedman[105] and Wetzling[106] point out.

The following measures to strengthen GILAB and related legislation in the intelligence gathering, data collection and surveillance oversight cluster are suggested.

a) Intelligence overreach in South Africa, Africa and abroad has prompted the following recommendation: "These abuses mean intelligence mandates should be narrowed and state intelligence power should be reduced."[107] It is suggested that the astute remark is well conceived. Given that South Africa is not under pressing foreign threats, unlike the case with Islamic extremists in Nigeria and Kenya, these mandates should urgently be narrowed and state intelligence power be reduced accordingly. Failing this, the danger of repurposing intelligence surveillance for nefarious purposes becomes a real possibility.
b) From a procedural standpoint, as highlighted in the Constitutional Court judgment on RICA oversight,[108] legal difficulties exist in obtaining surveillance orders without notifying the suspect, who is then unaware of their surveillance and unable to participate in automatic review proceedings.[109] However, this problem is not restricted to South Africa; it is also a problem in several other African countries.[110] Even if there are compelling reasons for the suspect not to be apprised of their surveillance, Duncan's suggestion that they be given an opportunity to address the judge on automatic review proceedings[111] is supported. In *Amabhungane*, it was held: "[I]t is purely fortuitous that some subjects of surveillance do become aware of their surveillance. In the vast majority of cases they never do. That must surely incentivise or facilitate the

21-south-africas-organised-crime-climbs-to-italys-levels-racing-past-mexico-somalia-and-libya/ (accessed 2024-03-18).

103 Duncan https://theconversation.com/south-africas-intelligence-agency-needs-speedy-reform-or-it-must-be-shut-down-200386.

104 *Ibid*.

105 Friedman https://theconversation.com/zumas-abuse-of-south-africas-spy-agency-underscores-need-for-strong-civilian-oversight-154439.

106 Wetzling in Bigo *et al Intelligence Oversight* 248.

107 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

108 *Amabhungane supra* par 50–52.

109 *Amabhungane supra* par 50–52.

110 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

111 Duncan https://theconversation.com/south-africas-new-intelligence-bill-is-meant-to-stem-abuses-whats-good-and-bad-about-it-220473.

abuse which we know does take place."[112] Only the suspect has an abiding interest in bringing relevant matters to the judiciary's attention, which the State may be reluctant to disclose to the presiding review judge for undisclosed reasons. This elucidates the need for the vital principle of the "proportionality analysis", as identified by Madlanga J in the *Amabhungane* judgment.[113]

c) The potential for abuse arises because RICA permits surveillance procedures beyond those provided for in RICA – such as those envisaged in section 205 of the Criminal Procedure Act. Once again, the evidence is that this also occurs in several other African countries.[114] It is recommended that RICA, and/or GILAB be amended to disavow the avenues that allow for surveillance approval outside of RICA or GILAB. There is no point in oversight protection if the safeguards provided for in RICA are overridden without proper justification.

d) The independence of the RICA judge or judges should be strengthened by perhaps appointing them solely under the authority of the Chief Justice. In terms of the concept Bill, at present, the RICA judge is appointed by the justice minister in consultation with the Chief Justice. The proposed change would remove any suspicion that the executive is interfering with or influencing the appointed judges' vocation and commitment to fairness and impartiality.

e) Duncan has expressed reservations at the appointment of a single judge to consider RICA warrants and reviews.[115] The German case proves instructive: no less than six judges consider and decide surveillance oversight cases. Since Germany has a population of roughly 83 million people and at least six judges in the UKR to decide and review target surveillance matters, having only one judge to service South Africa's roughly 60 million people appears woefully inadequate. A complement of three or four judges (judged by the German template) would ensure a more sustainable approach.

f) The ruling in the *Amabhungane* case, which held that RICA cannot guarantee the safe and secure storage of intercepted data, could be readily addressed by looking at the German experience. The German Data Protection Authority and the UKR, as noted above, both have a review function regarding data protection (focusing on data processing and the establishment of databases). It is submitted that a similar data protection agency authority be legislated into existence to review the handling and safeguarding of data intercepted by the South African authorities, a measure that would contribute significantly to closing regulatory and oversight gaps.

g) Secrecy in the activities of the intelligence community is strongly discouraged, especially while the national psyche is still recovering from the detrimental impact of abuses perpetrated during the Zuma years.

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112 Par 43.

113 Par 42.

114 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

115 Duncan https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508.

Similarly, while the intelligence abuses of the Zuma era are still fresh and vivid in the nation's psyche, every effort should be made to ensure that rogue elements are fully removed from the intelligence cluster.

h) GILAB must mandate the public disclosure of all complaints filed and resolved by the Office of the Inspector-General of Intelligence to uphold the guardrails of transparency and accountability. Germany may have a case for limiting published reporting. However, given the abuses (committed even after Zuma's exit in February 2018, exemplified by the events leading to the *Amabhungane* case), there is no justification for such mollycoddling or opacity in the South African context. In fact, the opposite is applicable.

i) Professionals who are bound by a duty to maintain confidentiality (such as lawyers and journalists) concerning their data sources should be given an exemption to ensure that such data cannot be surveilled or collected unless in specific cases there be compelling reasons to the contrary. This was one of the interim orders in the *Amabhungane* matter (pending the government's overhaul of RICA considering the findings of unconstitutionality) on which the department failed to act.

j) The German experience (where more than 30 laws and other regulations govern intelligence oversight) illustrates the value of legislative simplicity. Wetzling suggests that Germany's having "the most fragmented landscape for intelligence oversight" is partially an attempt to obscure its provisions "from too much external scrutiny".[116] This approach might be effective in Germany under German conditions but would certainly not be feasible for South Africa, considering the Zuma fiasco. Furthermore, this is an ongoing problem in many African countries, including Egypt, Kenya, Nigeria, Senegal, and Sudan.[117] Roberts comments: "[P]iecemeal provisions, spread across multiple pieces of legislation, can conflict with each other. This makes it impossible for citizens to know what law is applicable."[118]

k) For precisely this reason, it is submitted that every effort should be made to avoid replicating the German set-up, and instead all matters relating to surveillance should be dealt with in one or, at most, two Acts.

l) Legislative changes are required as an initiative to bolster democracy. Perhaps the most important lesson to be learnt from Germany's experience during its inter-war years (1919–1939) is that if people become disillusioned with democracy, authoritarian measures such as the abolition of privacy, manifesting in mass, unregulated surveillance without adequate oversight, will follow shortly thereafter.[119]

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116 Wetzling in Bigo *et al Intelligence Oversight* 250.

117 Roberts "Surveillance Laws Are Failing to Protect Privacy Rights: What We Found in Six African Countries" (21 October 2021) https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373 (accessed 2024-03-21).

118 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

119 Dyzenhaus "Political Atmosphere in the United States: Here's What We Can Learn About Germany in the Interwar Period" (29 January 2024) https://theconversation.com/atmosphere-politique-aux-etats-unis-voici-ce-quon-peut-apprendre-de-lallemagne-de-lentre-deux-guerres-222140 (accessed 2024-03-05).

m) Every effort must be made to strengthen civil oversight, including institutional support for oversight mechanisms and state funding. This article endorses Wetzling's valuable distinction between civil and delegated oversight.[120] This is important, especially at this critical juncture in our nation's history, given the substantial erosion of public trust in surveillance oversight and a lack of assurance from the government regarding any future safeguards for such oversight.

n) Finally, in the words of Roberts, nothing can beat raising "public awareness of privacy rights and surveillance practices".[121]

Appreciating how South Africa arrived at its surveillance framework and delegated oversight (as suggested by Duncan), in conjunction with an application of Habermas's rational reconstruction model, are two useful ways to reformulate and reshape our intelligence laws. It is hoped that lawmakers will find these suggestions to strengthen laws helpful and practical enough to implement in the proposed legislation.

6 CONCLUSIONS

Germany's comprehensive intelligence oversight function for mass digital gathering is indeed helpful to those who wish to defend democracy, even in post-colonial Africa. That said, it should immediately be noted that the South African context differs substantially from the German situation.

While Germany's democratic situation appears to be more stable when compared to South Africa's post-colonial proto-democratic instability, recent intelligence abuses during the Zuma administration (May 2009–February 2018) created a multifaceted and notorious legacy of state security protecting those in power. This legacy extended to shielding Zuma's former business associates (such as the Guptas) from investigation and prosecution. Whereas in Germany, authorities might seek to find a balance between oversight and overreach, it is argued that the position is considerably more complex in South Africa. Since 2009, the South African intelligence agencies have developed a troubling legacy of unchecked abuses, as detailed by the 2018 High-Level Review Panel on the State Security Agency[122] and the Zondo Commission of Inquiry into State Capture.[123] This observation suggests that while the governing party (the ANC) has any influence in the running of this country, public confidence in the operations of intelligence agencies will remain fragile. This poses the inherent risk of eroding trust in the democratic process. In this regard, as

120 Wetzling in Bigo *et al Intelligence Oversight* 248.

121 Roberts https://theconversation.com/surveillance-laws-are-failing-to-protect-privacy-rights-what-we-found-in-six-african-countries-170373.

122 High-Level Review Panel on the State Security Agency "Investigation into the State Security Agency" (2018) https://www.gov.za/sites/default/files/gcis_document/201903/high-level-review-panel-state-security-agency.pdf (accessed 2024-03-19).

123 Zondo Commission of Inquiry into State Capture "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State Report: Part V, Vol. 1: State Security Agency, and Crime Intelligence" (undated) https://www.saflii.org/images/state-capture-commission-report-part-5-vol1.pdf (accessed 2024-10-09).

noted above, Duncan refers to "the broader threats to democracy posed by unaccountable intelligence".[124]

Setting aside the contextual difference, there appears to be significant overlap or similarities between German intelligence oversight of mass data interception and the situation in South Africa. Examples include persistent weaknesses such as overlapping mandates among multiple agencies, lack of judicial independence, secrecy and the use of *ex parte* application procedures (motions without notice). The most pressing recommendation seems to be Duncan's notion (quoted above): "These abuses mean intelligence mandates should be narrowed and state intelligence power should be reduced."[125]

Despite the considerable weaknesses still apparent in the legislation governing mass data collection and its intelligence oversight in South Africa, several suggestions for improvement have been proposed. This article has employed an additional extra-judicial resource from Germany, namely Habermas's idea of rational reconstruction, which has resulted in several innovative recommendations. These include the annual publication of a summary of complaints lodged with the intelligence watchdog; the abolition of secrecy surrounding the operation of the intelligence community until public confidence in its mandate is restored; providing a suspect under surveillance with an opportunity to respond to allegations during automatic review proceedings; and the appointment of permanent staff to head separate foreign and domestic intelligence-gathering divisions. These suggestions should significantly strengthen the provisions in GILAB, and similar intelligence-gathering legislation, thereby restoring public confidence in the activities of our intelligence community. Given the volatile, uncertain, complex and ambiguous (VUCA) postmodern world we navigate, the presence of an intelligence community that can strike a balance between safeguarding national security interests and upholding civil liberties is essential in an open, democratic society committed to values of human dignity and freedom.

GILAB appears to represent a transformative paradigm shift, moving from prioritising state security to embracing a broader concept of security that includes human security as a component of national security. This is a positive development flowing from the Zuma debacle. However, considering the intelligence community's history of abuses, it is important, as Friedman and Wetzling observe, for civil society to remain vigilant in monitoring the activities of these entities, which are inherently inclined towards clandestine and covert operations. For this perspective to offer significant value, another lesson from Germany's interwar period (1919–1939) needs to be heeded: maintaining public confidence and trust in the very idea of democracy – under increasing pressure in the twenty-first century – is crucial to preventing our descent into authoritarianism. As Duncan states:

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[124] Duncan https://theconversation.com/zondo-commissions-report-on-south-africas-intelligence-agency-is-important-but-flawed-186582.

[125] Duncan https://theconversation.com/south-africas-surveillance-law-is-changing-but-citizens-privacy-is-still-at-risk-214508.

> "In grappling with the tasks set for them by their Constitutional Courts, South Africa and Germany may well set the bar for other countries for democratic oversight of these highly invasive powers, and let us hope that they set a high bar indeed."[126]

Indeed, COMINT surveillance is the spymaster of the twenty-first century. However, privacy should not and cannot be the preserve and privilege of a few, as this would pave the way for (what Duncan calls) an instrument "target[ing] those considered to be politically threatening to ruling interests".[127]

[126] Duncan "The Global Significance of South Africa's Mass Surveillance Ruling" (2021) https://aboutintel.eu/south-africa-surveillance-ruling/ (accessed 2024-10-09).

[127] Duncan *Stopping the Spies* Preface xvii.