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LAW REFORM AND DEVELOPMENT COMMISSION

**REPORT ON
PUBLIC GATHERINGS
(PROJECT 10)**

LRDC 14

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LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

To: THE HONOURABLE MINISTER OF JUSTICE

I have the honour to submit to you, in terms of section 9(1) of the Law Reform and Development Commission Act, 1991 (Act 29 of 1991), the Commission's Report on Public Gatherings.

.....
A VAATZ
ACTING-CHAIRPERSON: LRDC
2006-03-01 #

with effect from 15 July 2004, a new LRDC, with six new members was appointed. Mr A Vaatz, was appointed Acting-Chairperson, on the 27th April 2005, after Mr U D Nujoma, was appointed Deputy Minister of Justice, on the 21st March 2005.

LAW REFORM AND DEVELOPMENT COMMISSION OF NAMIBIA

The LRDC was established by the Law Reform and Development Commission Act, 1991 (Act 29 of 1991) which came into operation on 15 July 1992.

The members of the LRDC on 14 July 2004 were (see# on page (iii)):

Mr U D Nujoma	(Chairperson : Full time)
Adv. J R Walters	(appointed Ombudsman from 1 July 2004)
Adv. D Sauls	(nominated by the Law Society of Namibia)
Mr G M Mutwa	(Deputy Chief : Legislative Drafting in the Ministry of Justice)
Mr A Vaatz	(Legal Practitioner)
Mr G N Ndauendapo	(Legal Practitioner)

There were two vacancies.

The members of the LRDC on 01 March 2006 are:

Mr J R Walters	(Ombudsman)
Ms L Conradie	(nominated by the Law Society of Namibia)
Ms N N Shivute	(Deputy Chief : Lower Courts in the Ministry of Justice)
Mr S K Amoo	(Lecturer at Law Faculty of University of Namibia, nominated by the Vice Chancellor of the University of Namibia)
Mr A Vaatz	(Legal Practitioner: Acting Chairperson).
Mr T Kamuhanga-Hoveka	(Legal Practitioner)
Ms M Samson	(Legal Adviser in Office of the Attorney-General).

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1. INTRODUCTION AND BACKGROUND

- 1.1 The Attorney-General, by letter dated 22 October 1997 requested the Chairperson of the Law Reform and Development Commission (LRDC) to review the Public Gatherings Proclamation, 1989 (Proclamation No. 23 of 1989). This would be to bring the said legislation in line with the provisions of the Namibian Constitution as well as to strengthen it by giving the police the necessary discretionary powers to temporarily ban certain gatherings if the same are on good grounds believed to be a threat to public order.
- 2.1 The Minister of Justice by, letter dated 4 March 1998 formally requested the Chairperson of the LRDC to initiate the process of reviewing the Public Gatherings Proclamation 1989 (Proclamation 23 of 1989).
- 3.1 The LRDC then, identified the following as terms of reference for the project:
 - 3.1.1 Determination/identification of the relevant constitutional rights provisions which protect public peace and order at public gatherings, with special reference to articles 21(1)(d), 21(1)(e), 21(1)(g) and 22 of the Namibian Constitution.
 - 3.2.1 Special consideration as to whether the Police should or should not be empowered to use force, firearms and other weapons, to disperse a gathering, irrespective of whether the force is “moderate” and “proportional”.
 - 3.3.1 Due regard as to what should constitute good grounds for the Police to ban or prohibit public gatherings believed to be a threat to public order and peace.
 - 3.4.1 To formulate appropriate legislation that would replace the Public Gatherings, 1989 (Proclamation (AG.) 23 of 1989) bearing in mind
 - the constitutional guarantee of freedom of political activity (article 17 of the Namibian Constitution); the Demonstrations in or near Court Buildings Act 71 of 1982, which prohibits demonstrations and gatherings within five-hundred-metre radius of a building containing a courtroom, except on weekends and public holidays and any other existing laws affecting public gatherings
 - the operations of the Electoral Act, 1992 (Act No 24 of 1992) concerning electoral gatherings.
4. This Project seeks to propose a law that will address most shortcomings that exist in the Public Gatherings Proclamation, 1989 (Proclamation 23 of 1989) without necessarily doing away with some of the good aspects contained therein.

2. THE NAMIBIAN CONSTITUTION

The right to assemble is generally seen by many commentators as the *lex specialis* of the right to engage in political activity.

These two rights and freedoms enjoy constitutional protection in our legal system in the form of Articles 21(1)(d) and 17(1) of the Namibian Constitution respectively.

Article 21(1)(d) provides that :

“All persons shall have the right to assemble peaceably and without arms.”

Article 17(1), on the other hand, provides that:

“All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.”

It has become hard to imagine how citizens can effectively enjoy rights to engage in political activity without invoking the freedom to demonstrate peacefully.

Other fundamental freedoms that come into play in this context are, freedom of speech and expression (Article 21(1)(a)), freedom of association (Article 21(1)(e)) and freedom of movement (Article 21(1)(g)).

3. THE CONTENT OF THE FREEDOM OF ASSEMBLY

This freedom is only protected provided the assembly or demonstration takes place peaceably or peacefully and it is without arms.

It is deemed that any intention to cause violence on the part of the organiser or his or her supporters will render the assembly being classified as not being “peaceful” hence not enjoying any protection.

The prohibition against the carrying of arms closely corresponds to the condition that assemblies must be peaceful. The Public Gatherings Proclamation (AG. 23 of 1989), makes an offence to carry weapons at public gathering, but there is an exception which makes it legal to bring along pistols or revolvers as long as they are completely concealed. Indications of a potentially violent gathering would be where assemblers carry protective devices and defensive weapons as this is often seen as stimulating aggression amongst participants.

4. FREEDOM OF ASSEMBLY AND PUBLIC INTERNATIONAL LAW

The right to freedom of assembly enjoys recognition in international human rights instruments.

The International Covenant on Civil and Political Rights (ICCPR) of 1966 recognizes the freedom of assembly in Article 21, subject to the restrictions where it is necessary to protect national security; public order; public health or moral, or the rights and freedom of others. This right is also found in other instruments, these being the European Convention for the Protection of Human Rights and Fundamental Freedoms (section 11(2)) and the Africa Charter on Human and People's Rights (section 11). Namibia acceded to the ICCPR, on 28 November 1994 and to the African Charter on People and Human Rights, on 16 September 1994.

5. PUBLIC GATHERINGS BEFORE INDEPENDENCE

During the period 1915 until 1989, Namibia (then called South West Africa) was under the administration of South Africa and a brief discussion of South African legislation (laws) in this regard is important for background purposes.

Prior to Independence, the South Africa Government showed scant regard for the practice of free assembly with legislation after legislation being passed with the aim of suppressing assembly as a form of political participation.

Prior to 1950 assembly was, to an extent, permissively regulated by common law, through the crime of public violence.

After 1950, the South African (National Party) Government accelerated the passage of legislation designed to curtail assembly, especially where it took form of a political protest. The (National Party) Government began with section 9 of the Suppression of Communism Act, 1950 (Act No. 44 of 1950). Section 9 allowed the Minister of Justice to prohibit a gathering or an assembly wherever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering. Proclamation AG 14 of 1989, referred to hereunder, repealed this legislation. The rationale was to remove any legislation, which restricts free and fair political activity, pursuant to the 1989 elections.

A few years thereafter, in response to the African National Congress' (ANC) 1952 campaign, the government passed the Criminal Law Amendment Act, 1953 (Act No. 8 of 1953). This Act increased penalties for crimes committed in the context of political protest.

That was followed by the Riotous Assemblies Act, 1956 (Act No. 17 of 1956) which allowed the Minister of Justice to prohibit any public gathering in order to maintain public peace or to prevent the engendering of racial hostility. Through 1974 amendments, the Minister's powers were extended to private gatherings.

Worthy of special note is Section 17 of the Riotous Assemblies Act which deems a person to commit the crime of incitement to public violence if the natural and probable consequences of his act, conduct, speech or publication would be the commission of public violence by others, which (at the time of writing was) is still in force in Namibia. (This legislation seems to have been repealed by The Internal Security Act, referred to hereunder, which was ultimately repealed by Proclamation AG 14 of 1989.

Government then followed up with the passing of the notorious Internal Security Act, 1982 (Act No. 74 of 1982). In this Act, the provision mostly used was section 46(1), which provided that a magistrate could prohibit - for a maximum of 48 hours - any gathering in his or her district when he or she had reason to apprehend that it would seriously endanger the public peace. In s 46(3) it was provided that the Minister may prohibit any gathering in any area for any period of time, if he or she deems it necessary or expedient in the interest(s) of the state security or peace or to prevent feelings of hostility between different population groups.

The above sequence of developments clearly illustrates the extent to which the old order was keen on ensuring that political rights, and particularly the assembly freedoms did not see the light of the day. This Act was however repealed by Proclamation AG 14 of 1989 by the enactment of the First Law Amendment (Abolition of Discriminatory or Restrictive Laws for purposes of free and fair elections).

As for the Demonstrations in or near Court Buildings Act 1982 (Act no. (71 of 1982), which was made applicable to the then SWA/Namibia by the Security Matters Proclamation, AG 29 of 1985 and the Public Gatherings Proclamation AG 23 of 1989, these laws warrant separate discussions and are dealt with elsewhere in this paper.

6. A COMPARATIVE STUDY; US, GERMANY, THE NETHERLANDS AND BELGIUM

{Please note: the information contained herein might appear to some to be outdated given the fact that some of the information more than 2 years old since the project was initiated}

A survey of assembly legislation in the fore-stated countries displays a set of commonalities.

They all have liberal laws founded on the basic tenet of recognizing freedom of assembly as of right subject to few reasonable limitations.

6.1 UNITED STATES

In the USA, freedom of assembly is considered to be foundational for the life of a liberal democracy.

The approach of the courts when called upon to balance rights of speech and assembly as against the State's interest in the laws and regulations restricting these rights is such that they begin their analysis with a general presumption in favour of expressive activity.

Courts tend to focus more on the context of what is said at the gathering rather than the fact of the gathering itself. Whereas there has often been recognition of the importance of the value of assembly, it has been accorded lesser protection as compared to pure speech. Courts therefore do distinguish between the content of a belief from the conduct employed to express that belief.

6.1.1 THE PUBLIC/PRIVATE FORUM DISTINCTION

In US jurisprudence, a distinction has evolved affording varying protections to free speech and assembly taking place in that are known as public forums and those taking place on non-public forms.

6.1.2 Public forum doctrine

Certain places are traditionally categorised as being public forums, these being for instance streets, parks and sidewalks.

Assembly and speech rights are accorded the greatest protection in public forums with the result that any denial of the exercise of these rights is forbidden thereby.

The fact that the public has guaranteed access to public forums does not mean that such access cannot be restricted. A three-tier test has therefore been developed over time for the restriction of assembly at public forums.

The first leg of the test requires that the restriction be content-neutral (*This test was laid down in Chicago v Mosely 408 U.S.92 (1972)*). This means that the restriction cannot be based on the content or subject matter of the communication being controlled.

Secondly, that the restriction be so "narrowly tailored" as to serve on "significant government interest".

Thirdly, the restriction must leave open alternative channels for communication of information.

As for time, place and manner restrictions, the court in Cox v Louisiana 379 US 536 (1965) spelt out two other important characteristics of time, place and manner restrictions namely;

- (1) that the restriction must provide clear guidelines for the specific conduct being regulated and restricted;

- (2) they cannot give a public official the relatively unfettered discretion to decide what kind of expressive conduct is permissible.

6.1.3 Non-public forums doctrine

In contrast to public forums, non-public forums are not freely open to public and as such access thereto is subject to greater state regulation.

A government regulation on the time, place and manner of assembly and expressive conduct in a non-public forum will be upheld if it satisfies the following two-part test.

Firstly, that it must be viewpoint-neutral, i.e. the regulation need not be content neutral, but may in fact allow speech on some subjects and not others.

Secondly, that it must be reasonably related to a legitimate government interest.

Criticism has been leveled against public/non-public forum distinction in that it tends to dwell too much on the physical and geographical locations whilst shying away from the actual legitimate governmental interests at stake.

6.2 GERMANY

In terms of article 8(1) of the German Constitution, all Germans have the right to assemble without giving notice and without express permission as long as they assemble peacefully and unarmed.

Pursuant to article 8(2), which provides that Parliament may pass statutes limiting the exercise of this right in so far as it relates to outdoor assemblies, the Act on Assemblies and Processions (1953) was enacted which contains the following as key provisions:

- Article 1(1) provides that “Every person has the right to organise and/or participate in public assemblies.”
- No person has the right to disrupt an orderly public assembly or procession. (as per article 2(2).
- No person can carry weapons, or any implements, which may cause harm to others or damage to property.
- Assemblies can only be prohibited (on a case-by-case basis) when authorities have proof that organisers are planning a violent assembly.
- Assemblies must be conducted within certain parameters from federal and state parliament buildings.

- The police may only disperse an assembly if, -
 - (i) they inform the crowd the reasons for dispersal;
 - (ii) the crowd becomes so violent as to pose a clear and imminent threat to the health and life of the crowd; and
 - (iii) if other police measures are not effective in calming down the crowd and restore order.
- The assembly organiser must give notice to the proper authorities 48 hours before the event takes place.
- The authorities may prohibit a particular assembly or attach specific conditions if there is evidence that an assembly will present a serious threat to public safety and order.
- The authorities may disperse an assembly when -
 - (i) they have not received prior notice of the intended assembly;
 - (ii) when notice requirements have not been followed; and
 - (iii) when an assembly has been prohibited pursuant to Article 15(1).
- The police can remove from assembly participants who disturb public order.

{Articles 2(3); 9(1); 16(1); 13(1); 14(1); 15(1) and (2) and 18(3) of the Act on Assemblies and Processions (1953), are relevant}

- As regards the use of force in general and firearms in particular the use of firearms, the Act on the Police functions of the state of Bavaria (1954) provides the following:
Firearms may only be used -
 - (i) against persons whose actions present a clear and imminent danger to the life an/or safety of others or;
 - (ii) to prevent a crime which is imminent or continuing, which must have been perpetuated with the use of firearms or explosives. *(in accordance with the provisions of Article 67(1)).*
- Only when other preventative measures become ineffective may firearms be used against a crowd, which becomes violent.
- Machine guns and hand-grenades may only be used against violent persons -
 - (i) with the consent of the Minister of the Interior or his designate and
 - (ii) when the persons have used firearms or and hand-grenades or similar explosives, and
 - (iii) when the use of other fire-weapons has been ineffective.

6.3 THE NETHERLANDS

The law on assembly in the Netherlands is in many respects similar to that in Germany.

Article 9(1) of the Netherlands Constitution provides that, “*everyone has the right to assemble and/or demonstrate as long as they obey the law*”.

Article 9(2) provides that statutes may be passed concerning the limitation of the right of assembly in the interests of health, the regulation of traffic and the repression of disturbances.

Parliament has since passed the Act on Public Manifestations, (1988) to regulate the rights and obligations regarding the freedom of assembly. As a result thereof, the local authorities have now capacity to enact subordinate legislation pertaining to notice requirements preceding the holding of assemblies and demonstrations.

The institution tasked with the responsibility of overseeing and administering assemblies is the office of the Burgermaster (Mayor). This office attends to notification requirements for gatherings to be held and it is empowered amongst others to -

- (i) prohibit,
- (ii) attach conditions to the holding of; and
- (iii) order the dispersal of a gathering.

As regards the use of force, the Police Act of 1957, particularly article 33(a), section 1 provides guidance in this respect. It allows police officers to use force (in order to maintain public order) with due regard to the dangers involved, provided no other measures are sufficient. Also covering the same area as the Instruction for the Police (1988) which provides, amongst others, the following:

- article 4(1) - where an officer uses force, he can only do that when acting under the immediate supervision of a superior officer and then acting under the express order of the said superior officer;
- Where non-automatic firearms are used to suppress riots this is only possible if done pursuant to an order from the relevant authorities;
- that where firearms are used in close formation, this is done under the direction from the superior officer.

6.4 BELGIUM

A little more restrictive is Belgian Law on assembly. Article 19(1) of the Belgian Constitution states that unarmed Belgians have the right to gather peacefully, without permission, if they

obey the laws governing the freedom of assembly. However, in terms of Article 19(2), this constitutional right does not apply to gatherings held outdoors.

Unlike Germany and the Netherlands, Belgium does not have compressive statutory laws regulating rights, duties and obligations of assemblers, with the most relevant one being the Local Government Act. Article 19 of the same Act enables the local councils to make municipal police by-laws, which task is shared with the office of the Burgermaster.

As a result many municipalities have passed by-laws which -

- (i) require that permission to assemble be requested prior to holding an assembly; and
- (ii) authorise the Burgermaster to attach condition(s) wherever he grants permission for a gathering.

On the use of force, Article 20 of the Act on the Gendarmerie of 1957 provides that, whenever possible, every commander trying to disperse a gathering must first request those disturbing public peace to disperse before ordering the use of weapons and that those weapons must be less dangerous than firearms and bladed weapons.

Lessons to be learned the above European jurisdictions.

Various lessons can be learned from the fore-mentioned jurisdictions.

The right to assembly enjoys a strong constitutional foundation; this is clearly illustrated by the high price that these countries attach to it.

There exists some kind of orderly pre-demonstration phase involving the key stakeholders, namely assembly conveners, local authorities and the police. It is during this phase that a timeous notification of the intended gathering needs to be lodged with the relevant authorities to ensure adequate preparedness for the event.

There should further be always room for regulated and moderated use of force, considered a key necessity in the event of crowd control losing shape in the end.

7. THE AFRICAN EXPERIENCE

The situation in African states studied for the purposes of this paper is characterised by sanctioning assemblies through requiring both a permit and a licence from the authorities before the event can take place.

7.1. GAMBIA

In the Gambia, section 5(2) of the Public Order Act, (Act No. 7 of 1961) provides:

“A person desirous of forming any public procession shall first make application for a licence to the Inspector General of Police for permission to conduct such a procession.”

7.2. NIGERIA

A somewhat similar provision also exists in Nigerian statute law in the form of S 1(2) of the Public Order Act, Act No. 5 of 1979 which provides:

“Any person desirous of convening or collecting any assembly or meeting of forming any procession in any public road or place of public resort shall unless such assembly, meeting or procession is permitted by a general licence granted under subsection (3) of this section first make application for a licence to the Governor not less than 48 hours thereto, and if such Governor is satisfied that the assembly, meeting or procession is not likely to cause a breach of the peace, he shall direct any superior police officer to issue a licence not less than 48 hours thereto, specifying the name of the licensee and defining the conditions on which the assembly, meeting or procession is permitted to take place, and if he is not so satisfied, he shall convey his refusal in like manner to the applicant within the time herein before stipulated.”

These kinds of provisions were not to be tolerated for far too long and it came as no surprise when matters came to head with liberal rulings in Ghana; Zimbabwe; Zambia and Tanzania.

7.3. GHANA

This West African State has also, through the famous decision of *NPP v Inspector General*, made its fair contribution towards liberalizing the law of assembly. When called upon to rule on the constitutionality and validity of legislation making it a requirement to obtain a permit prior to holding a peaceful assembly, Hayfron - Benjamin J.S.C., writing for the Supreme Court of Ghana {writ No.4/93- unreported } remarked that, “*such legislation creates a prior restraint on the freedom of the citizens to form or hold a meeting or procession and in terms of Article 21(d) also to demonstrate in a public place. A prior restraint is an injunction prohibiting, procession or demonstration, whether such injunction or prohibition is imposed by statute or by order of court the citizen’s freedom may be restricted by law on the grounds stated in the Constitution but they cannot be denied. Any such denial will be unconstitutional and void.*”

7.4. ZIMBABWE

At Independence, Zimbabwe inherited the infamous Law and Order (Maintenance) Act (Chapter 11:07), which made it a requirement to first obtain a permit from the relevant state authority prior to holding a procession.

This provision came up for a constitutional challenge in *Re Munhumeso and Others (1995 (2) BLCR 125 (ES))*. In this landmark matter Gubbay C J was called upon to decide whether section 6 of the Law and Order (Maintenance) Act, was in conflict with section 21 of the Zimbabwean Constitution which guarantees freedom of assembly and association.

It was found that such a limitation was not reasonably justifiable in a democratic society for three reasons. Firstly, the discretionary power regulating the authority was uncontrolled. Secondly, the authority was not obliged to determine whether the attaching of conditions upon the conduct would have been just as effective in preserving peace, law and order. Thirdly, although the rights to freedom of expression and assembly are primary and the limitations secondary, section 6(2) reverses the order.”

As a result, and in accordance with section 24(5) of the Zimbabwean Constitution, the judge issued a *rule nisi*, calling upon the Minister of Home Affairs to show cause why that provision should not be struck down as being unconstitutional.

7.5. ZAMBIA

Following right upon the heels of the Munhumeso decision, is the Zambian judgment in *Mulundika and Others v The People (1996) 2 LRC 175*.

In this case, the applicant and seven others, including the former Republican President, Dr Kenneth Kaunda, were charged in a magistrate’s court with unlawful assembly, contrary to section 5 of the Public Order Act (CAP. 113 of the laws of Zambia). Section 5 required anyone who wished to hold a public meeting, procession or demonstration to apply to the police for a permit.

The police were entitled to reject the application or if they decided to allow the said event to, they could impose conditions. Among these conditions were: *the persons who may or may not be permitted to address such assembly or public meeting; the matter, which may or may not be discussed at such assembly or public meeting, etc*. Section 7 made it an offence to contravene section 5, which was punishable by imprisonment of up to six (6) months or a fine not exceeding one thousand five hundred penalty units, or both.

The applicants then challenged the constitutionality of sections 5 and 7 of the Public Order Act. The magistrate’s court stayed the criminal proceedings until the constitutional issue was dealt with by the High Court. The High Court fearing that it may create a vacuum, declined to declare the two sections unconstitutional.

The Supreme Court struck down sections 5 and 7 of the Public Order Act for being unconstitutional as they infringed upon the freedoms of expression and assembly guaranteed by Articles 20 and 21 of the Constitution, respectively. The court held that section 5(4) was not reasonably justifiable in a democratic society for a number of reasons: *the uncontrolled nature of the discretionary power vested in the regulating authority; the fact that the regulating authority was not obliged, when imposing a ban, to take into account whether disorder or breach of the peace could be averted by attaching conditions relating to, for example, time, duration and route upon the conduct of the procession or meeting.*

Although the rights to freedom of expression and assembly and the limitations thereon are secondary, section 5(4) reversed the order, in effect denying such rights unless the public meeting or procession was unlikely to cause or lead to a breach of the peace or to public disorder; the criminalisation of a procession or meeting held without a permit, irrespective of the likelihood of occurrence of any threat to public safety or public order; and the lack of adequate safeguards against arbitrary decisions.

Seemingly awoken by the *Mulundika* decision, government passed the Public Order Amendment Act 1996, Act no.1/36 of 1996.

Critical discussion of the Public Order Amendment Act 1996, Act 1/36 of 1996.

The passing of the above legislation has introduced far-reaching changes in that it is no longer necessary to apply for police permit to conduct a public gathering. In addition the police are no longer required to decide on who can address a public meeting or what subject can be discussed.

Section 5(4) specifically provides that every person who intends to assemble or convene a public meeting, procession or demonstration shall give the police at least seven days notice of that person's intention to assemble or convene such a meeting, procession or demonstration.

Section 5(5) provides that "the notice requirement must be in the prescribed form, and shall contain an undertaking by the person intending to assemble or convene public meeting, procession or demonstration that order and peace shall be maintained through the observance of the following conditions:-

- (a) that they have been informed by the police that the site for the meeting has not already been granted to another convener for the holding of the public meeting, procession, or demonstration;
- (b) that the route and the width of the route is suitable for the holding of processions in accordance with width and route specifications for such purposes as specified by the Minister by statutory order;
- (c) that marshals of a number sufficient to monitor the public meeting, procession or demonstration are available and shall co-operate with the police to ensure peace and order;
- (d) that the commencement, duration and destination of the public meeting, procession or demonstration shall be notified to the police;

- (e) that the public meeting, procession or demonstration shall not create a risk to inhabitants of that neighborhood; and
- (f) that the conveners of the public meeting, procession or demonstration have been assured by the police that at the time the proposed activity shall be held, it will be possible for it to be adequately policed.

Section 5(6) states that, where it is not possible for the police to adequately police any particular public meeting, procession or demonstration, the regulating officer of the area shall, at least five days before the date of the public meeting, procession or demonstration, inform the conveners in writing of the reasons for the inability of the police to police the public meeting, procession or demonstration and propose an alternative date and time for the holding of such public meeting, procession or demonstration.

And the new Act seems to have resolved the issue of reviewing of judgments by parties aggrieved by those in position of authority.

Section 5(8) provides that, if the conveners of the public event are not satisfied with the reasons given by the regulating officer under subsection (6), they may immediately appeal to the Minister of Home Affairs who shall decide and inform the conveners in writing of his decision on the matter within a period of five (5) days.

According to section 5(9), where any person is aggrieved by the decision of the Minister that person may appeal that decision to the High Court within thirty (30) days of the Minister's decision.

While it is clear that from the above provisions that most of the odious features of the old Public Order Act have been removed, the new Amendment Act still has some unacceptable provisions which make it difficult for people to enjoy freedom of assembly and expression unhindered. And it is arguable, for instance that the requirements of seven day's advance notice in every situation is a prior restraint on the exercise of the fundamental rights to expression and assembly.

7.6. TANZANIA

The rule on the exercise of discretion in *Pumbun v A-G* (1993) 2 LRC 317.

In the above Tanzanian landmark decision, requirements for the exercise of discretion were set out at 323:

"... a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by Article 30(2) of the Constitution only if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority when using the law.

Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of society.

If the law, which infringes a basic right, does not meet both requirements, such law is not saved by Article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the Constitution may be easily derogative or claw-back clauses of that very same Constitution.”

In the light of the above ruling it becomes apparent that the discretion entrusted to the station commander is both without adequate guidelines and nor subject to effective control. He does not have to give reasons for his decision(s) and nor are there judicial review mechanisms in place to assist aggrieved parties intent on having his decision set aside.

It is therefore recommended that proposed law incorporate above safeguards set out in the above decision so as to guard against arbitrary decision, which would otherwise compromise assembly freedoms.

OBSERVATIONS ON DEVELOPMENTS IN AFRICA

The above developments on the continent clearly illustrate how for long authorities have lagged behind in elevating assembly rights/freedoms to the level they rightly belong.

This is evident in various states where, at independence, the trend has been either to retain pre-independence public order laws or to enact laws that required state or local authority sanctioning prior to holding a gathering.

It was only in the early to mid - 1990's with progressive decisions in {Kenya}, Zambia, Zimbabwe and Ghana that there has been a genuine signs of heeding the call for reform.

It is thus crucial that proposed law be so liberally framed, so as to take into account the prime importance that freedom of assembly should enjoy in a modern democratic society.

8. THE SOUTH AFRICAN EXPERIENCE

{It is deemed necessary to deal with the South African situation under a separate discussion given the historical links and the influence their jurisprudence has on our situation }

8.1 FINDINGS OF THE SOUTH AFRICAN COMMISSION OF PUBLIC VIOLENCE AND INTIMIDATION, 9TH JULY 1992 AND THE ENACTMENT OF THE REGULATION OF GATHERINGS ACT, ACT 205 OF 1993

In South Africa a very bold initiative was taken towards resolving the problem of public gatherings by instituting a Commission of Enquiry into Public Violence and Intimidation, which was chaired by Mr. Justice Richard J Goldstone.

The Commission established a committee, which was tasked with enquiry into the procedures relating to mass demonstrations, marches and picketing and the role of the police or other security forces.

A multinational panel of experts was appointed to submit testimony to this Committee regarding the lawful control of demonstrations in South Africa.

The panel did, amongst other things, submit proposals on principles and procedures relating to the proper management of demonstrations, which had become characteristic of the sociopolitical environment of the time.

8.2 Recommendations of the Panel of Experts

The Committee adopted, as point of departure, the notion that the right to demonstrate is as fundamental a right as is the right to take part in political campaigns.

One of the key recommendations put forward was that there should be enhanced transparency and effective communication among all the stakeholders, namely, the organiser of the event, the police and the local authorities. It was felt that constructive and ongoing pre-event negotiations were essential for this purpose. In this light it was deemed imperative that the police and the local authorities had to be apprised of the nature, size and route of the demonstration so as to be able to facilitate a peaceful and orderly response with the co-operation of the organisers.

The panel, in acknowledging the need for orderly gatherings, maintained that reasonable restrictions should be imposed so that traffic is not unnecessarily impeded with, thereby allowing members of the public to exercise their rights.

As regards the use of force, the experts recommended the rule applicable in Germany, the Netherlands, and most jurisdictions in the USA, Australia and Great Britain. In all these jurisdictions the use of lethal force is only justified when conditions make available general justifications for the use of lethal force found in principles of criminal law and criminal procedure, self-defence, protection of the lives of others and the prevention of certain very serious violent crimes standing out as typical examples.

The work of the Commission culminated in the enactment of the Regulation of Public Gatherings Act, 205 of 1993 which development was to usher in a new era in South African assembly laws.

8.3 The Regulation of Gatherings Act, 205 of 1993

This piece of legislation enshrines the notion of “demonstration as a right”, with the consequence that the ability to hold a public gathering is no longer necessarily contingent upon the approval of some state or local authority.

While it is seen as a very progressive law, the Act is still seen by various authors as either not entirely libertarian in spirit or that it still contains provisions which reflect the difficulty that political actors and security establishments had in breaking with the previous dispensation.

Firstly, section 3(2) requires that notices for demonstrations or gatherings be provided at least 7 days in advance. It has often been argued in certain quarters that 7 days is an unreasonably long period if considered against the fact that demonstrations are very often a passionate and immediate response to a particular controversial issue.

This provision is not likely to survive if tested against both sections 16 and 17 of the South African (1996) Constitution, as it may prevent persons and political parties from registering their opposition to a particular policy or conduct of the government before it becomes a *fait accompli*.

Where assembly conveners fail to comply with the seven (7) days notice, they can have recourse to section 3(2) whereby a 48-hour notice must be observed. With the latter deadline, conditions are even more circumcising. In the event of failure to comply with the 48-hour deadline, then the local authorities are armed with the unfettered discretion to issue blanket prohibitions. It is submitted that just as is the case with the 7-day notice requirement, this 48-hour deadline is quite unsatisfactory for it is in conflict with the ethos if not the letter of the Constitution.

Chapter 4 of the Act imposes joint and several civil liability for riot damage on each member. It is expected that joint and several liability for riot damage creates a potential for huge personal liability, with the result that only those who have virtually nothing to lose would want to challenge the authorities. The response often put forward is that demonstration organisers can always take out demonstration damage insurance prior to the march. That line of argument would not appear to hold water if weighed against the question whether controversial groups can secure insurance, or whether even a mainstream political group can convince their insurers that they will not attract a violent response for which they may be held liable. This form of insurance would in all probability prove too exorbitant for most groups to take out.

The Act also seems to have laid to rest the thorny problem of the use of deadly force by the police to disperse demonstrations. It is stipulated that the force necessary to prevent the killing or serious injury of persons, or the destruction or serious damage to immovable property or valuable movable property must be “necessary”, “moderated” and “proportionate” to the circumstances” (*section 9(2)(e)*), while the use of deadly force is however subject to various limitations. (*sections 9(2)(d) & 13(1)(b)*)

This Act represents a radical departure from the position in many African jurisdictions where it is an absolute requirement to obtain a permit prior to conducting a gathering.

Despite falling short of certain libertarian elements, it should still go a long way in meeting aspirations of would-be assemblers. It is a law from which Namibian lawmakers can only draw valuable lessons.

9. NAMIBIAN LAWS REGULATING GATHERINGS AND DEMONSTRATIONS.

This chapter examines current Namibian legislations (both pre and post Independence) regulating gatherings and demonstrations. Below is a brief synopsis of existing legislations.

9.1 DEMONSTRATIONS AT OR NEAR COURT BUILDINGS, PARLIAMENT AND THE STATE HOUSE

This topic has become contentious of late with the recent increase in the number of demonstrations being staged at or near courts and the presidential residence and administrative headquarters, The State House.

When addressing the question of demonstration at premises in question, the enquiry must always strive to balance to conflicting interests, namely the citizen's right to exercise his freedom of assembly as against the State and Court Officials' ability to carry out their duties with minimal disruptions.

9.1.1 GATHERINGS OR DEMONSTRATIONS AT NEAR COURT BUILDINGS

The law presently in force is the South African Demonstrations in or near Court Buildings Prohibition Act 71 of 1982, particularly S 2(1) which prohibits gatherings and demonstrations held within five hundred (500) metres of a court-room on a weekday, where permission has not been obtained. This Act which was made applicable by the Security Matters Proclamation AG 29 of 1985, still remains law in Namibia despite having been repealed in South Africa by the Regulation of Gatherings Act, which provides under section 7, for gatherings to take place within a 100-metre radius.

The 500 metre limitation is quite an unreasonable especially if considered against the fact that demonstrations constitute a response to some government action and if conducted from such a remote point, chances are that they will not elicit the desired response. It is recommended that the proposed legislation reduce the distance to 150-metre radius for reasons aforesaid.

9.1.2 DEMONSTRATIONS AND GATHERINGS AT PARLIAMENT.

During the pre-Independence dispensation this position was dealt with by the Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973, particularly section 3, which criminalises demonstrations and/or gatherings within areas in the immediate vicinity of parliament buildings.

In domestic law, the closest legislators have come to regulating activities within the immediate vicinity of parliament in through the enactment of the Powers, Privileges and Immunities of Parliament Act 17 of 1996. This Act imposes criminal sanctions on various undesirable activities within the precincts of parliament.

Considering the importance attached to activities conducted within parliament chambers it is only imperative that any demonstration be prohibited within the "precincts of parliament". This is the trend in Germany and Israel.

9.1.3 PUBLIC GATHERINGS AND DEMONSTRATIONS AT THE STATE HOUSE

The State House constitutes the official residence and administrative headquarters of the State President and as such relevant limitations should be imposed on the exercise of various freedoms within the immediate vicinity of these premises in the interests of safety and security.

Currently there is no legislation directly dealing with this kind of situation.

It is therefore suggested that limitations proposed for demonstrations and gatherings within the precincts of parliament should likewise apply to State House. This is because demonstrations would normally have a disruptive effect on official business being conducted at State House; hence assemblers should carry out their activities at some reasonable distance from the country's highest office.

9.2 PUBLIC GATHERINGS AND ELECTIONS

The right to assemble freely strongly supplements the right to engage in political activity. Equally integral to the latter fundamental right is the ability to conduct political rallies without fear and intimidation. It is in this light that the reform of any law of assembly in Namibia is set to compact on relevant electoral laws.

Pursuant to section 43(2) of the Electoral Act 24 of 1992, the Electoral Commission issued guidelines for the conduct of political activities by political parties, associations, organisations and independent candidates during election campaigning. These guidelines are contained in Government Notice No. 143 of 1992.

The notice provides *inter alia* that:

1. Intimidation, in any form, is impermissible.
2. No weapons of any kind, including any traditional weapon, may be brought to any political rally, meetings, march or other demonstration.
3. Parties shall avoid holding rallies, meetings, marches or demonstrations physically close to one another during the same time of the day.
4. Parties shall refrain from utilizing public address systems, either fixed or mobile between 21h00 pm and 07h00 am and which would constitute a public nuisance.
5. Speakers at political rallies may not use language, which incites violence in any form against any other person or group of persons. Parties will not issue pamphlets, newsletters or fosters or fosters which contain materials, which incite people to violence.
6. Party members and supporters will not disrupt other parties, rallies, meetings marches or demonstrations.
7. Party members and supporters will not seek to obstruct other persons from attending political rallies of other parties.
8. Party members and supporters will not disfigure or destroy political campaign materials of other parties.
9. The Director of Elections will meet party representatives on a weekly basis to discuss all matters of concern to the election campaign, with emergency meetings to be summoned as and when necessary.
10. Designated members will attend their parties' rallies to ensure compliance with this Code.
11. All allegations of misconduct and other unlawful conduct in the election campaign will be brought to the attention of police an to the attention of the Directorate of Elections at the places they are alleged to have occurred.”

While this Code of Conduct sets out useful guidelines for electoral conduct, it is seriously flawed in that it lacks the necessary bite in the form of criminal sanctions. It is therefore proposed that if the intended legislation is to achieve the desired results, the commission of acts set out in the Code of Conduct should be criminalized.

10. LOCAL AUTHORITIES AND PUBLIC GATHERINGS OR DEMONSTRATIONS.

Acknowledging the vital role that local authorities play in the administration of gatherings especially during the pre-event phase, this paper further seeks to analyze relevant subordinate legislation prevailing at some three local authorities, namely; Windhoek, Walvis Bay and Swakopmund. In terms of section ... of the Local Authorities Act, local authorities are empowered to legislate by way of bylaws on certain matters falling within their domain.

10.1 Windhoek

In the country's biggest municipality, the position is regulated by regulation 13 and 55 of the Street and Traffic Regulation, (G/N 9/30 – Government Gazette No. 352 of 15/01/1930) which govern gatherings and processions respectively.

The former provision provides as follows:

- “13(1) No person shall hold, convene or organise any performance or gathering in the street or public place without the approval of the Council, and subject to such conditions as the Council may impose.
- (2) A written application for such approval shall be submitted to the Town Clerk not later than three working days prior to the proposed performance or gathering.
- (3) Every such application shall -
- (a) contain the full name and address of the convener or organiser of the proposed performance or gathering;
- (b) set out fully the purpose of the proposed performance or gathering; and
- (c) specify the date, time and place of the proposed performance or gathering and whether it is proposed to make use of any orchestra, musical instrument, loudspeaker or similar device which may create a public nuisance.
- (4) On any occasion of public celebration, a public meeting or any other event likely to cause congestion in any street or public place, any person in or in the vicinity of such street or public place shall obey the directions of any authorised officer as to the route to be followed by vehicles, animals or pedestrians, or as to any other matter which may be necessary for the avoidance, prevention or removal of an obstruction in such street or public place.”

As for the regulation 55, it provides that;

“No procession of any kind other than a funeral procession or a wedding procession or a procession for military or police purposes shall pass along any street without the written permission of the Council, and then only under such conditions as the Council may impose. Any person taking part in or following any procession for which no previous permission has been obtained from the Council or not conforming to the condition prescribed by the Council where such permission has been given shall be guilty of an offence.”

10.2 Walvis Bay

Regulations governing gatherings and processions require in section 11(1)(d - e), that “*any person arranging, holding or attending any meeting, public gathering or procession shall only proceed to do the same subject to the Council’s consent*”.

The consent can only be refused if the Council is of the opinion that it would give rise to public rioting, disturbance of public peace, commission of the offence, be detrimental to the public or the users of or visitors to the public amenity or detrimental to the public amenity concerned. (see section 3(3)(a – c). The application for written consent must be lodged with the Council at least 21 days in advance.

10.3 Swakopmund

Authority on public order by-laws in the town of Swakopmund lies in the policy on processions in streets as per the Council’s decision 6.1.1.

The town policy requires that the town clerk sanction political processions after consulting with the Chief Traffic Officers and only once the former is convinced that the organisers of the event are able to control it such that it takes place within the limits of law and order. As for political meetings and gatherings, the Town Clerk must permit these.

In all the above municipalities, the licensing requirement features very prominently. It is submitted that by-laws requiring that would be assemblers obtain permission prior to holding a gathering, meeting or procession would not survive constitutionally because they unreasonably limit the right to assemble freely and without arms as contained in Article 21(d) of the Namibian constitution.

In the interests of sound municipal administration and consistency with higher law, it is therefore recommended that municipal by-laws be amended to bring these in line with progressive trends elsewhere.

11. PUBLIC GATHERINGS AND LABOUR RELATIONS

The right to assemble freely and the right to picket are generally seen as the two sides of the same coin with the latter considered a more efficient tool in the labour relations context.

In some Constitutions, these rights are even consolidated into one provision. For instance section 17 of the South African Constitution reads:

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”.

It appears the idea of placing the right to picket within s 17 was meant to strengthen the hand of some groups of protesters in non-labour disputes. The rationale for this can be explained as follows: **Stuart Moolman** in “**Freedom of Assembly**” argues that, “it is possible that without express mention of picketing in the text, the right to freedom of assembly and demonstrations would have been read to exclude the right to picket.”

In the U.S., courts have also come out in support of the right to picket as a constitutionally protected activity. In *Thornhill v Alabama* 310 U.S 88 (1940), Mr. Justice Murphy, when called upon to rule on the constitutionality of an Alabama statute which banned all forms of labour picketing, held that:

“Free discussion concerning the condition in industry and the causes of labour disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of labour dispute, are part of the larger problem.”

In domestic law the right to picket finds expression in the form of section 81(3) of the Labour Act 6 of 1992 which provides that:

“Notwithstanding the provisions of any other law to the contrary, it shall be lawful for any employee, office-bearer or official of any registered trade union to be, whether or without the permission of the employer concerned, at or near the place of employment in question for the purposes of peacefully communicating information or peacefully persuading any other person to perform any work, provided such action is in furtherance of a strike by virtue of the provisions of section 79(1)(c)(iii)”.

Section 72(1) of the Labour Act, 2004 (Act No. 15 of 2004) regulates the right to strike and lockouts.

“Subject to section 73, every party to a dispute of interest has the right to strike or lock out-...”

This provision insulates the right to picket freely and considering the vital role that picketers are bound to play in the development of sound labour relations, it is imperative that all recommendations to be put forward on the new law governing assemblies, gatherings and demonstrations should be read as equally applying to the right to picket.

12. THE PUBLIC GATHERINGS PROCLAMATION, NO 23 OF 1989

Legislation governing public gatherings in Namibia is the Public Gatherings Proclamation 1989, Proclamation no. 23 of 1989. Though not a solution to every conceivable problem pertaining to public gatherings, it contains various libertarian elements such as to provide a fundamental framework for reform.

12.1 Number of persons constituting a gathering

Section 1(iii) of the Proclamation designates twenty (20) as the number of persons required to constitute a gathering for Proclamation purposes. In Israel, section 83 of the Police Ordinance, with analogous provision requires a total of fifty (50) persons for meetings and processions. Section 1 of the South African Regulation of Gatherings Act puts the cut-off figure at (fifteen) 15.

Opting for a negligible number would often have problems of over-regulating every small gathering, thereby creating unwanted administrative difficulties for authorities.

12.2 Notification of authorities

It is further provided that a person desiring to hold a meeting is required to give notice in writing to the Commander of the nearest police station at least three (3) days before the date of the gathering. (section 2(1)). It is submitted that this provision allows the police adequate time to make relevant security arrangements for any possible eventuality.

There is, however, one shortcoming with the notification requirement in that there is no obligation whatsoever to notify, inform or consult the local authorities. As custodians of roads, land and premises on which gatherings take place, it is only imperative that such a major stakeholder be alerted prior to the event so that relevant logistical arrangements can be made.

12.3 Failure to notify authorities and consequences thereof

In the event of the person desiring to hold a gathering giving notice less than three (3) days but more than 24 hours before the date of gathering, authorisation is then required from the Station Commander of the nearest police station with the concurrence of the Commissioner (modern-day equivalent of Inspector-General).

The fact that the station commander may authorize the gathering should be read to equally mean that he/she may prohibit the gathering on account of failure to receive due notice timeously.

It has been argued in various quarters that certain provisions of the Proclamation, specifically section 2(3) are a little over-broad and are necessarily restrictive of the assembly freedoms as enshrined in Article 21 of the Namibian Constitution.

12.4 THE MEANING OF “GATHERING”

Section 2(5) provides that no notification requirements would apply to a public gathering:

- (a) for the purpose of a *bona fide* church service or funeral;
- (b) in connection with the domestic affairs of any household;
- (c) of the members of a statutory body of persons, held exclusively for the purposes of transacting any business of that body;
- (d) for the purpose of education in terms of any law;
- (e) held as a *bona fide* sports gathering or for entertainment;
- (f) of any assembly, council, committee or other body established by or under any law;
- (g) for official administrative or judicial purpose.

The above manner of stipulating categories is always fraught with the danger that the list may not always prove to be exhaustive enough to accommodate every conceivable type of gathering for which notification could be or could not be a necessity.

In the South African **Regulation of Gatherings Act 205 of 1995**, a more broader and all-encompassing definition was adopted. A gathering is defined as “an assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of 1989 or any other public place or premises wholly or partly open to the air -

- (a) at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked or criticised, promoted or propagated; or
- (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.

It is therefore submitted that the latter is the preferred position and should be adopted for the sake of envisaged law on public gatherings as it has the benefit of eliminating shortcomings existing in rigid classifications characterising the former legislation.

12.5 IMPOSITION OF CONDITIONS FOR HOLDING OF GATHERINGS

The Proclamation provides (section 3), that where the Commissioner has reason to think that public peace would be endangered, public order would be threatened, any person(s) would be killed or seriously injured, hostility between different sectors of the population would be encouraged and that any person(s) could be compelled to do something or abstain from doing something which they are legally entitled to do, he may direct that the gathering be held according to certain conditions.

Comments and criticism made in respect of s 2(3) would *mutatis mutandis* apply here because unfettered discretion is conferred on the Commissioner. The said official can still make arbitrary decisions, he is not obliged to give reasons and nor is there a duty to consult other stakeholders, particularly members of the local authorities and event organiser(s).

12.6 CONTAINED IN OR DONE UNDER THE AUTHORITY OF ANY LAW

The discretion enjoyed by members of the police has the effect of compromising the exercise of the fundamental right to assemble freely. And it is in this light that the accumulative effect of sections 2(3) and 3(1) of the Public Gatherings Proclamation should be analysed against Article 21(2) of the Namibian Constitution.

The latter provides that:

“The 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 the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in 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.”

It is settled and trite law that the freedom of assembly is not absolute and hence permissible restrictions are allowed. It is further so that these restrictions must be contained in or done under the authority of any law.

Under the European Convention on Human Rights, Articles 9(2); 10(2); 11(2) require that specific restrictions to the right to freedom of conscience, expression, assembly and association must be prescribed by law. The European court of Human Rights has also on a number of occasions considered the word “law” in the context of permissible restrictions and in *Silver and Others* judgment of 25 March 1983 A 61, it was held that:

“a norm cannot be regarded as “law” unless it is drafted with sufficient precision to enable the citizen to regulate his conduct: he must be able to - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

This was equally the positions in Tanzania in the *Pumbun v Attorney-General* and the Zambian case of *Mtikila v Attorney General* 1996 2 LRC 175.

CONCLUSION

It can therefore be concluded that in the light of the wide discretion granted to both the Station Commander and the Inspector-General in the fore-stated provisions, a strong possibility exists that the courts are likely to find various provisions of Public Gatherings Proclamation unconstitutional on the grounds of not being contained or done under the authority of any law.

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ANNEXURE A: FEATURES OF THE POSSIBLE PUBLIC GATHERING BILL

The new law incorporates various elements of existing law whilst borrowing certain features of South African legislation (The Regulation of Gatherings Act 205 of 1993) especially on matters of mutual consultation and negotiation; judiciary review and imposition of civil liability for riot damage.

Characterizing the draft bill are the following features:

- the provisions covering assembly at parliament, the courts and the State house
- prior notification of the police about the gathering or demonstration.
- Negotiation(s) and consultation(s) between the police and the stakeholders.
- Strong elements of judicial review whenever any gathering or demonstration is prohibited or conditions are attached.
- Regulated police powers; and
- Imposition of civil liability for riot damage arising from gathering(s) and demonstration(s)

Clause 1: Definitions

The definition of what constitutes a gathering has presented problems in certain quarters.

The Public Gatherings Proclamation 23 of 1989 defines it as “ any gathering in or on a public place and provides for exceptions in the form of a gathering for the purpose of a church service; business transaction by members of statutory body; educational purposes; bona fide sports event or entertainment; administrative purposes or by any other body established by or under any law”.

In contrast the South African Regulation of Gatherings Act adopts a broader and all – encompassing definition, which reads:

“Any assembly, concourse or procession of more than 15 persons on any public road or any other public place or premises wholly or partly open to the air –

- (a) at which the principles, policy, actions or failure to act of any Government, political organization, whether or not that party or organization is registered in terms of any applicable law are discussed, attacked, omitted, promoted or propagated;
- (b) held to form pressure groups to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government administration or government institution.

It is submitted that the former definition is flawed in that it does not cover every conceivable situation for one could always have left out a certain category.

The latter position is therefore adopted for the sake of the proposed draft bill.

Clause 2 : Notification of Public Gatherings

From experience on the African continent, it becomes apparent that the requirement of obtaining a licence or permit from authorities (prior to holding a gathering) has not stood the test of time.

From the court decisions studied, one is left with no doubt that licensing gatherings is subject to abuse by authorities, thereby significantly compromising the freedom of assembly.

The proposed law adopts a more liberal approach, which will involve notifying authorities of intended gatherings. It shall be required that any person intent on holding, officiating or presiding at a gathering shall give a 4 day notice to the station commander of the police station in the district closest to the place where the gathering is being held.

Where assembly organizers are unable to deliver notice to the Police, 4 days in advance but not more than 24-hours before the gathering they can still notify the authorities provided that it was not reasonably or practically possible to notify relevant authority (Station Commander) within the prescribed period.

When a person(s) or an organization is intent on conducting a gathering and have less than twenty four (24) hours to give notice, permission shall be sought from the Station Commander, who upon considering public peace; public order; possible injury or death or damage to property can after consulting with the magistrate of the court nearest to the place where the gathering is supposed to take place and only after giving reasons, can he / she refuse permission to hold the gathering, or order that the gathering be conducted in accordance with certain condition(s).

Normal judicial review mechanisms shall apply thereby.

Clause 3: Consultation, Negotiations, and Attachment of conditions and alteration of notices.

One major criticism leveled against the Public gatherings Proclamation is lack of consultation between the police officers and other stakeholders (local authorities, assembly organizers).

The proposed law requires that, upon receipt of notification, the police shall undertake consultation and (if need be) negotiation with assembly organizers, representatives of the local authorities and any other stakeholders that might have interest in the event.

Consultations and negotiations shall focus on contents, amendment of the notice, conditions (to be) attached to the gathering and any other matter of concern to the stakeholders.

Clause 4: Prevention and prohibition of a gathering.

An idea has been noted that the new law should be strengthened such as to give the police the necessary discretionary powers to temporarily ban certain gatherings if the same are, on good grounds, believed to be a threat to public order or peace.

The proposed law has a provision to the effect that *where the station [Regional] commander receives information that there is a threat that proposed gatherings will result in a serious disruption of traffic, injury to participants in the gathering and the police would be unable to contain these threats; a meeting shall be convened with the relevant stakeholders.*

Consultation and negotiation will be undertaken to consider the possibility of prohibiting the gathering and where the Station Commander is still on reasonable grounds, convinced that neither the amendment of the notice nor the attachment of conditions can save the situation, he may prohibit the gathering.

Along with the prohibition, the Station Commander shall be bound to give reasons and his decision shall be subject to judicial review.

Clause 5: Demonstrations and gatherings at or near Courts, Parliament and the State house.

As regards gatherings in the above instances the enquiry must always involve two conflicting interests: the ability of occupants of these premises to conduct their official business with the least possible disruptions.

Whereas in the Demonstrations in or near Court Buildings Prohibition Act, demonstrators could only assemble at the radius of 500 meters from the courtroom, The Public Gatherings Proclamation is silent on gatherings at or near courtrooms.

The former remains law in Namibia, despite the situation having been rectified in South Africa through the enactment of the Regulation of Gatherings Act by reducing the distance from 500 meters to 100 meters (from the courtroom).

In terms of proposed law, *all demonstrations at or near courtrooms, parliament and at the State House shall be held at the radius of 150 meters from the same premises.*

Clause 6: Conduct of gatherings

With the potentially explosive nature of public gatherings and demonstrations, it is imperative that the provision relating to conduct of public gatherings be drafted such that violence, loss of lives and damage to property is avoided at all costs.

Legislation shall incorporate guidelines contained in the Electoral Code of Conduct pertaining to use of hate speech at rallies (*provision to be along guidelines of s 11 (1) of the racial discrimination prohibition Act*); make it illegal for assemblers to carry weapons at gatherings and demonstrations (*in the context of Dangerous Weapons Act and Arms and Ammunition Act*) prohibit any form of disguises in apparel or in whatever form ; make it illegal for assemblers from wearing any uniforms or anything resembling uniforms of the Namibian Defence Force and or Namibian Police.

Clause 7: Gatherings and elections

In line with the terms of reference for this project, it is essential that the proposed law addresses political activities (especially gatherings) of political parties, associations, organizations and Independent candidates during election campaigns.

The draft proposes that political party supporters and leaders conform to the following:

- Intimidation in any form is prohibited.
- A prohibition on weapons (including traditional weapons being brought to any political rally, meeting, march or other demonstration.
- Parties prohibited from holding rallies, meetings, marches or demonstrations in close proximity of each other at the same time of the day.
- Parties to refrain from using public address system between 21h00 and 07h00, which would constitute a nuisance.
- Party members prohibited from disrupting other parties, rallies, meetings, marches or demonstrations.
- Party members and supporters prohibited from obstructing other persons from attending the political rallies of other parties.
- Also party member prohibited from forcing or coercing other persons to attend the political rallies of their parties.
- Party members and supporters prohibited from disfiguring or destroying political or campaign materials of other parties.

All the above will carry a corresponding criminal sanction resulting in a fine of N\$10 000 or imprisonment for 5 years or both such imprisonment and a fine.

Clause 8: Powers of the police

A crucial/integral aspect of sound assembly law is the question of police powers and more particularly, the use of force by the police in dispersing gatherings or demonstrations.

The draft provides that where the police believe (reasonably/on reasonable grounds) there exists a danger of injury to persons or damage to property, he shall be able to call on the assemblers to disperse.

Should demonstrators or assemblers fail to heed the call, the police officer shall then use force to disperse the gathering, which force shall exclude weapons likely to cause serious bodily injury, death or serious damage to property.

The degree of force, which may be used, shall not be greater than is reasonably necessary for dispersing the persons gathered and the force shall be moderated and proportionate to the circumstances of the case and the object to be attained.

Clause 9: Liability for damages from gatherings and demonstrations.

The Public Gatherings Proclamation has left open the question of imposing liability (civil) on the demonstrators for riot damage. In Great Britain, the position is that local authorities and the Police are responsible for certain damage to property caused by riot.

In South Africa, the Regulation of Gatherings Act imposes civil (joint and several) liability for riot damage flowing from a demonstration on the assemblers. Various arguments have been put forward both for and against the idea of having this clause in assembly legislation. Arguments in favour include:

- The demonstrators are more likely to be responsible and accountable if they know they can incur financial losses for any resultant riot damage.

Demonstrators need to conduct themselves within the confines of the law.

Arguments against include:

- The provision is likely to discourage free assembly with demonstrators fearing dire financial consequences that may result.
- Even if riot damage insurance were available, there is a danger that it may prove to be unaffordable.

It is submitted that there is merit in having a liability clause because demonstrators can only get responsible if they know there is a danger of them incurring some financial costs. In

any case organizers would always be able to escape liability by proving that they were not fault.

Clause 10: Regulations

This clause provides for the powers of the responsible Minister to make regulations regarding the exercise of powers; suspension thereof; condonation of actions and exemptions of certain persona and or group of persons from the application of the provisions of this Act or parts thereof.

Clause 11: Offences and Penalties

This section outlines offences and penalties, when a gathering has been conveyed contrary to the provisions of the Act. Any contravention of conditions attached; interference with police officers; attending a gathering knowing it to be illegal, will be sanctioned with a prison sentence, alternatively a fine or both such imprisonment and a fine.

Clause 12: Conflict and repeal of Laws

In the event of a conflict as to whether the provisions of a local authority are applicable, the provisions of this Act will always prevail. The rationale being that local authorities by-laws are insubordinate to this legislation.

Clause 13: Short title and commencement.

This is a self-explanatory section.

ANNEXURE B: DRAFT PUBLIC GATHERINGS BILL

To regulate the holding of public gatherings and demonstrations at certain places; to provide for the imposition of conditions thereof; imposition of joint liability for damages caused during a demonstration and or gathering and to provide for matter connected therewith.

(Introduced by the Minister of)

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows-

Definitions

1. In this Act, unless the context indicates otherwise-

“Station Commander”, in relation to a police station, means a police officer who is in overall in charge of the police station or any police officer acting under the delegation of the said station commander and Regional Commander shall have a corresponding meaning in relation to a region.

“gathering” means an assembly, concourse or procession of more than 35¹ persons in or on any public road or public place:

- (a) at which principles, policy, actions or failure to act of any government or political party or political organisation is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
- (b) held to form pressure groups, to hand over petitions to any person or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.

“magistrate” means a magistrate as defined in the Magistrate’s Courts Act no 32 of 1944 as amended in the Magistrate’s Courts Amendment Act No 9 of 1990.

“minister” means the Minister responsible for police.

“police” means the Namibian Police Force established under Article 115 of the Namibian Constitution.

¹ The Namibian Police has suggested that the number be reduced to 25. Insufficient manpower means starting with smaller numbers as a result of viability of proper policing.

“riot damage” means any loss suffered as a result of any injury to or the death of any person or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.

“police officer” means a member of the Police Force appointed/ designated as an officer by the Inspector-General in terms of section 4 of the Police Act, 1990 (Act No. 19 of 1990).

“municipal council” means a municipal council as referred to in section 6(1)(a) of the Local Authorities Act no 23 of 1992.

“responsible official” means a person appointed as such by the conveners of a gathering or by the Station Commander or his Deputy, as a responsible official, for purposes of a gathering.

“public place” includes any premises or place to which the public or any section of the public, ordinarily or at specific times or for the purposes of a specific gathering, has access, whether as of right or by virtue of express or implied consent, irrespective of whether or not the right of admission to the premises or place is reserved and whether or not payment is required for such admission.

2. Notification of Public Gatherings

- (1) Any person intending to hold, preside, officiate or address a public gathering shall first give written notice in terms of the provisions of this Act.
- (2) The notice shall be given not later than four (4) days before the date on which the gathering is to be held.
- (3) The notice shall be given to the Station Commander {or officer in charge thereof} of the police station nearest to the place where the gathering is to be held.
- (4) The notice referred to in above shall contain at least the following information:
 - (i) the place at which the gathering is to be held;
 - (ii) the nature and purpose of the gathering;
 - (iii) the person(s) or organisation in the name, on behalf or in the interests of whom or which the gathering is to be held;
 - (iv) the names and addresses of persons who will preside and otherwise officiate at and address the gathering;
 - (v) the time, duration and date of the gathering.

- (5) It shall be possible to hand in the notice referred to in subsection (1) less than 4 days but more than 24 hours before the gathering takes place provided that it was not reasonably and practically possible to notify the station commander in advance.
- (6) It shall be incumbent on the station commander to consult and if need be, negotiate with an official of the Municipality {Local authority / Town Council or whatever the case might be} within the area where the gathering is to be held.
- (7) When persons or any organisation is intent on conducting a gathering and have less than twenty four (24) hours to give notice, it shall be required that permission shall be sought from the Station Commander, who upon considering public peace, public order, possible injury or death or damage to property, can after consulting with the magistrate of the court nearest to the place where the gathering is to take place and only after giving reasons, can refuse permission or order that the gathering be conducted in accordance with certain conditions.
- (8) Normal judicial review mechanism(s) will apply thereby.

3. Consultations, negotiations, attachment of conditions and alteration of notices

- (1) If the station commander receives a notice, specified in section 2(1), he shall initiate consultation regarding the necessity for negotiations on anything pertaining to the conduct, conditions or any other aspect regarding the planned or intended gathering.
- (2) (a) If following consultation, the station commander is of the opinion that negotiations are necessary he will initiate negotiations by summoning to a meeting:
 - (i) a member of the local authority; (City Police whenever applicable)
 - (ii) the person notifying the authorities about the gathering; and
 - (iii) any other party who may have an interest in the gathering.
- (b) At a meeting contemplated in section 2(a) above, discussions shall be held on contents of the notice, amendments thereto, additions thereof and conditions.

- (c) It shall be the responsibility of the Station Commander to ensure that such discussion and/or negotiations take place in utmost good faith.
- (3) If agreement is reached at a meeting contemplated in section 2(a) above, the gathering shall then take place in accordance with the -
 - (i) contents of the notice; and
 - (ii) the amendments (if any) on which agreement was reached.
- (4) The parties negotiating at a meeting contemplated under section 3 (2) (a) shall be able to impose conditions regarding the holding of a gathering to ensure that:
 - (i) vehicular or pedestrian traffic is least impeded,
 - (ii) an appropriate distance is maintained between participants in the gathering and rival gatherings;
 - (iii) there is access to property and public places;
 - (iv) the prevention of injury to persons or damage to property.

4. Prevention and prohibition of a gathering

- (1) If credible information (on oath?) is brought to the attention of the Station Commander that there is a threat that a proposed gathering will result in a serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons; or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall call a meeting with the parties referred to in section 3(2)(a)(i)(ii) and (iii) and any other affected stakeholder, to consider the prohibition of the gathering.
- (2) If, after the meeting or consultation contemplated in section 3(1), the station commander is on reasonable grounds convinced that no amendment contemplated in section 3(3)(ii) and not conditions contemplated in section 3(4) would prevent the occurrence of any circumstances contemplated in section 4(1), then the station commander may after consultation with the Regional Commander, prohibit the gathering.
- (3) If the station commander decides to prohibit the gathering, he shall notify the parties referred to in **subsection 1** above and any other stakeholder of the decision and the reasons thereof.

5. Demonstrations and gatherings at or near Courts, Parliament and the State House

1. All demonstrations and gatherings –
 - (a) in any building which is a courtroom, the State House and precincts of parliament or at any place within the radius of 150 metres from such premises are hereby prohibited.

6. Conduct of gatherings and demonstrations

The following provisions shall apply to the conduct of gatherings and, where so indicated, to the conduct of demonstrations:

- (1) Assemblers at a gathering or demonstration shall abide by any law in respect of the carrying of (dangerous) weapons.
- (2) No person present at or participating in a gathering or demonstration or rally (electoral or otherwise) shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.
- (3) No person present at or participating in a gathering shall by way of a banner, placard, speed or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in sex, race, colour, ethnic origin, religion creed or social or economic status.
- (4) No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item, which obscures his facial features and prevents his identification.
- (5) No person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Namibian Police and the Namibia Defence Force.
- (6) No person shall in any manner whatsoever, either before or during a gathering or demonstration, compel or attempt to compel any person to attend, join or participate in the gathering or demonstration.
- (7) No person participating in a gathering or demonstration shall use any megaphone; loudhailer; loudspeaker or any like apparatus in a public place before the hours of 07H00 and after the hours of 19H00.
- (8) No person participating in a gathering or demonstration shall supply; sell or make use of any intoxicating liquor or stupefying drugs, *narcotics* or any substance having or known to have such effect.

7. Gatherings and elections

- (1) The provisions of this Act shall mutatis mutandis be applicable to election campaigning; religious gatherings; celebrations and or other demonstrations.

8. Powers of the police

- (1) If at a gathering or demonstration, a police officer has reasonable grounds to believe that a danger to persons and/or property exists that cannot be averted, he may take one of the following steps:

- (i) notify the conveners any other persons accordingly, that the police will not be able to provide adequate protection for the people participating in such a gathering or demonstration;
- (ii) prevent people participating in a gathering from proceeding to a different place or from disobeying any condition to which the holding of the gathering is subject;
- (iii) guide the participants along a route to ensure that:
 - (a) vehicular or pedestrian traffic is least impended
 - (b) an appropriate distance between participants and any rival gathering;
 - (c) access to property and workplaces;
 - (d) there is no injury to persons or damage to property;

- (2) If the circumstances referred to above cannot be averted by the steps referred to in subsection 1 above, if and when the demonstration proceeds, the police may and only then, take the following steps:

- (a) call upon the persons participating in a gathering or demonstration to disperse and, for that purposes he shall endeavor to obtain the attention of those persons by such lawful means as he deems most appropriate, and then;
- (b) in a loud voice order them in the official language and, if possible, in a language understood by them, to disperse and depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable.

- (3) If within the time so specified the persons gathered have not so dispersed or departed or made no preparations to disperse or depart, a police officer may

order the members of the Police under his command to disperse the gathering or demonstration and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.

- (4) The degree of force, which may be so used, shall not be greater than is reasonably necessary for dispersing the persons gathered and the force shall be moderated and proportionate to the circumstances of the case and the object to be attained.
- (5) No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.

9. Liability for damage arising from gatherings and demonstrations

- (1) If any riot damage occurred as a result of a gathering or demonstration, every organisation on behalf of whom or under whose auspices the gathering or demonstration was held and/or every person who presides, holds, officiates or otherwise participates in a gathering or demonstration shall, subject to subsection (2), be jointly and severally liable as a joint wrongdoer contemplated in chapter II of the Apportionment of Damages Act, 1956 (Act no 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other person who is liable therefore in terms of this subsection.
- (2) It shall be a defence to a person or organisation contemplated in subsection (1) if such a person proves:
 - (i) that he or it did not permit or connive at the act or omission which caused the damage in question; and
 - (ii) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was reasonably foreseeable; and
 - (iii) that he or it took all reasonable steps within his or its power to prevent the act or omission in question.
- (3) For the purposes of -
 - (i) recourse against, or contribution by, any person who, or organization which, intentionally and unlawfully caused or contributed to the cause of any riot damage; or
 - (ii) contribution by any person who, or organisation which, is jointly liable for any riot damage by virtue of the provision of this subsection.

- (iii) any person or organisation held liable for such damage by virtue of the provision of subsection 1 shall, notwithstanding the said provisions, be deemed to have been liable therefore in delict.
- (4) The provisions of this subsection shall not affect in any way the right, under the common law or any other law, of a person or body to recover the full amount of damages arising from negligence, intentional act or omission, or delict of whatever nature committed by or at the behest of any other person.

10. REGULATIONS

The Minister may subject to the provisions of this Act (section...), make regulations in regard to –

- (a) the procedure to be followed in the exercise of police powers; suspension thereof and dispersal of demonstrations and gatherings
- (b) condonation of actions done or purported to have been done under the provisions of this Act
- (c) the exemption of certain persons or groups from the application of this Act.
- (d) Any other matter in regard to which it may be necessary to make regulations in order to achieve the objects of this Act.

11. OFFENCES AND PENALTIES

- 1. Any person who :
 - (a) convenes a gathering in respect of which no notice or adequate notice has been given in accordance with the provisions of section 2 (1), or
 - (b) after giving notice in accordance with the provisions of section 2 (1), fails to attend a relevant meeting called in terms of section 3, or
 - (c) contravenes or fails to comply with any provision of section 3 (3) in regard to the conduct of a gathering or demonstration; or
 - (d) knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or
 - (e) convenes or attends a gathering or demonstration prohibited in terms of this Act

- (f) knowingly contravenes or fails to comply with a condition imposed in terms of this Act; or
- (g) hinders, interferes with, obstructs or resists a member of the Police, convener or any other person in the exercise of their powers, duties and or rights under this Act,

shall be guilty of an offence and on conviction liable to a fine not exceeding N\$0000.00 or to imprisonments for a period not exceeding {....} or to both such fine and such imprisonment.

- 2. It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering was spontaneously.

12. CONFLICT AND REPEAL OF LAWS

- (1) In the case of a conflict between the provisions of this Act and any other law applicable in the area of jurisdiction of any Local Authority the provisions of this Act shall prevail.
- (2) The Acts specified in Schedule,1 are hereby repealed to the extent set out in that schedule

13. SHORT TITLE AND COMMENCEMENT

This Act shall be called the Public Gatherings Act 2004, and shall come into operation on a date fixed by the Minister by proclamation in the Government Gazette.

Schedule 1.

- (a) Demonstrations in or near Court buildings Act 71 of 1982;
- (b) Public Gatherings Proclamation 23 of 1989;
- (c) Security Matters Proclamation (AG) 29 of 1985.

