Institutional Transformation and the Choice Against Vetting in South Africa's Transition

Jonathan Klaaren

Introduction

This paper analyses the South African (in)experience with practices of vetting during the transition from apartheid to constitutional democracy over the years from 1990 to 1996. It argues that there was no institutional practice of vetting in the South African transition –although there were certain events akin to vetting, such as the operation of the Goldstone Commission—and, furthermore, that different sectors of South Africa's administrative and power structures transformed themselves through other means. The political choice made against vetting was reinforced by some legal doctrines and their constitutional entrenchment, in particular the competence of existing public service institutions and strong labor and administrative justice rights.

Different institutions and sectors in South Africa were transformed differently in the transition. The public service sector was transformed during this time by processes of rationalization and demographic change. Political parties did not undergo any vetting of their membership either, but were rather influenced directly by the changed political currents. Significant institutional practices of personnel turnover were implemented in the judiciary and also in the security services. The key position of the judiciary and of the new 11-member Constitutional Court within the politics of transition demanded that certain rules and processes be negotiated regarding the composition of the courts and the selection of its members. The Judicial Service Commission (JSC) was established to play this role. Within the security services, initial dismissals were reactions to media revelations or ad hoc investigations, while government and liberation intelligence services were formally amalgamated at a later stage and a statutory basis for vetting on grounds of loyalty to the state was instituted. Concluding that the content of concepts such as administrative justice is variable and contested, particularly in times of transition, the paper aims to highlight the institutional influences on our understanding of such concepts.

Situated within the field of transitional justice, the core analytic definition of 'vetting' used in this paper will follow that of the ICTJ research project. Thus, the definition used is that of processes of public power that involve the examination of employment and other records of individuals for the purposes of hiring or firing on grounds of past human rights behavior. Personnel selection procedures involve similar examination for such purposes, but the criteria on the basis of which such screening takes place, what I shall call 'grounds of transition,' encompass but are broader than the category of past human rights behavior. Grounds of transition refers, then, to human rights records (as the Goldstone Commission did), but, more often, to status as an apartheid or homelands government employee or as a member of a liberation movement, or record of activity undertaken for the government or the liberation movement.[1] Thus,

[1] A definitional issue is raised by the practice of security clearances. Indeed, this is the common sense understanding of the term 'vetting' in South Africa. Security clearance procedures were used in South Africa before, during, and after the transition. Perhaps inherently politicized,

personnel selection procedures were not in themselves vetting procedures, but, in the instances where they involved a (minimal) concern for individuals' human rights records, did include processes akin to vetting. Finally, 'grounds of transition' do not include those grounds (such as formal educational qualifications) that are unrelated (or at most distantly related) to the political transition from apartheid to democratic non-racial government in South Africa. As is addressed further below, the influence of affirmative action policies complicated the issues examined here. I have not considered race on its own as a ground of transition.

Background

A brief sketch of the dates and significant events of the South African transition from apartheid to constitutional democracy can provide some context for this analysis. The transition had two aspects of particular interest for a study of the practice of vetting: the broad series of political events leading to the adoption of the 1996 Constitution[2] and the more narrow series of developments related to the establishment and operation of the Truth and Reconciliation Commission (TRC) in 1995 (which continued beyond 1996).

Without sketching the rise and fall of apartheid in South Africa, one can see the transition as initiated by two events at the beginning of February 1990.[3] The South African State President F.W. de Klerk, himself recently in power, released the world's most famous political prisoner, Nelson Mandela, from prison. Following prior negotiations with Mandela, this release was unconditional. Furthermore, de Klerk unbanned not only Mandela's political party, the African National Congress (ANC), but also a number of other banned organizations including some direct political rivals to the ANC. The releases and the unbanning of organizations were followed by the launch of the Convention for a Democratic South Africa (CODESA) in December 1991. CODESA, however, collapsed in mid-1992 after the parties failed to reach an agreement on a negotiated settlement and constitution. Following what one observer has described as "social upheaval, mass action, and escalating violence," the parties agreed to restart negotiations in March 1993 and by the end of that year negotiated an interim Constitution which essentially took effect during the first non-racial elections held on 27 April 1994.[4] Over the next two years, the democratically elected Parliament negotiated a final Constitution, adhering in the process to a set of agreed-to Constitutional Principles

---

security clearance procedures can easily become even more so in a transition. Here, security clearances are distinguished from vetting and from personnel selection procedures.

[2] Constitution of the Republic of South Africa, Act 108 of 1996 (1996 Constitution).

[3] There are numerous accounts of the events leading up to 1990. For a good overview, see William Beinart, *Twentieth-Century South Africa* (Oxford: Oxford University Press, 2001). For accounts of the transition, see Alistair Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (Wynburg: Struik Books, 1994).

[4] Heinz Klug, "Historical Background," in Jonathan Klaaren, Anthony Stein, Matthew Chaskalson, eds., *Constitutional Law of South Africa* (Cape Town: Juta, 1998), 2-1 to 2-19. The interim Constitution was adopted in December 1993 and the majority of its provisions came into effect on 27 April 1994. After the National Party government rejected the ANC's demand for an interim government, the parties agreed to establish a transitional executive council to provide some degree of access to the governing process for the ANC. The structures of the interim Constitution were thus preceded by those of the Transitional Executive Council Act 151 of 1993.

providing for a bill of rights, the separation of powers, etc. On its second try, the 1996 Constitution was certified by the Constitutional Court and took effect in February 1997, signifying (at least for the purposes of this paper) the end to the South African transition.

While the South African transition itself was politically dramatic, one of its central institutional forms was even more so –the operation of the Truth and Reconciliation Commission.[5] The events directly leading to the establishment of the TRC have attracted much analysis and reflection.[6] One important source of the movement towards establishing the TRC relates to the developments relating to legal guarantees of indemnity and begins in 1990.

The initial talks between the liberation movement and the F.W. de Klerk-led apartheid government resulted in a series of minutes and statements. Some regard the Pretoria Minute of August 1990 as the place where the compromise political deal truly began, with the ANC suspending its armed struggle and both parties committing themselves to inclusive negotiations.[7] In these initial negotiations with the government, the ANC was concerned about providing protection from legal prosecution for its returning exiles. The apartheid government matched this interest with concern for persons within its own constituency who had engaged in rights abuses. The result was the Indemnity Act 35 of 1990, modeled on an international definition of political offences. In terms of this law, de Klerk as the State President could grant indemnity to any person or category of persons upon publishing certain facts in the official government gazette. After a series of later controversies where members of the government and its constituencies appeared vulnerable to criminal charges without benefiting from the protection of this definition in terms of the Indemnity Act, the apartheid government pushed through the Further Indemnity Act of 1992 which gave the President power to grant indemnity by discretion.[8]

This statutory framework of indemnity was thus in place during the negotiations over the interim Constitution. At the end of these talks, the ANC and the National Party mandated the writing of a clause (sometimes termed the 'postamble') to the Constitution taking effect in April 1994. This clause ensured that a mechanism for amnesty would be set up. Pursuant to this clause, the TRC was established by the Promotion of National Unity and Reconciliation Act 34 of 1995. The TRC was mandated to grant amnesty from prosecution if alleged perpetrators made full disclosure of the human rights violations and

---

[5] Much less dramatic was the amalgamation of the 11 public services as detailed below.

[6] See, for instance, Charles Villa-Vicencio and Wilhelm Verwoerd, eds., *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000); Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa Apartheid & Truth* (Cape Town: RedWorks, 2001); Deborah Posel and Graeme Simpson, eds., *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002); Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

[7] See Richard Spitz and Matthew Chaskalson, *The Politics of Transition* (Oxford: Hart Publishing, 2000), 16. According to the Minute, "the way is now open to proceed towards negotiations on a new constitution. Exploratory talks in this regard will be held before the next meeting which will be held soon."

[8] See Graeme Simpson and Paul van Zyl, "South Africa's Truth and Reconciliation Commission," *Temps Modernes* 585 (1995): 394-407.

if those violations were proportional to the achievement of political objectives. It was also mandated to institute a process for granting reparations and reporting on human rights violations and make recommendations for truth and reconciliation more generally.[9]

The Place of Vetting in the South African Transition

With the above account of the political transition and the establishment and operation of the TRC as background, it is worthwhile to locate the practice of vetting within the South African transition. Perhaps the evidence of the South African choice on the practice of vetting can be most clearly seen in the *Truth and Reconciliation Commission of South Africa Report*.[10] Published in October 1998, volume 5 of the *Report* made the following recommendation in its three paragraphs dealing with the policy of lustration:[11]

17. The Commission gave careful consideration to the possibility of lustration as a mechanism for dealing with people responsible for violations of human rights. As used in several Eastern European countries, lustration (from the Latin meaning to illuminate or to purify by sacrificing or purging) involves the disqualification of such persons from certain categories of public office, or their removal from office. Other international and South African commissions have commented on this matter. For example, the report of the Skweyiya Commission recommends that "no person who is guilty of committing atrocities should ever again be allowed to assume a position of power".[12]
18. The current opinion in International Law is that lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights, and that it should not apply to positions in private organizations.
19. The Commission decided not to recommend lustration because it was felt that it would be inappropriate in the South African context.

[9] As part of its operation, the TRC conducted several different sectoral hearings, including one for the legal sector. While the TRC attempted to facilitate such appearances, members of the judiciary refused to come in person before the TRC. Instead, the judiciary submitted only written representations. See Jonathan Klaaren, "The Truth and Reconciliation Commission, the South African Judiciary, and Constitutionalism," *African Studies* 57 (1998): 197-208 (exploring some aspects of the tension between the judiciary and the TRC).

[10] What the TRC refers to in this quotation as lustration –disqualification for civil service on the grounds of responsibility for human rights violations—falls within the project's and this paper's definition of vetting.

[11] Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: TRC, 1998), Volume 5, Chapter 8: "Recommendations," 310-311, paras 17-19.

[12] "The Skweyiya Commission of Enquiry into complaints by former African National Congress prisoners and detainees, August 1992." Footnote in the original. The Skweyiya Commission was an internal investigation commissioned by the ANC and led by a senior advocate.

Despite perceiving international law as permitting lustration in limited circumstances in the public service,[13] the TRC did not recommend the use of lustration in those circumstances. The TRC's choice against lustration went quite far. Even after explicitly raising and considering the matter, the TRC chose not to recommend the disqualification from public service of personally responsible human rights violators who would be a danger to human rights.

From the South African point of view, the TRC's non-recommendation demonstrates the ongoing power of the compromise negotiated between the liberation movements and the apartheid government over employment stability. The source of this political compromise lay in the balance of power between the two sides. There was no clear winning side; "the only way out of an untenable stalemate was to negotiate."[14] The enactment of this political compromise took the form of both political agreements and doctrines of law. As noted above, its clearest written form is the interim Constitution and its postamble. As discussed below in relation to the public sector, the political and constitutional choice made at the start of the South African transition against vetting was reinforced by the continuing influence of legal doctrines of competence and rights during the period from 1990 to 1996.

The political reasons behind the choice against vetting also meant that at least some public institutions delayed initiating institutional transformation until after this period, as for instance happened in the case of the criminal justice system. The establishment of a high-profile multi-disciplinary investigating unit located within the Department of Justice, the Directorate of Special Investigations (the Scorpions), and of the National Directorate of Public Prosecutions (NDPP) in 1998 was motivated by the need to have certain structures within the criminal justice system completely free of any organizational attachment to those of the apartheid order.[15] In this sense, the establishment of the Scorpions and the NDPP is similar to the establishment of the Constitutional Court (discussed more fully below), but, unlike the establishment of the Judicial Service Commission (also discussed more fully below), the establishment of these separate prosecution and investigatory agencies occurred after the immediate phase of transition from 1990 to 1996.

The Public Service

[13] It is beyond the scope of this paper to outline what the position of international law is on this question. Also, it is not absolutely clear exactly what the TRC meant by 'lustration' and whether that meaning is the same as 'vetting.' The TRC seems to have used the term 'lustration' in a manner that emphasizes a categorical rule of disqualification rather than in a manner that includes the possibilities for institutional processes or practices of vetting. In this sense, the TRC may have been quick to dismiss the potential of vetting for bolstering the transition.

[14] Peter Bouckaert, "The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy," *Stanford Journal of International Law* 33 (1997): 380.

[15] The Office of the Attorney-General was perceived to lack independence and legitimacy due to a number of shortcomings. *Annual Survey of South Africa Law* (1992), 775-777. The founding of the Independent Complaints Directorate might be seen similarly within the policing sector although the motivation for its establishment in 1998 was more clearly one of innovation than of renewal.

There was no vetting legislation in the South African transition generally applicable to the public service. Nor was there any formal practice of vetting generally applied within the public service sector. No generally applicable vetting law was enacted within the national sphere nor were there vetting laws adopted in the homelands (before 1994) or in the nine newly established provinces (after 1994). This is a crucial feature that must be appreciated to understand the place of vetting in the South African transition.

The public service did not engage generally in vetting during the transition.[16] As the Acting Director-General of the Department of Public Service and Administration is on record as having stated: "In so far as the human resource management area in the Public Service is concerned, staff was not subjected to security vetting as part of the transitional phase in the country. As such, processes of the nature alluded to in the [ICTJ] project extract … have thus not taken place."[17] This point was confirmed by a number of line departments.[18]

This does not mean that the public service was not undergoing a radical transformation during this transition. It was. However, this transformation did not occur through a process of vetting of public servants. Instead, the public service was subjected to different processes of transformation during this period.[19] Two processes were of particular importance in this general transformation of the public service: rationalization and affirmative action.

The dominant process during the period of transition was one of 'rationalization'. Rationalization was primarily aimed at amalgamating the various existing but fragmented apartheid-era public services. These were the public services of the homelands as well as the public service of apartheid South Africa. As the Public Service Commission put it: "The legacy of the apartheid past was a fragmented collection of public services serving the former Republic of South Africa, the TBVC States [that is, the 'independent' homelands of Transkei, Bophuthatswana, Venda, and Ciskei] and the self-governing territories. There were 11 public services in all, each with its legislation, structures, systems, personnel composition and organizational cultures. Out of this inefficient and ineffective fragmentation of public personnel corps, a new unified Public Service has to

[16] This section reports some primary research conducted on the civil service (including the security service). In this research, a modified version of the International Center for Transitional Justice (ICTJ) questionnaire with a covering letter and an abstract of the overall study were sent to all national government departments. The total number of these departments was 37. Seventeen departments responded, just under half the number contacted. A number of the Departments referred the matter to the Department of Public Service and Administration (DPSA). A number of other Departments referred the matter to the National Intelligence Agency (NIA).

[17] Acting Director General, Department: Public Service and Administration, letter to author, 12 July 2004 (on file with author).

[18] According to the Director Generals of the Departments of Environmental Affairs and Tourism and of Minerals and Energy, no vetting took place in those departments.

[19] Explaining why no vetting took place, a senior human resources official of the DPSA pointed to the fact that the South African public service instead underwent rationalization. Interview by author (by telephone), April 2004.

be built."[20] This process of rationalization was carried out within the constitutional constraints of section 237 of the interim Constitution.[21]

Although it was perhaps not headlined, the process of rationalization had another organizational dimension beyond consolidation as well: rightsizing or downsizing the number of employees.[22] While the numbers of existing public servants were very uncertain and contested, the total number of civil servants decreased during the period of transition as part of these organizational consolidations. Furthermore, beyond its organizational aspects, the process of public service transformation during this period of transition included initiatives directed at racial and gender representativeness (see below) as well as initiatives meant to promote management skills and political capacity within the civil service.[23]

This process of rationalization began in earnest in 1995, the year after the adoption of the interim Constitution. In that year, 23 national departments submitted proposals for rationalization of their "full organizational structures" while three national departments and all provincial administrations had submitted proposals for rationalization "at management level only."[24] The executive functions of the Public Service Commission were transferred to the Minister for the Public Service and Administration only on 12 April 1996.[25]

These organizational aspects of rationalization were more significant in public service transformation than terminations of public servants on individual grounds. The Public Service legislation as amended in 1994 allowed for the early or premature termination of public servants within the management echelon with full benefits. This was termed "taking the early retirement package." The legislation allowed for a number of grounds (some quite vague) for this termination: retirement to the advantage of the state, rationalization, continued ill health, the interest of the Public Service, and discharge by the President. This policy was in effect from January 1995 to February 1996. The implementation of this policy during this period of transition, however, saw relatively small numbers of persons discharged.[26] While there may have been elements of

---

[20] Annual Report of the Public Service Commission 1994, 6-7.

[21] Annual Report of the Public Service Commission 1995, 6. For instance, s 237(1)(b) provided that responsibility for "internal rationalization" of administrations primarily rested with the relevant provincial government with due regard to advice of the Public Service Commission and relevant provincial commissions.

[22] Annual Report of the Public Service Commission 1996, 14-15.

[23] As of 30 November 1996, the public service was reported to consist of 775,956 Africans (65%), 39,845 Asians (3%), 110,221 Coloured persons (9%), and 269,816 Whites (23%). Annual Report of the Public Service Commission 1996, 18. As a very rough measure of comparison, as of 30 September 1990, the predecessor of the Public Service Commission (which reported on only one of the prior public services) claimed to have oversight of 748,302 persons, distributed in race categories as follows: 294,432 Africans (39%), 31,307 Asians (4%), 119,680 Coloureds (16%), and 302,883 Whites (40%). Commission for Administration 1990 Annual Report, Chapter E, 4.

[24] Annual Report of the Public Service Commission 1995, 6.

[25] Annual Report of the Public Service Commission 1996, "Foreword."

[26] F. Pelser, DPSA, 31 January 2005. Criteria for this policy included 30 years of service to the state, 50 years of age and rank at least the assistant director of department level. This policy should be distinguished from the later one operative between mid-1996 and 1999 –the voluntary

constructive discharge in some instances, this process of early retirement was essentially a voluntary one and was under the executive direction of the renamed structure (the Public Service Commission) that had been in control of the national public service during the apartheid era.[27]

A second important process in the transformation of the public service in this period was one of affirmative action. During the period of transition, the public service was changed from one that was markedly white (at least in its more senior ranks) to one that has begun to reflect the demographics of the South African nation. The management echelon of the public service was 94% white and 6% black in 1994. This composition contrasted with the population demographics which were nearly opposed: 87% black and 13% white in mid-1995.[28] By 31 October 1997, those percentages had changed to 66% and 34%.[29] This process was, however, underway before the transition, as greater and greater numbers of the black majority in South Africa found positions within the civil service. As with rationalization, the process of changing personnel composition had a great impact on the transformation of the public service. Indeed, the process of rationalization sped up the process of changing personnel composition since representation of black persons within the homeland administration was greater than that within the pre-1994 South African public service.

Political Parties

What was true for the public service and the formal structures of the state –that there was no general rule or practice of vetting—was also true for the more informal structures, that is to say the political parties. By and large, the principal South African political parties did not engage in vetting of their own membership during the transition.[30] Political parties do not self report having undergone vetting, nor does evidence emerge from other sources.[31] For instance, the Democratic Alliance (reporting on behalf of its predecessor

---

severance package initiative—under which greater numbers of skilled persons left the public service. In 1994, 39 persons were discharged "to the advantage of the State" and 10 on grounds of ill-health, with 57 persons discharged in total. In 1995, 120 persons were retired "to the advantage of the State," 24 on the grounds of ill-health, and 16 on the basis of rationalization, with 163 discharged in total. In 1996, four were discharged on the basis of rationalization and one on grounds of the interest of the public service. These figures are taken from the 1994-1996 Annual Reports of the Public Service Commission.

[27] The Public Service Commission is a body dating back to 1912. It was called the Commission for Administration from 1980 to 1994 and was renamed the Public Service Commission in 1994.

[28] Presidential Review Commission, *Developing a Culture of Good Governance: Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa* (1998), 124 (citing the Central Statistics Service mid 1995 Estimate).

[29] Ibid., 123-127.

[30] This section does not directly examine the extent to which permanent state structures of elected officials (such as Parliament) used vetting processes with respect to elected officials. Essentially, this was left to the political process.

[31] A research assistant phoned each national political party in existence during the transition still in existence in 2004. These parties were the African National Congress (ANC), the New National Party (NNP), the Democratic Alliance (DA), the Pan-Africanist Congress (PAC), and the Inkatha Freedom Party (IFP). These phone interviews were conducted with public relations

party, the Democratic Party) states that it "did not have specific vetting requirements applicable to its staff, members or public representatives relating to the transition to democracy."[32]

During the transition, persons alleged to have been involved in human rights abuses were routinely appointed to significant positions within the major political parties. For instance, in 1993, the ANC appointed Andrew Masondo as political commissar of its armed wing, Umkhonto weSizwe (also known by the acronym MK), despite allegations made by former ANC detainees that he was involved in incidents of torture in the ANC detention camps in exile, and despite his earlier removal from the ANC's national executive in 1985 after an internal investigation.[33] ANC internal investigations into allegations of abuse made findings of indirect involvement of senior party figures who later rose to occupy high government positions, including Joe Modise, who became the Minister of Defence after 1994, and Jacob Zuma, who became the Deputy President in 1999.

Even with respect to its own internal investigations into alleged abuses, such as the Skweyiya Commission and the Motsuenyane Commission, the ANC position was that the organization itself would not take action and that, instead, the findings of these investigations would be referred to and dealt with by the TRC.[34] Amnesty International noted specifically that these reports stopped short of recommending that no one implicated in human rights abuses should be allowed to hold a senior post in the ANC or in any future government of South Africa or in its security forces.[35]

Why Did the Choice Against Vetting Stick?

This section argues that the political choice against vetting made in 1990 as identified above was reinforced by an intertwined set of organizational factors and legal doctrines during the subsequent six years. These factors included (1) constitutional provisions, including some which gave, at best, uncertain legal authority for enactment of vetting

---

persons for each of the parties. Letters similar to the letters written to the national departments were then written to the political parties, addressed to the persons identified through the phone interviews. Some of the parties responded to the questions regarding vetting. The information in the responses is the information used in this section. In addition, a survey of newspaper documentation at the Centre for Applied Legal Studies (CALS) was conducted with respect to membership questions regarding political parties during the transition.

[32] James Selfe, MP, Chairperson Federal Council, Democratic Alliance, letter to author, 31 May 2004 (on file with author).

[33] "Accused ANC camps abuser made MK commissar," *Weekly Mail and Guardian*, 13 August 1993.

[34] "Getting to the truth of ANC Commissions," *Weekly Mail and Guardian*, 3 September 1993. This position was publicly supported by Nelson Mandela. "Mandela's Group Won't Punish Its Rights Abusers," *New York Times*, 31 August 1993. This political position was not limited to the ANC. Indeed, it was a feature of the constitutional compromise negotiated by these very same parties that the TRC would function as an alternative to criminal prosecution; Posel and Simpson, 2-3. Given the constitutional status of the TRC, it was an attractive party strategy to deflect the issue of vetting to the TRC process.

[35] Amnesty International (AI), "South Africa: Amnesty International Responds to ANC Report on Human Rights Abuses," AI Index: AFR 53/WU 02/93 (24 August 1993).

legislation and protection for existing powerful public service institutions and (2) strong legal protections for the labor rights of public service employees and for the due process concerns of administrative justice.

The first factor reinforcing the initial political decision against vetting was a lack of constitutional competence to enact such laws at the national level (e.g., a lack of legal authority). This was coupled with the considerable organizational power of the public service oversight institutions.[36] From 1990, the white-dominated apartheid Parliament certainly would have been competent to enact such legislation under the pre-1994 constitution. In principle, that Parliament was supreme and (notoriously) competent to enact nearly any piece of legislation it wished to. However, perhaps for readily apparent reasons of self-interest, no vetting legislation was either considered or enacted by this white-dominated Parliament during the transition.[37] And the subsequent power of the first post-apartheid Parliament after 1994 and the strength of its political will must be considered alongside two legal texts: the postscript (the final (and un-numbered) section of the interim Constitution) as well as section 236, one of the transitional clauses of the interim Constitution.

Entitled National Unity and Reconciliation, the postscript is worth quoting at length. It provided in part: "In order to advance … reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date … and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed." As with any text, this clause remained open to interpretation, both in courts and in policy processes. An amnesty may be limited to the granting of immunity from criminal and/or civil liability and thus need not constitute a bar to vetting procedures. There is no judicial decision specifically interpreting this clause in the context of vetting procedures. In government policy during the transition, however, the scope of the amnesty appeared to be understood such that this clause not only shielded beneficiaries from criminal and civil liability, but that it further shielded officials from measures such as vetting.

Judge John Didcott (one of if not the foremost judicial critic of apartheid serving within that system and later a Judge on the Constitutional Court) wrote of the postscript in the following terms: "Once the truth about the iniquities of the past has been

[36] Those who drafted the interim Constitution could have provided competence to Parliament to enact vetting legislation. And of course, one can see the constitutional scheme as merely the result of political choices made during the drafting of the constitution. In any case, a significant feature of the interim Constitution (as well as the final one) is the degree of continuity between these legal orders and their predecessors. Institutions such as the public service commission were legally ratified under the interim Constitution. While that degree of continuity is itself of course also a political choice, there is nonetheless some autonomy that the legal order has from that of politics or society. The competence or lack thereof to enact legislation on vetting fell within that measure of autonomy.

[37] It is also not clear whether Parliament would have been competent to enact such legislation from 27 April 1994 under the interim Constitution, particularly in a phase of amalgamation of fragmented public services and their legal frameworks. Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).

established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the [interim] Constitution and the preamble to the [TRC] statute have set by declaring in turn that…the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society."[38]

In the case which Didcott was considering, *AZAPO v President of the Republic of South Africa*, the Constitutional Court rejected a challenge to the constitutionality of the TRC legislation.[39] Although all members of the Court accepted that the TRC Act infringed upon the right of the victims to access their judicial remedies (rights that were protected for the first time in South Africa in the interim Constitution), the Court held that these rights could be limited in the interests of reconciliation. The decision of the court depended heavily on the postscript.[40]

While it is inherently a matter of speculation, significant constitutional arguments based on the postscript could well have been raised as obstacles to any law of vetting that Parliament wished to consider. It is interesting to consider, however, whether a practice of vetting designed to achieve *preventive* rather than punitive goals would have fallen under the apparent prohibition of the postscript. Even staying within the understanding of the issues as expressed in *AZAPO*, much could have been said in favor of the constitutionality of preventive vetting. Arguably, such a practice would have had advantages of bolstering the transition by increasing the legitimacy of the public institutions. Such a practice might have been judged constitutional since *AZAPO* expresses a preference against punitive goals and demonstrates an overriding concern to support the transition.

A second legal text, section 236 of the interim Constitution, entrenched a set of provisions governing transitional arrangements for the public administration. Prominent within this constitutional section was the rule contained in section 236(2): "A person who immediately before the commencement of this Constitution was employed by an institution referred to in subsection (1) shall continue in such employment subject to and in accordance with this Constitution and other applicable laws regulating such employment." This legal text gave power to those officials arguing against vetting. According to the Director General of DPSA, the reason that there were no vetting processes during the transition was so "in the main … because of an approach that the position of staff in the Public Service be protected during the transitional phase. (This approach was enshrined in section 236 of the Interim Constitution, 1993.)"[41]

Effectively, Parliament shared competence in this area with the existing set of entrenched public service commissions. The strong legal position of the public service

---

[38] *AZAPO & Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 59.

[39] For a discussion of the case and its continuing relevance see John Duggard, "Is the truth and reconciliation process compatible with international law? An unanswered question," *South African Journal of Human Rights* 13 (1997): 258-268; Jonathan Klaaren and Howard Varney, "A second bite at the amnesty cherry? Constitutional and policy issues around legislation for a second amnesty," *South African Law Journal* 117 (2000): 572-593.

[40] Interestingly enough, the legal effect of the postscript has not, by and large, been continued in terms of the 1996 Constitution. See ibid.

[41] DG DPSA to author (12 July 2004).

before 1994 did not quickly change. Instead, the interim Constitution provided specific institutional protections for the public service. As part of its creation of new public agencies, the interim Constitution established one national Public Service Commission as well as nine Provincial Service Commissions.[42] To a great extent, old wine in new bottles at their inception, these public service commissions essentially were continuations of pre-interim Constitution structures intended to manage more than oversee the operation of the public service and operated in terms of pre-interim Constitution laws governing the public service.[43] They had operated in the past in a manner that zealously safeguarded the employment rights of (largely white) civil servants and they largely continued to do so during the years of the transition from 1990 to 1996.[44] These institutional protections were supplemented by a body of legal rules and norms since the interim Constitution made extensive and explicit provision for the general continuation of laws applicable from the pre-interim Constitution period. In particular, this meant that the Public Service Act –governing the terms and conditions of public employees— survived the transition.

In any case, even assuming that the Parliament possessed at least some degree of constitutional competence to enact a generally applicable vetting law, other legal provisions would have strongly operated against such a move. Any such law would have faced certain challenge based on provisions of the Bill of Rights, introduced in early 1994. Moreover, these provisions of the Bill of Rights were, of course, also applicable to the particular vetting laws and processes that were enacted. Thus, they form part of the legal background against which vetting was considered.

From the point of view of public employees, the Bill of Rights provided specific rights protection that could have been invoked by opponents of vetting and would have complicated the operation of any potential vetting legislation. This protection was in the form of labor rights and, perhaps even more powerfully, in the form of the interim Constitution's legal guarantee of administrative justice contained in section 24. This right is approximately equivalent to the due process rights of other constitutions. This section provided all persons with a right in particular to "procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened." While vetting processes would not necessarily violate such provisions, the implementation of vetting likely would have been complicated by the right to administrative justice. Indeed, from the point of view of the TRC, the administrative justice right became an obstacle to its efficient and quick functioning. Much of the 'legal firepower' of the TRC itself was spent on complying with legal guarantees of

[42] Sections 209 and 213, interim Constitution.

[43] In terms of s 209(2) of the interim Constitution, the Public Service Commission was to operate according to the laws in force prior to the interim Constitution. From the publication of the White Paper on the Transformation of the Public Service in November 1995, ideas about the transformation of the public service began to take hold within the culture of the public service. Pelser, interview.

[44] See Paseka Ncholo, "Reforming the Public Service in South Africa: A Policy Framework," *Public Administration & Development* 20 (2000): 89 ("In what can be regarded as a watershed year for public administration in South Africa…executive functions were transferred from the Public Service Commission to the Minister of Public Service and Administration in 1996.").

administrative justice.[45] Indeed, in a TRC setting closely analogous to that of vetting, administrative law came to the aid of an alleged apartheid perpetrator in the transition-era case of *Du Preez v Truth and Reconciliation Commission*.[46] This constraining experience of the TRC with rights of administrative justice demonstrates the power of these provisions in the South African legal tradition. While this experience did not make a process of vetting impossible, it demonstrates that any vetting initiatives would have faced powerful (albeit not insurmountable) constraints stemming from the obligation of procedural fairness.

It is, of course, deeply ironic that a great part of the legal protection enjoyed by public employees against the enactment of vetting legislation derived from the more celebrated legal victories of the anti-apartheid effort. This was especially the case in the context of an individual public service employee faced with retrenchment (i.e., firing). Cases such as *Administrator, Transvaal v Traub*[47] and *Administrator, Transvaal v Zenzile*[48] upheld the rights of black or progressively minded and outspoken employees in the face of actions by apartheid bureaucrats. These cases were regarded at the time as victories against apartheid. However, they also entrenched legal norms of procedural and substantive protection in South African law that would in the 1990s be significant potential obstacles to instituting a vetting process.

Personnel Selection Procedures in the Transition in South Africa

As the last section pointed out, there was no law of vetting in the South African transition from 1990 to 1996. No vetting took place within non-security components of the public service nor within political parties. This is not to say that no personnel selection or security clearance procedures took place. Some did. In particular, personnel selection practices took place within the security services and within the judiciary. After examining the highly limited degree to which personnel selection was practiced within the judiciary, this section will provide an accounting of the same within the security sector.

Beginning to Transform the Judiciary

This section will present an episode of the transition that relates specifically to the personnel of the judicial branch: the impetus for a constitutional court made up of a new slate of judges. This aspect of the transition derives from sharply contrasting attitudes of the apartheid government and the liberation movement. For a number of decades, the African National Congress had consistently held a skeptical attitude towards the personnel of the judiciary under apartheid. The ANC's view was that the majority of judges were stooges of the apartheid regime, apart from a few honorable exceptions such

[45] Posel and Simpson, 6.
[46] 1997 (3) SA 204 (A). This order delivered by a court just below the Constitutional Court in the South African judicial hierarchy ratified an earlier court decision to force the TRC in this case to provide notice to an alleged perpetrator of the Commission's intention to hear evidence that might harm the reputation of that alleged perpetrator of human rights abuses.
[47] 1989 (4) SA 731 (A).
[48] 1991 (1) SA 21 (A).

as Judge John Didcott. When constitutional issues began to be seriously debated within the ANC in the late 1980s, one of the hotly contested issues within the liberation movement was the composition of the judiciary as well as the power of judicial review. For instance, in response to one internal proposal that apparently would have allowed at least some apartheid judges to continue to hold their seats, Pallo Jordan and others in the ANC suggested before 1990 that all members of the judiciary would need to resign and then would be rehired by a new democratic regime.[49] In contrast, the apartheid government had belatedly and self-interestedly woken up to the value of an independent judiciary and of a bill of rights as structural guarantees for the rights of minorities in a constitutional democracy with a clear black majority. Both it and international opinion were thus strongly committed to maintaining rather than modifying the existing institutional independence of the South African judiciary.[50] This debate took place against the background of an existing judiciary that was nearly 100% white and male. The permanent appointment of the first judge who was not white did not take place until 1991.[51]

In the end, the interim Constitution essentially kept intact the existing judiciary with two significant innovations. First, constitutional review power (the power to strike down Parliamentary legislation on constitutional grounds) was given to first-instance judges (but not to the judges of the old-order apex court, the Appellate Division, now renamed the Supreme Court of Appeal). Second, while the vetting of sitting judges was a political non-starter, the different starting points of the liberation movement and the government nonetheless set the stage for the establishment of the Constitutional Court.[52] The establishment of the Constitutional Court thus owed much to a concern with the existing personnel of the judiciary. The creation of a new court with constitutional jurisdiction, but crucially also with newly appointed judges, can be seen as motivated in large part to make a decisive break with the past.

The Constitutional Court would embody that decisive break not only in terms of doctrine but also in terms of personnel.[53] Nonetheless, although the members of the new Court were to be selected and appointed anew, the Court was not a complete break with the personnel of the existing judiciary. Constitutionally, four of the eleven judges were required to be appointed from among the judges of the existing Supreme Court. Thus, a substantial portion of the personnel of the new Constitutional Court was mandated to have direct continuity with the existing judiciary. Furthermore, although it was not a legal requirement, two of the remaining seven appointments to the Constitutional Court were in fact also judges of the existing Supreme Court. One of these non-mandated appointments was that of Judge Didcott. Moreover, there was significant participation by the judiciary and by the legal profession in the actual process of nominating the judges for the Court. Six of the eleven appointments required the consultation of a

[49] Tom Karis, March 2004, unpublished manuscript, City University of New York.
[50] Klug.
[51] *Annual Survey of South African Law* (1991), 665-666.
[52] Some background to the controversies regarding the legal profession in general and the judiciary in particular is provided in David Dyzenhaus, *Truth, Reconciliation and the Apartheid Legal Order* (Cape Town: Juta, 1998).
[53] Nicholas Haysom, "Constitutional Court for South Africa," CALS Occasional Paper 14 (November 1991).

constitutionally mandated body, the Judicial Service Commission (JSC).[54] In order to form its opinion, the JSC chose to interview a number of candidates. After a short but fierce period of controversy, it was resolved by the JSC that the process of interviewing and recommending candidates for these appointments would be open. The JSC thus conducted a transparent process for these six appointments, essentially along the lines by which the media is usually permitted to view public and open processes of the courts. In this interviewing process, the members of the JSC asked candidates questions based on the candidates résumés as well as questions regarding their views on the legal system.[55]

As the above demonstrates, the JSC was designed to and did play an important role in the selection of the Constitutional Court judges. It also was designed and has played a role in the selection and appointment of lower-rank judges. In this sense, one can point to the JSC as a personnel-selection institution. While retaining approximately the same size, the judiciary itself had changed from having one black male judge and two white female judges in May 1994 to a state where the Justice Minister could point to "14 white females, 42 indigenous African males, 8 indigenous African females, 8 coloured males, 1 coloured female, 11 Asiatic males and 2 Asiatic females" out of 214 judges.[56] By 2003, 60% of the judges were post-apartheid appointments. During the time of transition, the debates and discussions within the JSC covered in part grounds of transition, although they mostly focused on more institutional matters of judicial competence.[57] For instance, the membership of judges in the Afrikaner Broederbond (a secret brotherhood that was closely linked to the National Party) was a matter critically taken into account by the JSC in relation to the promotion of certain old-order judges, although the JSC has also recommended the appointment of some persons with that background.[58]

Personnel Selection and Security Clearances in the Security Services

The security services sector did undergo at least one formal and statutory personnel selection process during the transition. This sector saw the clearest separation of the old and the new regimes at the start of the transition, at least with respect to formal military and intelligence structures. Thus, even though there were numerous organizations involved, the transition witnessed the merger of two broad sets of military/intelligence organizations, one from the side of the liberation movements and one from the side of the

[54] The Judicial Service Commission was initially established in terms of s 105 of the interim Constitution and subsequently authorized in terms of s 178 of the 1996 Constitution.

[55] *Annual Survey of South Africa Law* (1993), 793. For transcripts of the interviews, see http://www.concourt.gov.za/interviews/index.html.

[56] Penuel Maduna, "Address at the Banquet of the Judicial Officers, Symposium," *South African Law Journal* 120 (2003): 665.

[57] Of course a concept of judicial competence (in the sense of judicial skill or knowledge) has no definite meaning and perhaps even more so during a time of transition. For instance, one contested matter was the degree to which judges had experience or knowledge of constitutional law. This quality served at least in part in the judicial context as a proxy for adherence to the values and ideals of the new constitutional democracy.

[58] Hugh Corder, "Judicial Authority in a Changing South Africa," *Legal Studies* 24 (2004): 263; M.T.K. Moerane, "The Meaning of Transformation of the Judiciary in the New South African context," *South African Law Journal* 120 (2004): 709.

governments.[59] These different organizational structures were put together during the years from 1994 to 1996, although on the military side the processes extended beyond 1996. This section will first outline personnel selection within the intelligence organizations and then treat more briefly personnel selection within the military and the police.

Intelligence

The period from 1990 to 1994 can be characterized as one in which President F.W. de Klerk was attempting to regain civilian political control over the intelligence services but was unable to wield much power in this effort. For instance, de Klerk repeatedly stated that no witch hunts were to be conducted, apparently needing to make this commitment in order to attain control over these services. The few high-profile sackings of senior intelligence officials that occurred during this period were all conducted in response to exposure by journalists or by a judicial commission of inquiry without any powers of enforcement or prosecution, the Goldstone Commission.[60] In December 1992, De Klerk dismissed 23 senior commanders of the military intelligence in response to evidence uncovered by the Goldstone Commission. However, the primary reason cited for the dismissal of these senior officials (including two generals and four brigadiers) was their apparent involvement in destabilizing the ongoing negotiations process.[61] While the Goldstone Commission had some formality to its investigation, these actions of dismissal were immediate responses to its reports and did not form part of any sustained program of vetting.

During this period (as well as prior to it), there were continued contacts between the National Intelligence Service (NIS) (as the primary intelligence service on the side of the government) and the MK Department of Intelligence and Security (MK-DIS) (as the primary intelligence structure for the ANC on the side of the liberation movements). The

[59] Indeed, the organizations did not fit neatly into two sets and had multiple conflicting interests and histories. For instance, the intelligence agencies of the two liberation movements were clearly distinct.

[60] Robert D'A Henderson, "South African Intelligence Under de Klerk," in Jakkie Cilliers and Markus Reichardt, eds., *About Turn* (Pretoria: Institute for Security Studies, 1995), 158-163. The Goldstone Commission is the commonly used term for The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation which was chaired by Mr. Justice Richard Goldstone. The five-person Commission was appointed by the government on 24 October 1991 in terms of the Prevention of Public Violence and Intimidation Act of 1991. Its reports were not binding, although they could be persuasive. Largely enjoying support from the major political parties and movements in terms of the National Peace Accord, the Goldstone Commission was essentially investigating political violence in South Africa during its period of operation and was a precursor to the TRC. It established several investigating units using police personnel, but these units functioned more as the eyes and ears of the Commission rather than as investigators working towards prosecutions. For an overview of the political violence and the role of the Goldstone Commission, see Human Rights Watch, "Half-Hearted Reform: The Official Response to the Rising Tide of Violence," 8 May 1993. For a view of the TRC from the perspective of the Goldstone Commission, see Gareth Newham, "Truth and Reconciliation: Realising the Ideals," *Indicator SA* 12 (1995): 7-12.

[61] Jeremy Sarkin, "Conscription," *South African Human Rights Yearbook* 4 (1993): 40.

NIS had been selected by de Klerk as his primary intelligence instrument for the transition from apartheid. Thus, the NIS was put in the position of performing the functions of a powerful yet reformist state agency in the midst of the transition. This position of power and the ability of the two intelligence agencies to shape their own relationship both with each other and with their respective principals contributed to the relatively warm relations between the NIS and MK-DIS. In 1992, the head of the MK-DIS indicated the degree of consensus that existed in stating: "In discussing the future of intelligence in our country, we cannot negate the fact that we, as intelligence actors, constitute a tragic legacy; a legacy of opposition to one another –some of us struggling against apartheid, others defending it—actions that were dictated by the very nature of our highly politicized roles respectively. Today, a new mission must be determined for the South African intelligence community – a mission which is in line with the desired goal of a non-racial democratic order."[62] Along these lines, there were arguments made within the ANC for retention of the NIS as it was. Beyond its contribution in the negotiations (as described above), the NIS was regarded by the ANC as possessing "assets and capabilities that the ANC would not want to lose, including sources, information on both the white right wing and extremists in black parties such as Inkatha, technological capabilities, and greater professional training than in the ANC."[63]

It is within the above context that we can outline and assess the personnel selection done in the security sector. Consider the experience of the South African Secret Service (SASS). SASS is one of the two South African intelligence services created in 1994 out of the NIS and the amalgamation of liberation movement intelligence services. It is a partner service to the National Intelligence Agency (NIA). NIA has primary responsibility for domestic intelligence and SASS has primary responsibility for foreign intelligence. SASS has indicated that "no vetting [i.e., security clearances such as background checks on issues of affiliation or screening for human rights abuses][64] was done as a prerequisite to join the new intelligence structures established by the Constitution and the Intelligence Services Act." Instead, the Service noted the existence of an "amalgamation process to incorporate all the intelligence structures".[65] SASS has reported that "[d]ue to the diversity of backgrounds and various other practical reasons, [it was] decided that security screening before amalgamation would not be a prerequisite, but to do a vetting thereafter. [SASS] conducted its own vetting and was one of the first departments to complete the vetting process. It needs also to be mentioned that during the early 1990s (pre-1994), severance packages were offered to members in the statutory Intelligence Services in an attempt to sever structures from members who could jeopardize the amalgamation process."[66]

As the experience of SASS demonstrates, there were a number of overlapping practices in the transition of the intelligence services sector. The creation of the new

---

[62] O'Brien, 174.
[63] Ibid., 178.
[64] Insertion by the author.
[65] H.A. Dennis, Director-General SASS to author, letter, 18 March 2004 (on file with author).
[66] Apparently, SASS here is continuing to refer to vetting in the sense of security clearances only and not screening for human rights abuses. The security sector here includes the intelligence agencies as well as the intelligence agencies of the Department of Defence and those of the police.

intelligence services out of elements of government and liberation intelligence services during this period included pre-amalgamation voluntary retirement incentives as well as post-amalgamation security screening[67] and post-amalgamation certification.[68] Of the approximately 4,000 members of the new civilian intelligence services, about one half came from the previous governmental intelligence services, one quarter from the ANC intelligence services and the rest from homelands and other services.[69]

This 1994 restructuring of the intelligence services (the amalgamation) was at most only in very small part a move to cleanse the services of individuals with backgrounds involving human rights violations or indeed of particular individuals at all. As demonstrated by the relatively warm relations between the intelligence services, there were other factors that loomed larger than changing the personnel. As one commentator put it: "The reason behind the changes in the intelligence and security structures was partly a result of the general government restructuring following independence, but also to allow for the integration of the MK-DIS, along with all other intelligence services in the country, into the new national intelligence structure."[70]

As indicated above, it was after the formal amalgamation that persons in the new intelligence services were subjected to a check for security clearance. The exemption from a pre-employment security clearance was a departure from prior governmental practice and was understood within the intelligences services to be a concession to those members not previously employed in government. In order to understand the practice of security clearance that developed at this time, one can make a distinction between two different types of security clearances. One type is a state information security clearance and is an intelligence-oriented understanding which extends to loyalty to the state.[71] Another type of security clearance is more corporate-oriented and refers to procedures such as checking on fraudulent curriculum vitae or qualifications as well as criminal records, etc., and does not necessarily include assessing loyalty to the state.[72] It was the first rather than the second type of security clearance that was implemented during this

---

[67] At the time of the intelligence service amalgamation, the security clearance screening done was governed by the same set of guidelines as existed before 1994. It was not until 1996 that the security clearance procedures were themselves changed in line with the Constitution. Jonathan Klaaren, "National Information Insecurity?: Constitutional Issues regarding Protection and Disclosure of Information by Public Officials," *South African Law Journal* 119 (2002): 721-732.

[68] Section 3(1) of the Intelligence Services Act allowed those who were part of the old organization to not join the new one. According to one commentator "many took this option, either resigning or being asked to leave." O'Brien, 186.

[69] Paul Todd and Jonathan Bloch, *Global Intelligence: The World's Secret Services Today* (London: Zed Books, 2003), 191.

[70] O'Brien, 174.

[71] See for instance Advocate K.D. McKenzie, Executive Director, Independent Complaints Directorate, letter to author, 19 April 2004 (stating vetting criteria to be inclusive of susceptibility to blackmail or extortion, amenability to bribes, susceptibility to being compromised due to compromising behaviour, and vulnerability to subversive activities and loyalty to the State or institution) (on file with author). For some description of current South African vetting practices, see O.V. Moalafi, "Qualified to conduct the security vetting process," *SA Soldier* 10, no. 8 (August 2003): 16.

[72] See P.L. Tlaka, letter to author (citing inter alia SABS ISO/IEC 17799 Code of Practice for Information Security Management), 17 March 2004 (on file with author).

period. To the extent, then, that human rights criteria were not the critical ones in the security clearances that were actually carried out, this practice was not one of vetting. Moreover, in this type of security clearance, the criteria adopted for the security clearance and the application of those criteria may have varied significantly in this period of transition.[73]

Beyond (but also linked to) the security clearance, the other primary post-amalgamation process in the new intelligence services affecting personnel through examination of records was that of certification. The central legislation for the amalgamation within the intelligence services was the Intelligence Services Act 38 of 1994. Section 3 of this Act regulated the process and essentially established the new National Intelligence Agency (NIA) and the South African Secret Service (SASS) out of members of the statutory Bureau for State Security, the ANC Department of Intelligence and Security, the Bophuthatswana Internal Intelligence Service, the Transkei Intelligence Service, and the Venda National Intelligence Service. Members of other services of other political parties and self-governing territories (e.g., KwaZulu) could be included if they applied to the Director-General within a set period.[74] It was necessary that each member be a South African citizen and that he or she feature on a personnel list submitted by the head of each organizational component. NIA and SASS were thus formally established on 1 January 1995.[75]

Section 8 of the Intelligence Services Act regulated the post-amalgamation personnel selection by providing for a security screening investigation by the newly created intelligence structure itself in section 8(1)(a) and then providing for evaluation of the collected information by the Deputy President or the Cabinet Minister charged with intelligence. For the relevant period, the Cabinet member charged with intelligence was Deputy President Thabo Mbeki, the current President of South Africa. According to section 8(1)(b) of the Intelligence Services Act, the condition of appointment of a member of the intelligence services was that the Deputy President would be "reasonably of the opinion that such person may be appointed as a member without the possibility that such person might be a security risk or that he or she might act in any way prejudicial to security interests of the Republic." Obviously, this was a standard that was open to interpretation by the Deputy President. There appears not to have been any policy made in order to guide his interpretation. Section 8(2) of the Act then provided for certification by the Deputy President of such 'appointability' of a member. However, the certification of appointability was not the end of the matter; there was the further possibility of the Deputy President withdrawing that certificate of appointability upon gaining new or different information regarding that member's appointability. Thus, the members of the intelligence services were placed under the control of a civilian politician, in particular that of Thabo Mbeki occupying the post of Deputy President.

---

[73] Prior to 1994, security clearance procedures were implemented by the National Intelligence Services (in addition to those implemented by the police and by Defence). After the creation of the separate organizations of NIA and SASS (see above), each of those two organizations conducted their own security clearance procedures.

[74] In particular, members of the Pan Africanist Security Service (PASS) did join the amalgamation process. NIA Public Annual Report 2001/2002, 8.

[75] Ibid.

This post-amalgamation personnel-selection process (i.e., the security clearance and the certification of appointability) of section 8(1) and 8(2) of the Intelligence Services Act only applied to persons appointed anew after the 1994 establishment of the Agency and the Service. For the bulk of the members who were amalgamated directly from the prior existing services, the equivalent provision was contained in section 8(3) of the Act. In terms of section 8(3), if the Deputy President "obtains information regarding [such] a member … which causes him to be reasonably of the opinion that the person could be a security risk or could possibly act in any manner prejudicial to security interests of the Republic, such member shall be deemed unfit for further membership of the Agency or Service …." While this standard also was open to interpretation by the Deputy President, it contained more protection against dismissal for these existing members than for the new members governed by section 8(2).

There are several points worth noting regarding this intelligence services amalgamation legislation. First, the Deputy President effectively operated with the final say. The model of personnel selection adopted is thus one of a newly established agency via amalgamation of existing units, in a process operated by a very senior political head, and with one key part of the process –that of security clearance—conducted by the newly established agency itself. Second, the members of the new service taken in from pre-existing units would only be evaluated in terms of information obtained after amalgamation (rather than in terms of information then available to the pre-existing unit). Thus, full information sharing was not established before amalgamation. Third, it bears emphasizing that the legal standard for the Deputy President's discretion in section 8(3) with respect to members of the new service who were members of pre-existing units is more objectively phrased than for the on-going selection process of section 8(1)-(2). For pre-existing members, the standard for non-appointability was thus higher. It was more difficult for the Deputy President to be of the opinion of the existence of security risk. On the face of the law at least, as demonstrated in these last two points, there were greater protections thus provided for existing members than for new members.

As for the impact and effect of this law, a detailed study of the operation of this personnel selection in practice remains to be done. However, some features –beyond the generally held observation that this process of integration of the intelligence services was successful—are clear. First, it does not appear that grounds of transition figured prominently within this process –there is no indication that an individual's record as a human rights violator or status as a government/liberation forces member was taken into account in any significant extent. Indeed, at least two of these statuses –participation in government or liberation forces—were made legally equivalent. Second, there remained significant non-cooperation from the part of the intelligence sector with the new democratic regime, at least initially. In particular, the leaders of the intelligence agencies refused to tell newly elected President Nelson Mandela in 1994 the names of the informers used against the liberation movements.[76] This indicates that the personnel selection processes likely remained contested and variable. The secrecy and lack of information sharing during this period was, however, not a break with bureaucratic tradition within the intelligence sector. From 1989 to 1994, the intelligence community had also withheld information from State President F.W. de Klerk.[77]

[76] "Spies' names kept from Mandela," *Saturday Star*, 24 January 2004.
[77] D'A Henderson, 141.

The Armed Forces

Occurring more slowly than the process within the intelligence service, the armed forces of the liberation movements were absorbed into the South African military in an integration process that was planned by commanders from both sides themselves.[78] After a series of off-the-record meetings in 1992 between South African Defence Force (SADF) and Umkhonto weSizwe (MK) commanders as well as more official and inclusive meetings in 1993-4, the Joint Military Co-ordinating Committee (JMCC) made a formal plan for the integration process including the establishment of certified personnel registers. In this process, the approximately 28,000 MK members, 6,000 members of the Azanian People's Liberation Army (APLA), and 11,000 members of the Transkei, Ciskei, Venda, and Bophuthatswana militaries were scheduled for integration with the 90,000 members of the South African Defence Force.[79] In the integration process, individuals were assessed in terms of a rank structure, a process that caused difficulties for the liberation movement armed forces that had not operated on the basis of rank.[80] In the end, fewer MK and APLA military personnel participated in the integration than had been expected. Thus, in 1998, about 16% of the SANDF uniformed component (of 73,500) were from MK and less than 7% from APLA.[81] Nonetheless, a process of rationalization was also begun with respect to the armed forces.[82]

The JMCC oversaw the process of integration and understood its mandate to include oversight over the process of security clearances (which was an institution (established in 1980) separate from that of the police and that of the intelligence organizations). There was a 'natural' fear on the part of the 'comers-in' that the process of security clearances could be used to keep out new members of the armed forces.[83] However, those implementing the clearance process in Defence made some allowances that were guided by the governmental policy of reconciliation and that had the effect of facilitating integration. These included a delay before a full-scale process of security

[78] For further research, see E. Taole, "Management Practice in Military Integration of the National Defence Force between 27 April 1994 – 27 April 1996," (masters thesis, University of the Witwatersrand, 1997); Tsepi Motumi, "Defence Demobilisation and Rationalisation in South Africa" (masters thesis, University of the Witwatersrand, 2000); and Tsepi Motumi and Andrew Hudson, "Rightsizing: The Challenges of Demobilisation and Social Reintegration in South Africa," in Jakkie Cilliers, ed., *Dismissed: Demobilisation and Reintegration of Former Combatants in Africa* (Pretoria: Institute for Security Studies, 1995), 112-129.

[79] Gavin Cawthra, "Security Transformation in Post-Apartheid South Africa," in Gavin Cawthra and Robin Luckham, eds., *Governing Insecurity* (London: Zed Books, 2003), 38.

[80] Ibid., 42.

[81] Ibid., 41.

[82] T.T. Matanzima, "Human Resources Challenges," in Jakkie Cilliers, ed., *Continuity in Change: The SA Army in Transition* (Pretoria: Institute for Security Studies, 1998), 55-72, 58-59.

[83] Thus, for instance, the JMCC commissioned a report into the operation and objectivity of the clearance process in 1994. In 1995, after integration, the security clearance unit collectively revisited their evaluation process and decided not to change the criteria but nonetheless to apply them more strictly.

clearance evaluation would be conducted as well as an explicit appreciation for cultural differences.[84]

The Police

The integration of the police forces differed from that of the armed forces in part because the liberation movements had few if any personnel with relevant policing experience or indeed desire to be integrated into police structures.[85] Instead, the police forces of the various homelands and independent territories needed to be amalgamated and rationalized in an organizational restructuring akin to the process that occurred with the public service generally. The newly appointed ANC Minister with political responsibility for the police reassured the existing members of the police service that no radical changes would be forthcoming and that jobs were secure.[86] In this process, the integration of the former homelands police forces improved the demographic representation of the national police. As Cawthra notes, "[b]y the end of 1999, about 70 per cent of the approximately 125,000 strong force was black, although less than 30 per cent were female. However, half of the middle managers in the service were white and white men constituted 70 per cent of senior management."[87] As with the intelligence and the army, a few high-profile personnel changes did occur as the result of judicial and other pressures. At least to some extent, these pressures derived from human rights related grounds. In August 1992, the retirement of about a third of the existing white generals in the South African Police was announced. Still, "none of the most senior ranking officers in the SAP who have been implicated in unlawful activities were among those scheduled to retire."[88] In March

[84] Brigadier General Moalifi and staff, interview by author, Pretoria, South Africa, 7 February 2005.

[85] Cawthra, 43-44. For an overview of the police in transition, see Janine Rauch, "Police Reform and South Africa's Transition," paper delivered at South African Institute for International Affairs, Johannesburg, 2000. Rauch points out that some members of the liberation movements were absorbed into the police, including "approximately 200 bodyguards [who] were integrated into the VIP Protection Service," "a number of ANC intelligence personnel [who] were posted to the Crime Intelligence Department of the SAPS - the reformed Security Branch," "a small number of young people who had been members of the ANC's "self-defence units" (SDU's) and the IFP's "self protection units" (SPU's) were integrated into a "community constable group," and "a small number of civilians [who] were recruited into middle and senior posts in the SAPS during the competitive "senior appointments process."

[86] The Minister "embarked on a nation-wide series of mass meetings with police personnel, to reassure them about the ANC's intentions to reform the police gradually, rather than radically; and to spread the message that, although the ANC would not tolerate abuses of human rights, it would not victimise perpetrators of such abuses committed in the past, if the perpetrators abided by new government doctrine. This series of meetings was also critical in giving a human face to the new ANC government, and identifying the ANC as the stable political authority during the insecure period of amalgamation of the police forces." Rauch.

[87] Cawthra, 44.

[88] Human Rights Watch, "Half-Hearted Reform: The Official Response to the Rising Tide of Violence," 8 May 1993.

1994, de Klerk ordered immediate leave from duties for ten South African Police senior officers in response to an interim report issued by the Goldstone Commission.[89]

Conclusion

One point raised by the South African inexperience with vetting in transition is that the relationship between the practice of vetting and the concept of administrative justice is not a relationship that can be prefigured. One cannot determine –without regard to the particular context of a society in transition and the implementation of particular programs—whether the fundamental rights of administrative justice (including procedural justice) are competitive with or complementary to the pursuit of transitional justice through practices such as vetting (which is also a form of administrative justice). In South Africa, this can be seen, for instance, in the operation of the TRC and its relationship to due process. Some will take the position that procedural obstacles (and potential obstacles) presented by the right of administrative justice impeded the operation of the TRC and reinforced, without regard for transformation, the choice made in the transition against a general practice of vetting.[90] Others will take the position of the Constitutional Court that procedural justice and substantive justice are inextricably intermingled.[91] In the end, the relationship will be a contested one.

It is hardly surprising that there are significant contests over the meaning and operation of concepts such as administrative justice within a time of transition. But the point does push us to move beyond it and to recognize at least one significant aspect (among others) of this contest. In an important sense –and a sense which is perhaps not recognized enough by those domestic and international advocates engaged in transitional politics—the contest over due process and administrative justice rights has a particularly *institutional* dimension. The contest –whether it occurs in the decisions of judicial bodies or the drafting of memoranda of understanding—cannot be separated from issues of the effective functioning of the public service or, for instance, the proper relationship between the judiciary and the executive.[92] As other papers in this collection demonstrate, attention to the institutional dimension is often overlooked but is significant.

Several institutional dimensions of vetting are demonstrated by the examination of the South African experience. First, what emerges as significant from the South African experience is the relationship of vetting with the content of the legal system. The

---

[89] *The Citizen,* 19 March 1994.

[90] Jeremy Sarkin, "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission," *South African Journal on Human Rights* 12 (1996): 617.

[91] *Premier of Mpumalanga v Executive Committee of the Association of Governing bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 44 ("A harmonious balance needs to be found between the urgent need to eradicate unfair discrimination on the one hand, and the obligation to act fairly, on the other. There is no doubt that, in the process of transition upon which we have embarked, we need to remain committed to the goal of equality, but that goal must be pursued in a manner consistent with the other constitutional requirements, including procedural fairness…").

[92] While I would include the independent role of the law in this institutional aspect, the term is chosen here to direct attention of policy-makers and other persons involved in the design and operation of transition to the organizational and bureaucratic dimensions of questions around vetting.

law (even in the relatively narrow sense of the pre-existing and dominant doctrine of the legal system) is a significant institution that must be taken into account when designing and operating a system of vetting. If the relationship of vetting with the legal system is not taken into account, then the stated goals of the vetting process are likely to be deflected and less likely to be achieved. Second, at least in the case of a transition –such as South Africa's transition—relatively uninfluenced by international actors, public service institutions and structures must also be taken into account in designing or implementing a process of vetting. These institutions were powerful reinforcing factors with respect to the choice made in South Africa against vetting. A third point –perhaps relevant again mostly to domestic-driven transitions such as South Africa's—builds upon this observation. As detailed above, the significant political actors –including the liberation movements—at the outset of the South African period of transition made a choice against vetting. Their understanding of this choice was that individuals in existing organizations such as the public service or the judiciary would not be dismissed. This understanding existed simultaneously with an understanding regarding the need to change the structure of the bureaucracies that make up, for example, the public service.[93] While the precise nature of those structural changes was not specified nor agreed upon, it was common cause that these structures would change. What perhaps were not taken into account or appreciated sufficiently by all the actors were the institutional consequences of the choice against vetting. The choice against vetting meant that agreed-upon structural reforms of organizations such as the public service were that much more difficult to effect.

As a last word, one cannot avoid reflecting upon the relationship between race and the transformation of the state in the South African context. The South African experience provides one example of the degree to which the process of vetting in a time of transition may compete with (or mask or overlap) other themes of transformation such as racial justice.[94] Given the prominent role of the public service in the political economy of South Africa[95] and the demographic distribution of South Africa,[96] it was perhaps not surprising that advocates of racial transformation would focus on the public service in the period of transition. The push for change of the personnel of the public service on the grounds of race (and to a lesser extent gender) has thus competed with the efforts of advocates of vetting, at least those who based their argument for vetting narrowly on human rights considerations.

---

[93] Paseka Ncholo, "Reforming the Public Service in South Africa: A Policy Framework," *Public Administration & Development* 20 (2000): 87 (noting that the pressure for change in the public service came from the new government in order to "replace the rule-bound, command-and-control approach of the apartheid regime with one that aimed to reorient public servants to 'serve the public' in a customer-focused way.").

[94] While racial justice and vetting practices are by no means necessarily incompatible, for purposes of analyzing and presenting the South African experience with vetting, this paper has defined the grounds of transition associated with vetting not to include racial justice.

[95] According to World Bank figures, South Africa is "amongst the world's biggest spenders on public service salaries." Robert Cameron and Chris Tapscott, "The Challenges of State Transformation in South Africa," *Public Administration & Development* 20 (2000): 85.

[96] See note 28 above.