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Preventive Powers of Police in Namibia – A Rights-Based Approach

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Abstract: Namibia gained independence and ended the rule of apartheid only in 1990. It is often lauded as a model of human rights-based countries in Africa. Immediately after independence, the country introduced a distinctly rights-based Constitution with a broad Bill of Rights and also promptly laid the base for a modern police by enacting the Police Act of 1990. In that framework the Namibian Police are endowed with a broad set of 'police powers', i.e. means or measures of the police like questioning, arrest, search and seizure etc. 'Preventive' powers as a legally distinctive feature refers to law and order policing and prevention of crime, both clearly to be distinguished from investigation of criminal offences. Standards of human and fundamental rights protection developed under criminal procedure law are not directly applicable when it comes to the broad field of "preventive" powers of police. Subsequently these powers often lack a clear cut notional and legal concept, resulting in a deficit of predictability and delimitations despite of a rights based approach in the Constitution and the Police Act in general.

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A. Introduction

Namibia is often referred to as one of the most representable human rights-based countries in Africa, even though this certainly does not pertain to its economic and social system.[1] Immediately after independence, the country introduced not only a modern Constitution[2]

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1 See, e.g., *Henning Melber,* Understanding Namibia, London 2014, pp. 89 et seq.

2 See, e.g. *Nico Horn*, The forerunners of the Namibian Constitution, in: Bösl/Horn/Pisani (eds.), Constitutional Democracy in Namibia, Windhoek 2010, pp. 62-83; *Marinus Wiechers*, Namibia's long walk to freedom: the role of constitution making in the creation of an independent Namibia, in: Miller (ed.), Framing the State in Times of Transition, Washington, DC 2010, pp. 88-110; *Sean M. Cleary*, A Bill of Rights as a normative instrument: South West Africa/Namibia 1975–1988, The Comparative and International Law Journal of Southern Africa 21 (1988), pp. 291-355.

with a broad Bill of Rights, but also laid the base for a post-colonial police by enacting the Police Act of 1990 (hereinafter: PA). These structural changes in law cut off the past by introducing the legal base for rule of law principles with regards to policing - while at the same time not really laying hand on criminal procedure, still governed by the South African Criminal Procedure Act of 1977, which however by amendments and court decisions in many instances was brought in line with the Namibian Constitution of 1990 (hereinafter: NC).

Yet, criminal procedure is not the topic of this paper but police law in terms of preventive powers of police. The police are, perhaps "the most visible daily manifestation of the state and of the rule of law in civilians' lives".[3] Rule of law standards in policing inevitably imply observance and promotion of the constitutional and statutory framework. On the one hand, criminal procedure is directed (*ex post*) to generate knowledge about an event in the past and to produce evidence that demonstrates beyond reasonable doubt what has already happened, from the perspective of the police. On the other hand, preventive powers of police are directed to avoid or terminate an event that might happen or already is happening. For this reason, preventive powers of police rather focus (*ex ante*) on events in the near future. Such differentiation is helpful to determine if police powers under Police Law or under Criminal Procedure law apply, even though a "grey zone" in-between might exist.

Police powers as a notion or legal category in a modern constitutional context[4] refer to means or measures used by the police such as, e.g., questioning, arrest, search and seizure, entering of premises and houses, interception of phones etc., as provided for by (statutory) law. Police powers under a concept of rights-based constitutionalism require a legitimate and legal "foundation"[5], which has to adhere to constitutional requirements in Namibia, most prominently those in the "Bill of Rights" in Chapter 3 NC, as well as under human rights standards. Any use of a power of the police to a greater or lesser extent constitutes an intrusion upon such rights of the person affected. For this reason, I do not consider police powers to constitute "rights"[6] of the police, as this might lead to an understanding of competing rights of citizens and police, which does not fit with the constitutional provisions on rights and freedoms of the individual.

3 *Rama Mani*, Contextualizing police reform: Security, the rule of law and post-conflict peacebuilding, International Peacekeeping 6 (1999), p. 22.

4 Cf. *Daniel D. Ntanda Nsereko*, The Police, Human Rights and the Constitution: An African Perspective, Human Rights Quarterly 15 (1993), p. 470.

5 *Clever Mapaure/Ndeunyema/Masake/Weyulu/Shaparara*, The law of pre-trial criminal procedure in Namibia, Windhoek 2014, p. 93, speak of "special but fettered powers".

6 But see *Nicol-Wilson/Katamila,* in: Sam K. Amoo et al. (eds.), A handbook on human rights for the Namibian Police, Windhoek 2000, revised edition 2006, p. 50.

While the general relationship between police powers on the one side and constitutional rights on the other side in criminal procedure have been analyzed in scholarly writing[7] and court decisions in Namibia, specific powers and means of the police under the Police Act attract little attention by legal scholars and in court decisions. This paper aims to start filling in the blank, being well aware of its limitations in understanding by someone without legal education in Namibia and in space for publication.

B. Principles of Constitutionalism in Namibian Law after 1990

The UN-supported transformation process from illegal domination by South Africa to Independence[8] coming into reality, Namibia in 1990 introduced a new constitutional and statutory framework for its police[9], implementing modern[10] and liberal[11] standards of constitutionalism[12] and (substantive[13]) rule of law[14], as well as a bill of rights[15] on both constitutional and statutory level. Thus, Namibia is often seen to be one of the most elaborate examples of democratic government and human rights protection[16] in (Southern) Africa.[17] The current status of rule of law and constitutionalism in Namibia has generated quite

7 See *Mapaure et al*., note 5, on pretrial criminal procedure; *Jamil Ddamulira Mujuzi*, The admissibility in Namibia of evidence obtained through human rights violations, African Human Rights Law Journal 16 (2016), pp. 407-434.

8 See only *Melber*, note 1; various pieces in: du Pisani/Kößler/Lindeke (eds.), The Long Aftermath of War, Reconciliation and Transition in Namibia, Freiburg 2010; *Wiechers*, note 2; from a very personal perspective *Hans Beukes*, Long road to Liberation, An exiled Namibian Activist's Perspective, North Charleston, SC 2014.

9 On the transition in post-conflict settings see *Mani*, note 3, pp. 15-16; see also *Laurie Nathan*, Human Rights, Reconciliation and conflict in Independent Namibia: The Formation of the Namibian Army and Police Force, in: Rupesinghe (ed.), Internal Conflict and Governance, St. Martin's Press 1992, pp. 152-68; *Colin Leys*, State and Civil Society: Policing in Transition, in: Leys/Saul (eds.), Namibia's Liberation Struggle: A Two-Edged Sword, Columbus, OH 1995, pp. 133-52.

10 Cf. *Ntanda Nsereko*, note 4, p. 470.

11 *Mapaure et al*., note 5, p. 5.

12 On the basic ideas of constitutionalism in Namibia see *Sam K. Amoo*, An introduction to Namibian law: materials and cases, Windhoek 2008, pp. 313 et seq.; for an all-African context see *André Mbata Mangu*, The African Union and the promotion of constitutionalism and democracy in post-colonial Africa: Ten years on, Namibia Law Journal 4 (2012), pp. 25-56.

13 See *Mani*, note 3, pp. 17-18.

14 But see *Wiechers*, note 2 , on rule of law versus legality and legitimacy in modern Namibia and South Africa.

15 For an early analysis see *Colin Kahanovitz*, The Namibian Bill of Rights: Implications for the Promotion of Procedural and Substantive Justice in Criminal Cases, Criminal Law Forum 2 (1991), pp. 569-94.

broad scholarly interest in the past.[18] Yet, following a rather enthusiastic[19] first decade[20] [21] after independence, more recently concerned observations[22] on the status of democracy[22],

16 On the African context in general see, e.g., *Mbata Mangu*, note 12; *Michelo Hansungule*, African Courts on Human Rights and the African Commission, in: Bösl/Diescho (eds.), Human Rights in Africa: legal perspectives on their protection and promotion, Windhoek 2009, pp. 233-72; *Bience Gawanas*, The African Union: Concepts and implementation mechanisms relating to human rights, in: Bösl/Diescho (eds.), Human Rights in Africa: legal perspectives on their protection and promotion, Windhoek 2009, pp. 135-162; *Sheila B. Keetharuth*, Major African Legal Instruments and Human Rights, in: Bösl/Diescho (eds.), Human Rights in Africa: legal perspectives on their protection and promotion, Windhoek 2009, pp. 163-232; *Onkemetse Tshosa*, The status of international law in Namibian national law: A critical appraisal of the constitutional strategy, Namibia Law Journal 2 (2010), pp. 3-30. On the implementation of the African human and peoples' rights system in Namibia, see *Ndjodi M. L Ndeunyema*, The African human and peoples' rights system within Namibia: Reflections after 23 Years, UNAM Law Review 1 (2013), pp. 175-206. On Namibia's participation in the United Nations Human Rights Council (UNHCR), e.g., Commonwealth Human Rights Initiative, Easier Said Than Done: Namibia, 2016.

17 Cf. *Gretchen Bauer,* Politics in Southern Africa: Transition and Transformation, 2nd ed. Boulder, CO 2011, passim; *Cornelia Glinz*, Verwaltungsrecht und Rechtsstaatlichkeit in Namibia, Baden-Baden 2013, pp. 194-95; the *Ibrahim Index of Governance* (IIAG) of 54 African countries, 2017 Report scored Namibia rank 5 in "overall governance", rank 5 with regards to "rule of law" and rank 3 in "safety and rule of law" as well as in "personal safety".

18 See, e.g., Horn/Hinz (eds.), Beyond a quarter century of constitutional democracy, Process and Progress in Namibia; Windhoek 2017; *Chucks Okpaluba*, State liability for acts and omissions of police and prison officers: recent developments in Namibia, Comparative and International Law Journal of Southern Africa 46 (2013), pp. 184-210; *Ndeunyema*, note 16; *Namibia Institute for Democracy/Institute for Public Policy Research* (IPPR), The constitution in the 21st century: perspectives on the context and future of Namibia`s supreme law, Windhoek 2011, *Ruppel/Ruppel-Schlichting*, Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?, Journal of Legal Pluralism 64 (2011), pp. 33-63; Bösl/Horn/du Pisani, note 2; *Peter Von Doepp*, Politics and judicial decision-making in Namibia: Separate or connected realms?, IPPR Briefing Paper No. 39, 2009; Horn/Bösl (eds.), Human rights and the rule of law in Namibia, 2nd edition, Windhoek 2009.

19 As *Wiechers*, note 2, p. 54, puts it with reference to a „highly idealistic and generous constitution": „A promised land and frustrated expectations".

20 See already: Göran Melander (ed.), *Raoul Wallenberg Institute*, Report No. 9: Human Rights Workshop Namibia, 1991.

21 For a multifaceted picture, *Glinz*, note 17, pp. 196-98; *Glinz*, Notwendigkeit und Herausforderungen der Verwaltungsrechtsreform in Namibia, in: Ruppel/Winter (eds.), Recht von innen: Rechtspluralismus in Afrika und anderswo, Hamburg 2011, pp. 375-92. Much earlier, *Gretchen Bauer*, Namibia in the First Decade of Independence: How Democratic?, Journal of Southern African Studies 27 No. 1 (2001), pp. 33-5

22 Cf. *Melber*, note 1, p. 57 et seq.

rule of law[23] and constitutionalism[24] can be found. Due to limitations in space for this publication I cannot deal with this topic in more detail here, unfortunately.

C. Colonial Overhangs in Namibian Law

In this paper I shall not attempt to elaborate into eventual leftovers of German colonial law in Namibia[25], which to my knowledge at least today no longer have relevant effects on Namibian public law and more specifically on police law. This is most probably attributable to the fact that German colonial rule[26] in the so-called German South West Africa *de facto* ended in 1915[27], while Namibia as an independent state came into existence only 75 years later after domination by South Africa until 1990.[28] Thus, the influence of South African law, including its heritage from Roman-Dutch Common Law and British Common Law was much more important than any German legal heritage after 1919, when Namibia came under the mandate of South Africa, substituting German Law as far as adopted at all in the former German colony.[29]

Since independence, Namibian law again took another turn, creating and developing an amalgam with (former) South African and common law as a major point of origin, which still is in existence today, thus not creating a completely novel legal system, despite of con-

23 *Cornelia Glinz*, Notwendigkeit und Herausforderungen der Verwaltungsrechtsreform in Namibia, in: Ruppel/Winter (eds.), Recht von innen: Rechtspluralismus in Afrika und anderswo, Hamburg 2011, pp. 375-92. On independence of the judiciary see *VonDoepp*, note 18; *Johannes Nicolaas Horn*, Interpreting the Interpreters: a Critical Analysis of Formalism and Transformative Adjudication in Namibian Jurisprudence 1990 - 2204, Bremen 2017, pp. 291 et seq.

24 See, e.g., the plethora of (critical) contributions, in: Horn/Hinz (eds.), Beyond a quarter century of constitutional democracy: Process and Progress in Namibia, Windhoek 2017, and *Bösl/Horn/du Pisani*, Constitutional Democracy in Namibia - A Critical Analysis After Two Decades, Windhoek 2010 On Western constitutionalism as a concept perhaps foreign to African constitutionalism, *Wiechers*, note 2, p. 52.

25 Cf. *Glinz*, note 17, p. 197; also: *Harald Sippel*, Each to his Own: Legal Pluralism in the German Colonies, in: Ruppel/Winter (eds.), Justice from within, Hamburg 2011, pp. 193-222; *Sippel*, Rechtsrezeption in Namibia: Prozesse direkter und indirekter Rezeption deutschen und südafrikanischen Rechts, Recht in Afrika 6 (2003), pp. 69-89; *Sippel,* Das deutsche Kolonialrecht als Vorstufe einer globalen "Kolonialisierung" von Recht und Verwaltung, Recht in Afrika (2000), pp. 91-95.

26 Cf. *Marion Wallace/John Kinahan*, A History of Namibia, Cape Town 2012, pp. 131-203; *Helmut Bley*, Namibia under German rule, Ann Arbor, MI 1996.

27 With regards to colonial genocide, see *Reinhart Kößler*, Two modes of amnesia: complexity in postcolonial Namibia, Acta Academica 47 (2015), pp. 138-60, referring also to massive human rights violations by SWAPO before independence.

28 For a detailed historical perspective see only *Wallace/Kinahan*, note 26, pp. 205-308.

29 See *Glinz*, note 17, 199 et seq.; *Sippel* 2003, note 25, pp. 79 et seq.; *Onkemetse Tshosa*, National law and international human rights, New York City, NY 2001, pp. 17 et seq.

trary political expectations.[30] The Namibian Constitution replaces supremacy of (South African) law and parliament by human rights protection to be one of its fundamental pillars.[31] However one has to take into account that Article 140(1) NC clearly states that, subject "to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court". While decisions of High South African Courts are no longer binding on the Namibian judiciary after independence, it still remains a task to fully adapt Namibian Law to the new constitutional order.[32] South African law and jurisprudence on a rather "informal" level still have influence in Namibia that should not be underestimated. With reference to German rule, however, it seems to be reasonable to summarize that a "colonial overhang" from pre-democratic German law is not discernible at least in public law. Links to basic ideas in modern German constitutional law can be traced however, probably due to Germany's membership in the so-called Western Contact Group.[33]

D. Fundamental Human Rights and Freedoms under the Namibian Constitution

As a general principle, the Namibian Constitution Article 1 declares the rule of law one of its most fundamental principles and the Constitution to be the Supreme Law of Namibia. Chapter 3 of the Constitution stipulates for an entrenched "bill of rights", comprising a broad approach towards the protection of fundamental human rights and freedoms[34], which shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and shall be enforceable by the courts as settled under Article 5 NC. The Namibian Constitution provides for a distinction between "fundamental human rights" (Articles 6 through 20) and "fundamental freedoms", as outlined in Article 21.

30 *Horn*, note 23, p. 6; see also *George Coleman*/*Schimming-Chase*, Constitutional jurisprudence in Namibia since Independence, Bösl/Horn/Pisani (eds.), Constitutional Democracy in Namibia, Windhoek 2010, pp. 199-214.

31 See *Glinz*, note 17, pp. 203-05.

32 Cf. *Nico Horn*, Interpreting the Constitution: Is Transformative Constitutionalism a Bridge Too Far?, UNAMLR 2 (2014), pp. 1-24.

33 Cf. *Horn*, note 23, p. 16; *Loammi Wolf*, The Constitutionality and Legality of Tax Incentive Programme questionable, UNAM Law Review 3 (2017) p. 17; see also *Stylianos-Ioannis Koutnatzis*, Comparative constitutional law thoughts on the reception of the proportionality principle overseas, in: VRÜ 44 (2011), p. 47, referring to comparable German constitutional principles (*Schrankenvorbehalt*).

34 The tenet of this paper is not to discuss different understandings of the very idea of fundamental rights and freedoms in a Western and an African context; see, e.g., *Stefan Schulz*, Legal interpretation and the Namibian Constitution (a paradigm shift: through reason towards justice), in: Hinz/Amoo./van Wyk (eds.), The constitution at work: 10 years of Namibian Nationhood, Windhoek 2002, p. 213-14.

On the broad agenda of constitutional protection of human rights[35], by way of example, Article 7 NC provides for "classical" *habeas corpus* protection.[36] Article 11(1) NC provides that; "[n]o persons shall be subject to arbitrary arrest[37] or detention", adding further safeguards in Sub-Articles (2) to (5). This is complemented by the guarantees of a fair trial in Article 12 NC. Article 8(1) NC opens up for a very broad concept of dignity: "The dignity of all persons shall be inviolable".[38]

Fundamental rights meanwhile might be limited or furnished, but only following explicit provisions of the Constitution itself.[39] For instance, Article 13(1) NC stipulates: "No persons shall be subject to interference with the privacy of their homes, correspondence or communications". This is limited however by the broad reservation: "save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."[40] Even though this reservation itself is limited to constraints admissible in a democratic society only, it mentions rather broad and unspecific reason like the protection of morals or the prevention of disorder, which run the risk of excessive limitations of fundamental rights.

Restrictions of a general nature do not apply to fundamental rights, but only to fundamental freedoms as provided in Article 21(1) NC.[41] However, according to subsequent Subsection (2), "[t]he fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on

35 This notion, including rights and freedoms, will be used in this paper. On the different meanings see, e.g., *Sam K. Amoo/Skeffers*, The rule of law in Namibia, in: Horn/Bösl, (eds.), Human rights and the rule of law in Namibia, 2nd edition, Windhoek 2009, p. 18. See also, e.g., *François X. Bangamwabo*, The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework, 2008, pp. 165-186; *Salome M Chomba*, The universality of human rights: Challenges for Namibia, 2008, pp. 187-212; *Nico Horn*, The process of human rights protection in Namibia, Journal of Namibian Studies 5 (2009), pp. 99–116.

36 In more detail see *Chucks Okpaluba*, Protecting the right to personal liberty in Namibia: constitutional, delictual and comparative perspectives, African Human Rights Law Journal 14 (2014), pp. 580-608. Whether the NC also protects a residual (negative) freedom or „general freedom right", has yet to be decided by the Namibian Supreme Court; cf. *Stefan Schulz*, In dubio pro libertate: The general freedom right and the Namibian Constitution, in: Bösl/Horn/Pisani (eds.), Constitutional Democracy in Namibia, Windhoek 2010, pp. 169-90.

37 On powers of police to unlimited arrest without charge or trial see *Ntanda Nsereko*, note 4, p. 481.

38 Perhaps one of the traces to the German *Grundgesetz*.

39 *Koutnatzis*, note 33, p. 47.

40 Cf. *Joseph Diescho*, The concepts of rights and constitutionalism in Africa, in: Bösl/Horn/Pisani (eds.), Constitutional Democracy in Namibia, Windhoek 2010, pp. 17-33; *Joseph Diescho*, The Namibian Constitution in Perspective, Windhoek 1994/reprint 2007, p. 61, on similarities to European human rights law.

41 *Gino J. Naldi*, Constitutional rights in Namibia: A Comparative Analysis with International Human Rights, Cape Town 1995, p. 31; see also *Amoo/Skeffers*, note 35, p. 19.

the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence." This obviously is an extremely broad "gateway" for limitations on fundamental rights and freedoms.

Article 25 (1) NC stipulates that the executive and the agencies of Government shall not take any action that abolishes or abridges the fundamental rights and freedoms conferred by the Constitution. According to Article 25(2) any aggrieved person "shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the *Ombudsman* to provide them with such legal assistance or advice as they require (…)".

From this very short summary, one can certainly deduce that the Namibian Constitution in principle provides for the protection of fundamental human[42] rights and freedoms. This also propagates a rights-based approach towards policing.[43] Despite this very promising and positive assessment in general, quite a significant number of critical accounts on legality of action and on the behavior of the Namibian Police have been reported however (see chapter F.).

E. Administrative Justice and Judicial Review in Police Powers

South Africa, with the Promotion of an Administrative Justice Act of 2000 significantly modernized and transformed administrative law into statutory law, within the new constitutional framework. Namibian administrative law[44], to the contrary, in general is still following pre-constitutional South African[45] common law principles[46], even though Article 18 NC

42 But see *Yvonne Dausab*, International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective, in: Bösl/Horn/Pisani (eds.), Constitutional Democracy in Namibia, Windhoek 2010, p. 266, stating that "the attitude of courts, when they consider international human rights treaties as part of developing their jurisprudence, leaves much to be desired". On the importance of transnational exchange and cooperation of the judiciary for human rights protection in Africa, see *Charles Manga Fombad*, Internationalization of Constitutional Law and Constitutionalism in Africa, in: The American Journal of Comparative Law 60 (2012), pp. 439–73.

43 *John Nakuta*/*Cloete*, The justice sector & the rule of law in Namibia: the criminal justice system, Institute for Democracy and Human Rights and Documentation Centre, Windhoek 2011, p. 9.

44 Cf. *Ruppel*/*Ambunda*, The justice sector & the rule of law in Namibia: framework, selected legal aspects and cases, Namibia Institute for Democracy and Human Rights and Documentation Centre, Windhoek 2011, p. 49; *Manfred O. Hinz*, More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment, Namibia Law Journal 1 (2009), pp. 81-89.

45 On major new developments in British administrative law see *Glinz*, note 17, p. 208 et seq., pointing at the growing „gap" between British „origin", South African and Namibia administrative law.

46 See *Glinz*, note 17, p. 206-08; *Ruppel/Ambunda* , note 44, p. 49; *Hinz*, note 44; *Collins Parker*, Administrative law in Namibia, its current state, challenges, and proposals for law reform, Comparative and International Law Journal of Southern Africa 42 (2009), p. 120 et seq.

sets constitutional standards for public administration and administrative justice. However, Article 18 NC does not define the key requirements of administrative justice under the Constitution.[47] While this provision after independence was considered to constitute a firm basis for the development of administrative law in Namibia[48], no specialized (Administrative) Court or Tribunal ever came into existence. As far as administrative action[49] is concerned, basic principles apply to protect fundamental rights of the aggrieved person. Here, the principles of legality of public administration as well as rule of law standards constitute basic paradigms.[50] Any administrative action is valid only if and as far as it corresponds with (statutory) law, otherwise considered to be *ultra vires* which will be decided upon by the courts in their function of judicial review.[51]

While quite a broad range of jurisprudence on violations of constitutional provisions and statutory and common law principles by the police can be traced[52] especially in the context of criminal procedure, both the High and the Supreme Court of Namibia do not seem to deal with preventive powers of police under the Police Act of 1990[53], which is difficult to understand. Whether or not a separate system of administrative justice would be a remedy when it comes to use of police powers beyond the CPA of 1977, even decent constitutional guarantees in practice seem to be rather a stub point needle for legal protection. This is probably due to the cost of judicial access, adjective legal requirements and burden of proof as well as low predictability of the legal outcome.[54] While in a criminal proceeding the accused has a right to legal aid[55] such right is neither specified in the constitution or statutory law nor in jurisprudence when it comes to review of police powers in other fields of policing.

47 *Parker*, note 46, p. 120.

48 *Parker*, The "Administrative Justice" provision of the constitution of the Republic of Namibia: a constitutional protection of judicial review and tribunal adjudication under administrative law, The Comparative and International Law Journal of Southern Africa 24 (1991), p. 89.

49 On the very notion see *Loammi Wolf*, A Succinct Definition of Administrative Action - A Prerequisite to Secure Just Administrative Action, UNAM Law Review 3 (2017), pp. 119-99.

50 See also *Parker*, note 46, p. 118.

51 *Glinz*, note 17, p. 225; *Chucks Okpaluba*, State liability for acts and omissions of police and prison officers: recent developments in Namibia, in: Comparative and International Law Journal of Southern Africa 46 (2013), p. 194.

52 As far as accessible at https://namiblii.org/ and other public sources; see also *Okpaluba*, note 51.

53 For this paper, all reported HC and SC judgments from 1990 to 2018 available at https://namiblii.org/ have been scrutinized as well as unreported cases since 2013. See also Namlex Update 31/12/2019 at https://www.lac.org.na/laws/namlex.html. Cases of the Magistrate Courts in general are not reported and thus could not be considered here.

54 *Glinz*, note 17, pp. 349 et seq.

55 Government of the Republic of Namibia and Others v Mwilima and Others (SA29/01, SA29/01) [2002] NASC 8 (7 June 2002); *Mapaure et al*., note 5, p. 407 et seq.; UN Committee against Torture (2015), p. 27.

F. Police Oversight and Complaint Mechanisms

Despite of the promising constitutional framework, reports on human rights issues with the Namibian Police are no singular occurrence unfortunately. The most prominent defiance to rule of law standards in Namibia probably is linked to the unsuccessful secessionist uprising in the Caprivi Region in 1998/99 and the so-called Caprivi High Treason Case is yet to be settled in the courts.[56] With regards to policing in general, it was, e.g., reported that sex workers were frequently arrested by the police for petty demeanors and arrested for periods from one day up to two weeks without seeing a judge. Women were allegedly beaten, threatened and forced to have sex with the members of the police force. Discrimination against homosexuals was reported too. It was also reported that both casual workers and people who moved around the settlements in search of work were treated with suspicion by the police.[57] Besides, minorities like the *San* people seem to suffer significantly in rural areas far from attention of media or human rights organizations.[58] Other reported problems refer to poor or inhumane standards[59] and overcrowding in police custody[60], death in police custody[61], detention and coerced sex of persons in prostitution before release from police custody. Violence of police officers is considered to be a structural problem that may well have some resonance with public perceptions and social norms.[62] Infringements with freedom of assembly and freedom of expression also were reported a number of times during the last decade.

56 Cf. US Department of State, https://2009-2017.state.gov/j/drl/rls/hrrpt/1999/263.htm; UN Committee on Torture, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fSR.1481&Lang=en, p. 6.

57 African Policing Civilian Oversight Forum (2012), pp. 106-07; very detailed and vivid: Annual Report of the Ombudsman 2018, pp. 29, 30, 36 et seq.

58 Cf. *Guy Lamb*, Debasing Democracy: Security Forces and Human Rights Abuses in Post-Liberation Namibia and South Africa, in: Melber (ed.), Measuring Democracy and Human Rights in Southern Africa, Uppsala 2002, p. 48.

59 See McNab and Others v Minister of Home Affairs and Others (I2852/05) [2007] NAHC 50 (12 July 2007).

60 *John R. Walters*, Special report on conditions prevailing at police cells throughout Namibia, 2006.

61 See, e.g., Shaanika v Ministry of Safety and Security (SA 35/2008) [2009] NASC 11 (23 July 2009).

62 Cf. *Lalli Metsola,* Reintegration as recognition: ex-combatant and veteran politics in Namibia, Helsinki 2015, pp. 172, 185; see also *Jan Beek*, Selbstverständliche Staatlichkeit: Ghanaische Polizeiarbeit im Vergleich, in: Polizei und Gesellschaft, Howe/Ostermeier (eds.), Polizei und Gesellschaft, Wiesbaden 2019 pp. 105 et seq.; *Thomas Bierschenk,* Who are the Police in Africa?, in: Beek et al. (eds.), Police in Africa: The Street Level View, London 2017, pp. 103 et seq.; *David Pratten*, Policing Boundaries: The Cultural Work of African Policing, in: Beek et al. (eds.), Police in Africa: The Street Level View, London 2017., pp. 193 et seq., and others in this compilation.

On the other hand, different from many other countries on the African continent, reports of Amnesty International[63], the US State Department[64] and the UN Committee against Torture[65], do not mention iterant and systematic[66] human rights violations by the police as an institution in Namibia, with exception of the Caprivi High Treason Case.

The promotion and protection of human rights certainly was not a priority of the Namibian government after independence, different from South Africa after 1994.[67] This might be understood *inter alia* by the political concept of "reconciliation" which SWAPO and the Namibian government were following after independence, choosing not to bring perpetrators of human rights violations under South African occupation to court. Until today, both reject to investigate multiple assertions of human rights violations by SWAPO and PLAN before independence[68], which may be seen as a means of integration of ex-combatants of the independence movement, also securing continuation of their allegiance with the ruling party.[69]

Oversight within the Namibia police is primarily conducted by the Namibian Police Complaints and Discipline Unit (NPCDU); a unit within the police command structure with all possible implications of such an internal structure.[70] Different from South Africa's Independent Police Investigative Directorate, Namibia never implemented any means of independent external complaints mechanisms with regards to the police nor does an independent Human Rights Commission or equivalent exist. *De facto* the Office of the *Ombudsman*[71] is the most relevant institution for any complaint. In 2018 598 complaints[72] were filed against the police, after 757 in 2017, 682 in 2016 and 749 in 2015. In most years the police top the list of complaints against all government institutions which is a steady increase from 483 in 2013, 389 in 2014, 441 in 2010 and 296 in 2003. However, the *Ombudsman* has no decisive powers and cannot issue binding legal decisions but is rather directed to practical conflict solution and compromises.[73] In 2012 he complained about struggles to

63 Cf. www.refworld.org/country,,,,NAM,,58b033cf13,0.html.

64 Cf. www.refworld.org/country,,,,NAM,,58ec89f439,0.html.

65 Cf. note 56.

66 But see *Lamb,* note 58, p. 37 et seq.

67 Ibid*,* p. 47.

68 See *Kößler*, note 27.

69 *Metsola*, note 62, p. 184; see also statement of Namibian government at the UN Committee on Torture, note 56, p. 2.

70 *Nakuta/Cloete*, note 43, pp. 16-18, stating that "suspicion exists that camaraderie amongst police officials might compromise rigorous investigation of their peers".

71 On the Office of Ombudsman see *Glinz*, note 17, pp. 380 et seq.; *John R., Walters*, The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman, in: Horn/Bösl, (eds.), Human rights and the rule of law in Namibia, 2nd edition, Windhoek 2009, pp. 121-30.

72 Cf. www.ombudsman.org.na/reports.

73 *Glinz*, note 17, pp. 385 et seq.; proposals for strengthening the Office in: *Horn*, note 35.

obtain progress reports on investigations referred to the Namibian Police.[74] Even though there seems to be little interference with her/his duties from government or the executive, budgetary constraints[75] and a lack of human resources seem to be an ongoing problem for this institution.[76]

Despite of a pretty high number of complaints, very few successful lawsuits[77] against the police can be revealed by means of public access to court decisions. A plausible reason for rather low numbers of court decisions might be a strong interest of the aggrieved persons to rather get a fast and less complicated as well as more affordable settlement under HC rules[78], instead of an incalculable and slow court proceeding.[79]

Summarizing, there are a number of instances where the police have been accused for failing to observe human rights standards, though this problem might have lost relevance over the years.[80] Compensation claims against the police were successful not only in single cases[81] and in 2011 alone, the State of Namibia lost several cases including an out of court settlement of NAM $ 3.65 million in respect of a claim of torture and unlawful arrests, including cases of detainees from the Caprivi region.[82]

74 African Policing Civilian Oversight Forum, *Dissel/Frank* (eds.), Policing and Human Rights Assessing southern African countries' compliance with the SARPCCO Code of Conduct for Police Officials, Somerset West2012, pp. 104.

75 Ombudsman Namibia, Annual Report 2017.

76 *Sufian Hemed Bukurura,* Essays on constitutionalism and the administration of justice in Namibia, Windhoek 2002, pp. 64-84.

77 Cf. *Nakuta/Cloete*, note 43, p. 17; African Policing Civilian Oversight Forum, note 74, p. 105. For case law see, e.g., Shaanika v Ministry of Safety and Security (SA 35/2008) [2009] NASC 11 (23 July 2009), damages for negligence in case of a person committing suicide while in custody; see also McNab and Others v Minister of Home Affairs and Others (I2852/05) [2007] NAHC 50 (12 July 2007).

78 Rules 38, 39 on Alternative Dispute Resolution (ADR), Rules of the High Court 2014, at www.lac.org.na/laws/2014/5392.pdf.

79 Interview *Corinna van Wyk*, Legal Assistance Center, 26/03/2018.

80 African Policing Civilian Oversight Forum, note 74, p. 105.

81 On State liability for acts and omissions of police, see *Okpaluba*, note 51, pp. 194 et seq.; The Namibian 05.09.2017, www.namibian.com.na/168845/archive-read/Judge-slams-police-abuse-of-power; see also McNab and Others v Minister of Home Affairs and Others (I2852/05) [2007] NAHC 50 (12 July 2007).

82 See above at note 56; cf. African Policing Civilian Oversight Forum, note 74, p. 105.

G. The Namibian Police Act of 1990

I. Introduction

The Namibian Constitution as well as statutory law prepared the path for a modern constitutionalist approach[83] of the now Namibian Police Force (NAMPOL) and the Namibian Police Act 19 of 1990[84]. On the other hand, the (South African) Criminal Procedure Act of 1977 is still in force after the failed implementation of a new Act in 2004.[85] The Police Act directly draws its legal foundation from the Namibian Constitution. According to Article 118[86] NC, a police force shall be established by Act of Parliament with "prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order". The Constitution propagates a rights-based approach to policing.[87] The Namibian Police Force in general can only refer to "powers" explicitly spelled out and entrenched as an Act of the Namibian Parliament. "The rationale behind this formulation is to prevent the police force from becoming an unruly horse with limitless powers. In keeping with the requirements of constitutionalism and the rule of law, police powers must be circumscribed and exercised only in accordance with the law, which is itself under the authority of the constitution. The goal is to prevent unwarranted intrusion by the police into the rights of the individual".[88]

II. Functions, Duties, and Powers of Police under the Namibian Police Act 1990

Chapter II of the Police Act 1990 stipulates functions of the police as well as duties and powers of members of the police.

1. Functions of Police

The wording in Section 13 PA marks a clear-cut distinction between "functions" and "powers" of police, which is an essential distinction. From a rights-based perspective this has to be construed in a sense that "functions" of the police do not *per se* imply any "powers." According to Section 13 PA functions of the police shall be the preservation of internal se-

83 Transition from colonialism to rule of law standards and subsequent law making in India neglects up to-date this very important distinction, thus giving police almost unlimited powers beyond criminal proceedings, especially in law and order policing; see *Clemens Arzt*, Police Reform and Preventive Powers of Police in India: Observations on an Unnoticed Problem, VRÜ 49 (2016), pp. 53-79.

84 See https://laws.parliament.na/annotated-laws-regulations/law-regulation.php?id=164.

85 On major differences of both Acts see *Horn/Schwikkard*, Commentary on the Criminal Procedure Act 2004.

86 Now Article 115 NC.

87 *Nakuta/Cloete*, note 43, p. 9.

88 *Ntanda Nsereko*, note 4, p. 470.

curity of Namibia, maintenance of law and order, investigation of any offence or alleged offence, prevention of crime, and protection of life and property.[89]

Even though not mentioned explicitly in the law, I will differentiate police functions into two major spheres: (i) prevention of crime and protection against any threat or risk to public safety on the one hand and (ii) criminal procedure (investigation of any offence or alleged offence) on the other hand. While maintenance of law and order and the protection of life and property will be encompassed in this paper by the notion of public safety, internal security covers a broader sphere and has to be delimited from external security. The approach that application of criminal law and procedure constitutes law and order policing[90],does not provide for a clear cut distinction of different functions of the police as provided for under Police Act Section 13(b and c), i.e. the maintenance of law and order on the one hand and the investigation of any offence or alleged offence on the other hand. Such delimitation from my point of view however is necessary to develop a sound understanding of different police powers which "normally conflict with the rights of individuals".[91] Nevertheless, it has to be taken into account that Section 13 PA only refers to "functions" of police only, not to police powers.

Under rule of law standards and more specifically with regards to principles of acuteness of wording and proportionality police powers need to be stipulated explicitly by statutory law. A clear-cut distinction of police powers in criminal procedure and preventive powers of police does not exclude that the police may, as far as provided for by pertinent law, use means that are similar in a rather physical or practical sense in both fields, such as, e.g., search and seizure. However, legal requirements and thresholds for such means in the CPA 1977 might be different from those in the PA 1990. For instance, strict observance of the rule of law may allow the police a search in a specific criminal procedure or case, but not in the field of law and order policing and vice versa. Thus, it would be *ultra vires* to search under the premises of criminal procedure, while there is no reasonable ground to support that the searched person has committed a crime, but the police want to 'send a message' to a person who is considered to be a "trouble maker" or threat to public safety. Vice versa, searching a person's home under the pretense of law and order, policing because the police suspect a person of having committed a crime but cannot yet establish reasonable ground, would be *ultra vires* as well.

2. Duties of Police

Section 14 PA explicitly establishes duties and powers of the police. Under rule of law standards, it is argued here that "duties" cannot encompass implicit or unwritten police powers, e.g. to stop and search a person. On the contrary, such means are "powers" of the police

89 The protection of life and property was inserted in Section 13 by Act No 3 of 1999, only.

90 *Nicol-Wilson/Katamila*, note 6, p. 52.

91 *Ibid.*

which constitute an intrusion upon a constitutional freedom or human right, admissible only if conceded to the police by explicit statutory provisions, as clearly set out in Article 118 NC. Any suggestion that no duty could be transferred to the members of police without at the same moment endowing them with all necessary powers - as is basically the case in the United States of America[92] and still an underlying argument in India[93] - grossly neglects substantive rule of law standards entrenched in the Namibian Constitution, as well as in the Police Act itself. According to what was just elaborated above, Section 14(1) PA specifies that any member of the police force shall only *"*exercise such powers and perform such duties as are by this Act or any other law conferred or imposed upon such member". While members of the police perform their duties "in the execution of his or her office", they also have to "obey all lawful orders, which he or she may from time to time receive from his or her seniors in the Force (…)." Interestingly, the PA explicitly highlights the rule of law in as far as only "lawful orders" have to be executed.

This very short outline already should demonstrate sufficiently that a duty is something imposed on a member of the police by law or by her/his superiors, which in no way however 'transfers' powers to accomplish such duty.

3. Powers of Police

Subsequently, I will discuss in detail some powers of police under the PA 1990, which from my point of view lack a clear-cut delimitation of police powers in criminal procedure on the one hand and police law on the other hand.[94] The PA 1990 features some very detailed provisions on the delimitations of police powers by clear and unequivocal notions and regulations, while contrariwise some limitations on fundamental rights and freedoms are extensively broad. A troubling perspective of clear-cut delimitations of duties and powers, e.g., is Section 14(4)(a) PA, stipulating that

> *"notwithstanding anything to the contrary in any other law contained, a member may, where it is reasonably necessary for a purpose referred to in Section 13, without warrant search any person, premises, place, vehicle, vessel or aircraft or any receptacle if the delay in obtaining a warrant would defeat the object of the search (...) and such member may seize anything found in the possession of such person or upon or at or in such premises, other place (...) which in his or her opinion has a bearing on the purpose of the search".*

92 Cf. *Clemens Arzt*, Data Protection versus Fourth Amendment Privacy: A New Approach Towards Police Search and Seizure, Criminal Law Forum 16 (2015), pp. 183–230; *Clemens Arzt*, Policing under the Rule of Law – Constitutional Rights as a Legal Constraint on Policing in Germany and in the United States of America, in: Treubrodt/Kirstein (eds.), Auf dem Weg zur Hochschule für öffentliche Aufgaben (…), Berlin 2008, pp. 19 ff.

93 Cf. *Clemens Arzt*, note 83, pp. 53 et seq.

94 Which however does not draw any attention in the Namibian discussion; see, e.g., *Mapaure et al*., note 5, pp. 156-58.

Such search is admissible only however if (i) it "is not excessively intrusive in the light of the threat or offence; and (ii) the person concerned, if he or she is present, is informed of the object of the search."

Section 13 PA, which is made reference to in above mentioned provision also implies "the investigation of any offence or alleged offence". This raises doubt about the traceable line of distinction between a search under Sections 22, 23(a) CPA 1977 on the one hand and under Section 14(4)(a) PA on the other hand. Under rule of law standards however, the police cannot be "free" to unilaterally choose which law applies because this may result in a decision according to whatever statutory provision sets lower limits for such action.

Section 14(4)(c) PA further stipulates that "[t]he provisions of section 30 of the Criminal Procedure Act, 1977 (…) shall *mutatis mutandis* apply in respect of anything seized under paragraph (a)". Subsection (d) further specifies that "provisions of the Criminal Procedure Act, 1977 (…), with regard to the disposal of an article referred to in section 30 of that Act and seized under the provisions of that Act, shall *mutatis mutandis* apply in respect of an article seized under paragraph (a)." Both provisions incontrovertibly reveal that mentioned provisions of the CPA only apply *mutatis mutandis,* but do not change the nature of the means to be part of a (pre-trial) criminal procedure. This poses questions about the nature of mentioned powers for "a purpose referred to in Section 13" under Section 14(4)(a) PA, taking into account the broad nature of functions and duties outlined in Section 13 PA.

Section 14 Subsection (4)(d) PA is supposed to provide for the protection of fundamental rights:

> *"[t]o the extent that the provisions of this section authorize the interference with the privacy of a person's correspondence or home by conducting any search under those provisions, such interference shall be authorized only on the grounds of public safety, the prevention of disorder or crime and for the protection of the rights or freedom of others as contemplated in Article 13(1) of the Namibian Constitution."*

However, the Police Act by no means expressly legitimates the police to control a person's correspondence at all. Whether a search of the home also encompasses a power to scrutinize the content of seized correspondence by reading or even taking copies is at least questionable, as the Namibian Constitution draws a clear line between a home and a person's correspondence, which both form very important spheres of privacy. To simply subsume cognizance of the content of a person's most private correspondence an essential element of the police's power to enter and search the privacy constituted by her/his home, is far from suggesting itself. Thus, from my point of view Section 14(4)(a) PA does not constitute a sufficient, clear and precise legal fundament for the search of correspondence. And no other provision in the Police Act of 1990 provides for such powers of the police, even though Section 14(11) and (12) PA provide for items subject to legal privilege, explicitly making reference to certain kinds of communication which should include "correspondence" as mentioned above.

A more precise approach can be found at Section 14(5)(b), according to which the police

> *"may by means of an appropriate indication or direction, or in any other manner order the driver of a vehicle on a public road or railway to bring that vehicle to a stop and may, notwithstanding anything to the contrary in any law contained, display, set up or erect on or next to the road or railway such sign, barrier or object as is reasonably necessary to bring the order to the attention of the driver and to ensure that the vehicle will come to a stop."*

This provision underlines the legislative approach to exactly outline and at the same time clearly confine police powers, even in case of a probably rather uncontested means of stopping a specific car in traffic on public roads. The idea of contoured powers of the police is further supported by Subsection (5)(e) stipulating

> *"the extent that the provisions of this subsection authorize any limitation on a person's right to move freely throughout Namibia in that a member [of the police] may order any driver of a vehicle on a public road or railway to bring that vehicle to a stop and to set up or erect any barrier or object for that purpose under those provisions, such limitation shall be authorized only on the grounds of national security, public order or the incitement to an offence."*

The maintenance of "public order", as compared to restrictions for the protection of public safety, as mentioned in Articles 11 (5) and 13 NC however, is a rather broad and vague notion by rule of law standards even though certainly covered by Article 21(2) NC.

Section 16 PA too grants broad powers and means to the police that need to be scrutinized closely, with reference to constitutional limitations and fundamental rights and freedoms. Pursuant to Subsection (1) any officer

> *"without derogating from the functions referred to in section 13 and notwithstanding the provisions of any other law" may, "when he or she considers it necessary for the maintenance of law and order or for the prevention and detection of crime (a) erect or place or cause to be erected or placed barriers, or cause a cordon to be formed in or across any road, street or any other public place in such manner as he or she may think fit or (b) cause a cordon to be formed in, across or around any private property in such manner as he or she may think fit, and for that purpose it shall be lawful for the members forming the cordon, without the consent of any person, to enter any property and do any act or thing necessary for the effective formation of the cordon."*

As far as Subsection (1) refers to the maintenance of law and order or the prevention and detection of crime, this certainly makes reference to duties and functions of the police under Section 13. However, while police powers in the field of maintenance of law and order as well as "prevention" of crime refer to preventive powers of police, the "detection" of crime

is without doubt part of criminal justice and thus should be regulated and anchored in criminal procedure law instead of the Police Act from a rule of law point of view.

Summarizing very shortly it was demonstrated above that the Police Act does not in all provisions provide for adequate clear cut delimitations of criminal procedure and law and order policing on one hand and functions, duties and police powers on the other hand.

H. Other Laws providing for Police Powers

While the Police Act 1990 was presented in some detail, other laws besides the Criminal Procedure Act of 1977 also grant police powers under a preventive approach.

I. Restrictions on Freedom of Assembly

As a part of fundamental freedoms, Article 21(1)(a) NC protects freedom of speech and Article 21(1)(d) the freedom to assemble peaceably and without arms. Freedom of association is protected by Article 21(1)(e) NC, while freedom of movement could also be invoked when it comes to public gatherings or demonstrations.[95] Article 21(1)(d) NC is *lex specialis* however, when it comes to public gatherings and demonstrations. According to Article 21(2) NC, fundamental freedoms however can only be exercised subject to the laws of Namibia. Limitations by law can be erected as far they "impose[s] reasonable restrictions which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality (...) defamation or incitement to an offence", a wide door for intrusions obviously.

Interestingly - and different from Namibian police law - the law under scrutiny in the field of freedom of assembly is still embossed by pre-independence and pre-constitutional South African law. This is the case even though in 1997, the Attorney General requested the *Law Reform and Development Commission* (LRDC) to review whether the Public Gatherings Proclamation of 1989 is in line with the provisions of the Namibian Constitution. It was also suggested to give the police necessary discretionary powers to temporarily ban certain gatherings if "they had good grounds to believe [a gathering] to be a threat to public order".[96] The Report was delivered only in 2006, seeking to propose a law that would address "most shortcomings" of the Public Gatherings proclamation "without necessarily doing away some of the good aspects contained therein".[97] Furthermore, quite a number of papers[98] on limitations and violations of freedom of assembly on behalf of Government

95 Law Reform and Development Commission (2006), p. 2.

96 Ibid. p. 1.

97 Ibid.

98 See *Dianne Hubbard*, Namibia: Land of the Free? Police and public gatherings, Legal Assistance Centre, 2003; Freedom House Annual Reports; US State Department Country Reports on Human Rights Practices, 2012: „In July RDP accused NamPol of using 'colonial' laws to prevent them from demonstrating in front of the Supreme Court and National Assembly to protest delays in the

were published. Yet, a Bill was never tabled in parliament, nor was a modern Act on freedom of assembly ever implemented until these days.

Therefore, law of the land until to-date is the pre-constitutional Public Gatherings Proclamation 1989, which was enacted shortly before independence by the then Administrator-General for the so-called Territory of South-West Africa. It was supposed to provide for the protection of public peace and order at public gatherings from the Administrator-General's perspective, while freedom of assembly at this time was not yet protected by constitutional provisions. Interestingly, the Proclamation even refrains from using the very notion of assembly but refers to public gatherings. Consequently, the Proclamation of 1989 does not guarantee any right to assemble in public or to demonstrate,[99] but only provides for limitations, which is not much in line with a modern constitutionalist and rights-based approach. From a constitutionalist's point of view, it is scarcely understandable why 28 years into independence Parliament never took action on a modern regime of protection and constitutional limitations of the fundamental freedom of assembly.

Section 3(1)(a) Public Gatherings Proclamation 1989 grants the police a questionable broad discretionary power[100] if the head of police "has reason to think" that the public peace would be seriously endangered. "Reason to think" seems to establish a rather subjective threshold and "public peace" as a reason for legal constraints on freedom of assembly is not mentioned at all in Article 21(2) NC.

"Reason to think" as a legal prerequisite in effect grants too much of discretion[101] in decision making and the law does not even require for the reasoning to be fixed in writing, which would at least be revisable in court. Thus, reason to think certainly is a much lower threshold than, e.g. reasonable grounds as a jurisdictional fact. At least, from a rights-based point of view the catalogue of reasonable limitations in Article 21(2) seems to be conclusive, not allowing the introduction of new limits by mere construction under the auspices of the police without easily negating the essential content of the fundamental freedoms themselves.[102]

Section 3(1)(d) also is a matter of concern and open to broad discretionary power of the police, implementing "feelings of hostility between different sections of the population of the Territory" as a legal threshold. While hate crimes and an incitement to such crime might be an issue, "feelings" between different sections of the population are too broad a standard from a rights-based point of view, because already a demonstration for a radical approach on land reform might easily fall under this pattern.

2009 elections court challenge"; Freedom House Annual Reports; US State Department Country Reports on Human Rights Practices, 2000: „Organizers of public meetings were required to obtain prior police approval, but many public gatherings took place without such approval and without interference by the Government.". See also *Melber*, note 1, p. 82, 173, 182 et seq.

99 Law Reform and Development Commission (2006), p. 16.

100 Cf. ibid. p. 3, on the Internal Security Act of 1982.

101 Cf. *Mapaure et al*., note 5, p. 123-24, 170; see, e.g. Section 56(1) CrPA.

102 Reform and Development Commission (2006), p. 25.

Despite serious doubts outlined above and critical observations in the Report of the Law Reform and Development Commission (2006), no Supreme or High Court decision dealing with the constitutionality of parts of the Public Gatherings Proclamation 1989 can be traced in publicly accessible sources.

II. Prevention and Combating of Terrorist and Proliferation Activities Act 2014

Facing international pressure to have "anti-terrorism" legislation in place, the Namibian Parliament rushed through the Prevention and Combating of Terrorist Activities Act 12 of 2012[103]. No consultations with civil society or stakeholders took place. As a result, crucial elements of the Act and vast police powers implemented were never discussed publicly or in parliament. Shortly after the Act came into force, the National Assembly was even asked to urgently pass without any consultation or public discussion a revised version in June 2014, because the 2012 Act apparently did not meet international demands.[104] The revised Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014[105] came into force July 1, 2014.

Most relevant in terms of specific police powers certainly are Sections 37 and 38 of said Act. Section 37 provides for any police officer to have the discretion of closing or diverting a public road if she/he "considers it necessary for the combating of any terrorist activity or proliferation activity". "Combating" here embraces a broad variety of police powers. According to Section 1 combating a terrorist activity includes all efforts and measures related to the prevention, uncovering and halting of terrorist activities, as well as those related to the minimizing of losses caused by any terrorist activity. Also, it remains rather nebulous if "uncovering" terrorist activities refers to a preventive approach of police before such activities have already happened or if uncovering is already part of criminal procedure. This distinction is important, not only on a notional base, but would determine further legal action by the police, because only in the latter case, all means of criminal procedure under the Criminal Procedure Act of 1977 would be applicable which at least, would result in clear-cut legal remedies for the persons concerned by police action under said Act.

Taking into account the definitions in Section 1, the notion of "any terrorist activity" too is very vague, constituting a problematic starting point and "link" to specific police powers. This is even more the case if one takes into account the broad definition of "*proliferation activities*". It is hard to imagine how a single police officer should be able to decide that an act of "proliferation"[106] is taking place at a given moment which might efficiently and without further harm to the public be stopped by a road-block or a diversion of traffic.

103 www.lac.org.na/laws/2012/5095.pdf.

104 Cf. *Graham Hopwood*, Rushed and Ill-Concerned - Namibia's Anti-Terrorism Law, IPPR Policy Paper, 2015, p. 2-3.

105 www.lac.org.na/laws/2014/5490.pdf.

106 For definition see Section 1 of the Act.

On the contrary, this looks rather 'surreal' or mere lip service to the 'evils' of terrorism and proliferation, which is confirmed by Subsection (2), according to which a person who interferes with road closure works or road closure equipment[107], "commits an offence and is liable to a fine not exceeding N$ 50 million or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment."

Section 38(1) grants the police broad powers of search, seizure, arrest and forfeiture, if such search is not excessively intrusive in the light of the offence. Any member of the police may search a vehicle or, if such vehicle is on or in any premises, enter such premises for the purposes of searching such vehicle; and arrest any person found in possession of, or in control of, or driving such vehicle and seize such vehicle,

> *"whenever such member has reasonable grounds for believing that any person is committing or has committed a terrorist activity or proliferation activity and where delay in obtaining a warrant to search a vehicle or to enter any premises for the purpose of searching such vehicle, carries with it the danger of prejudicing the objects of the search".*

Combating terrorism and proliferation under this Act opens for a broad margin of police powers for the "prevention, uncovering and halting" of said activities. While Section 38(1) (b) in terms of proportionality constrains any search not to be "excessively intrusive in the light of the offence", it remains unclear how this limitation exactly relates to preventive powers of police, which are not embedded in the legal framework of criminal law and procedure, to which the very notion of "offence" indisputably refers to. As a result, the statutory provision does not provide for a sufficiently precise wording and a clear-cut notional concept and delimitations which however, would be necessary with reference to rule of law standards. The Act does not make clear whether a measure or action taken by the police is determined by the needs of criminal law and procedure or by the purpose of "prevention" of crime or both.

Summing up, Section 38 seems to be a strange amalgam of police powers which cannot clearly be classified to be either carried out in the context of an investigation of an offence or alleged offence or the prevention of crime under Section 13 Police Act. Besides, the legal threshold for the police to make use of such powers seems to be unreasonably low as "reasonable grounds for believing" on part of any member of police is a much lower legal threshold than, e.g., "reasonably necessary" as provided for in the Section 14(4) PA 1990.

107 The text of Section 34 of 2012 and Section 37 of 2014 in the Government Gazette is missing this part of the full wording.

III. Communications Act 2009 and Namibia Central Intelligence Service Act 1997

According to Section 70 Communications Act 8 of 2009[108], the Namibian President must establish interception centers for telecommunications. These centers shall be equipped by staff members of the Namibia Central Intelligence Service[109] (NCIS). Staff members are not members of the Namibian police and the Act does not grant any explicit power to the police with reference to such interceptions. Nevertheless, the Act in effect grants the police access to the outcomes of any interception carried out according to Section 70(1), providing that interception by NCIS may be carried out "for the combating of crime and national security[110]". Which fields of policing "combating of crime" embraces, however is less than unequivocal as already demonstrated above. Pursuant to Section 13 PA 1990, police functions *inter alia* relate to "the investigation of any offence or alleged offence" (criminal justice/procedure) as to be clearly distinguished from the "prevention of crime". Thus, the notion "combating of crime" rather obscures what exactly the purpose of interceptions under this Act is. From a legal perspective this contradicts basic principles of rule of law, like the acuteness of wording and predictability of powers of the executive when it comes to severe intrusions upon human and constitutional rights and freedoms like the Right to Privacy as well as Freedom of Opinion and Press.[111]

Section 5(1)(a) of the Namibia Central Intelligence Service Act 10 of 1997 transfers certain powers, duties and functions to the NCIS, inter alia to assist the Namibian Police Force by gathering intelligence to be used in the detection and prevention of such serious offences, as may be determined by the Director-General after consultation with the Inspector-General of Police under Subsection (iii). To assist the police "by" gathering intelligence is different from assisting the police "in" gathering such information, which makes clear that only the NCIS is legitimized to gather information by means of interception, but not the police itself. Notwithstanding, it is unclear if the NCIS under this Act is permitted to not only to gather such information, but also to transmit such information and data to the Namibian police while the police are permitted to use such information in criminal proceedings or other functions outlined in Section 13 PA 1990. Yet, such transmission and use of information and data collected under said provisions of the Communications Act of 2009

108 The Act came into force in 2011, however Sections 70-77 here discussed, are not yet in force (see Government Gazette 18 May 2011 No. 4714 p. 2). On technical surveillance in Namibia cf. www.namibian.com.na/64460/read/The-rise-of-the-Namibian-surveillance-state; www.namibian.com.na/64695/read/The-Rise-of-the-Namibian-Surveillance-State-Part-2 and www.namibian.com.na/65400/read/The-rise-of-the-Namibian-surveillance-state-Part-3.

109 Cf. Namibia Central Intelligence Service Act 10 of 1997.

110 National security has to be distinguished from the functions of police under Section 13 PA 1990.

111 Cf. www.lac.org.na/news/inthenews/archive/2008/news-20081127.html; www.lac.org.na/news/inthenews/archive/2009/news-20090605b.html.

and Namibia Central Intelligence Service Act of 1997 seems to take place in reality[112], without a clear-cut statutory provision allowing to do so.

Dubiety about the legal mechanisms of control and rule of law standards, regarding interception for purposes of "combating crime", is further intensified by the fact that the Act does not provide for any specific threshold or prerequisites for gathering information, by means of interception. A very vague wording in Section 70(1) Communications Act 2009 requires that interception centers must be implemented as "necessary" for the combating of crime and national security. Section 70(8) further outlines, "[w]here any law authorizes any person or institution to intercept or monitor electronic communications or to perform similar activities, that person or institution may forward a request together with any warrant that may be required under the law in question to the head of an interception centre." Hence a different law must specifically authorize the police to carry out interception as a precondition for such request. Strikingly enough, neither the Police Act nor the Criminal Procedure Act but only Section 40 of the Prevention and Combating of Terrorist and Proliferation Activities Act 2014 provides for such means, and yet apparently the NISC is delivering information generated by interception to the police.[113]

I. Conclusions

The Namibian Police are endowed with a broad set of "police powers", i.e. means or measures like questioning, arrest, search and seizure etc. Preventive powers in this context refer to law and order policing and prevention of crime, clearly to be distinguished and separated from investigation of criminal offences. The Police Act 1990 and other laws provide for such powers of police, often without clear borderlines and demarcations of preventive and other police powers, e.g., in criminal procedure. This might be considered to be a marginal problem of legal dogmatism. From my point of view however, this has quite an impact on standards of rule of law and legality of policing in every single case.

While flaws, uncertainties and problems with police powers in the field of criminal procedure are not in the focus of this paper, often a clear-cut classification as well as delimitation of the broad set of powers of police on the grounds of statutory law is rather difficult and seems to draw little attention in academic discussion or court proceedings in Namibia. With regards to rule of law and rights-based standards, this seems to be problematic, also when it comes to access to legal protection and justice.

While the Criminal Procedure Act of 1977 (with all its problems of access to justice due to education, social status etc.) establishes a clearly structured legal system, the Police Act 1990 and a set of complementary powers under both pre-constitutional and modern

112 Cf. Bernadette Jagger, MP, at www.parliament.na/index.php?option=com_content&view=category&id=14.

113 Ibid.

Namibian law provide for an additional toolbox of powers of the police apart from criminal procedure. These powers too can be used to the detriment of human or fundamental rights.

Standards of human and fundamental rights protection developed under criminal procedure law are not directly applicable when it comes to the broad field of "preventive" powers of police, often lacking a clear notional and legal concept. These police powers in consequence lack predictability and clear-cut boundaries from my point of view. Besides, Namibia did not implement a distinct model of administrative justice, which would be separate from the criminal justice system. Whether this results in an uncontrolled field of police power could not be established here empirically. Yet this seems to be a reasonable assumption because the use of preventive powers is hardly ever checked by Namibian courts.