Preventive Powers of Police in India and Namibia

Some Observations on Different Approaches in Constitutionalism

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The Topic

This contribution for Roberto Toniatti is a very first attempt to point out some aspects and differences in establishing a modern rights-based police law (i.e. law and order policing as distinguished from criminal procedure) after independence in two very different countries, both of which, to my knowledge, have never been in the focus of his research[1].

On the one hand, I will shortly look into the legal framework of policing in India. This country is often referred to as the biggest democracy with a stable history of constitutionalism since 1950, but one has to point out that this picture has been sullied on various occasions. I will mention here, for example, the state of emergency under Indira Gandhi as well as the more recent crisis of constitutionalism and rule of law - especially under the second term of PM Narendra Modi. Besides, various recent decisions of the Supreme Court of India, for decades an "activist" Court protecting human rights and fundamental rights, have also drawn much criticism from a rights-based approach.

On the other hand, I will focus on Namibia, a not so well known country on the southwestern tip of Africa, which has, to put things into perspective, fewer inhabitants than Berlin. Namibia, after having been a German colony until WW I, went through a long and bloody struggle for independence against decades of South African rule and its apartheid system. The country only gained independence in 1990. Namibia is often cited as one of the most rights-based countries on the African continent. So, what did Namibia do differently compared to India?

Obviously, the present endeavor has no chance but to remain on the surface, yet it will hopefully succeed in underlining some major differences between the two countries. This contribution draws on research and earlier publications on Indian and Namibian law by this author[2]. However, this is the first attempt to juxtapose the very different experiences and approaches in both countries. It is still "work in

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[1] Cf. https://webapps.unitn.it/du/it/Persona/PER0000359/Pubblicazioni.

[2] Clemens Arzt: Constitutionalism, Rule of Law and Preventive Powers of Police in Namibia, Namibia Law Journal 2019, 7 ff.; Rule of Law and Preventive Powers of Police in Namibia - A rights-based approach, VRÜ - WCL World Comparative Law 2019, 504 ff.; Preventive Powers of Police in India; KIIT Journal of Law and Society 2016 Vol. 6 No. 1, 7 ff.; Police Reform and Preventive Powers of Police in India – Observations on an Unnoticed Problem, VRÜ - Verfassung und Recht in Übersee 2016, 53 ff.

progress" and therefore any comment on the subject from readers is warmly welcome.

The focus will be on "preventive" powers of police, in contrast to police powers in criminal procedure once a crime has been / might have been committed; i.e. criminal justice. This notion explicitly does not refer to "preventive detention" under Indian Law[3], but to "ordinary" and "everyday" means of policing, e.g., arrest, search, interdictions to stay in a certain area or measures against assemblies, like dispersals, and many others. In India, such powers are settled in both Union and State Police Acts, as well as in the Code of Criminal Procedure. From a rule-of-law-based point of view, this reduplication is problematic because it lacks transparency, since it is not clear, under which law and legal prerequisites the police are allowed to act.

Giving the police leeway as to which statutory provision or legal rule to apply, often leads to the decision to revert to the law with lower legal thresholds. Thus, from my point of view, a strict and clear-cut distinction and separation of (i) law and order policing from (ii) police powers in criminal procedures, is at least one step to contain such powers in the interest of the protection of fundamental freedoms and human rights. This may sound very "legalistic" and certainly cannot lead to any result if the public understanding remains that in law and order policing it does not matter what the law of the land is because the police do not obey the law anyway. This apparently really is the case, as so many Supreme Court decisions and findings of various Commissions demonstrate and confirm. However, this results in legal nihilism, which certainly is not in the interest of a material or substantial rule of law.

Ma tutto questo, in che modo riguarda Roberto Toniatti? Noi ci siamo conosciuti nell' inverno del 2006/07 a Trento e non so neanche se il festeggiato si ricorda ancora di me. Uno dei vantaggi di essere professore in Germania è sicuramente quello di essere assegnato un mezz'anno di ricerca abbastanza regolarmente. Allora scelsi l'ateneo di Trento per una ricerca sulla libertà di riunione in Italia, protetto dall' Articolo 17 della Costituzione Italiana. Mi resi conto che la tipica percezione tedesca sull'entusiasmo italiano di manifestare la propria opinione in luoghi pubblici non era rispecchiato nella giurisprudenza italiana, salvo la monografia di Alessandro Pace del 1967, la quale, arrivando a Trento in prestito bibliotecario da Bologna, non aveva neanche le piegature dei fogli tagliate; 40 anni dopo la pubblicazione era ancora intonsa. Allora mi misi al lavoro scrivendo un libro sull'argomento. Durante uno degli ultimi giorni all'ateneo trentino fui invitato da Roberto a presentare l'esito del mio lavoro. Molto diverso da un evento comparabile che aveva avuto luogo alla fine del mio anno academico in India ("research about law on powers of police in India is totally needless because they do not obey the law anyway"), Roberto con grande amichevolezza accolse le mie ipotesi scientifiche con le parole "avevamo bisogno di qualcuno dall'estero per finalmente analizzare questo topos". Sicuramente esagerato ma che momento edificante dopo tanti mesi di dubbi sul

[3] Cf. the Preventive Detention Act, the Maintenance of Internal Security Act, the Prevention of Smuggling Activities Act, the Terrorist & Disruptive Activities (Prevention) Act, the Prevention of Terrorism Ordinance, and the recent Unlawful Activities (Prevention) Act.

progetto scientifico. Allora mettiamoci in moto per un lungo viaggio dall'Asia all' Africa…

The Indian experience

The debate about shortcomings and problems in policing in India is focused on the lack of accountability and professionalization of the organization as well as on numberless and severe human rights violations. Yet this is rather not a legal debate. "Digging" into the law of the land almost 70 years after Independence by thoroughly analyzing police powers under Union and State Police Acts is much less popular in academic or other writing. A widespread opinion seems to be that it does not make much sense to analyze shortcomings in statutory law because (i) India is a common law country and (ii) the Indian police do not obey the law anyway. At the same moment, it is objected that granting the police a set of clearly stated but also delimited statutory powers would automatically lead to even more powers of the police. To the point, it has to be conceded that any revision and modernization of statutory powers, e.g. in Police Acts and the Code of Criminal Procedure, implies the peril of an increment of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, police powers rather point in the opposite direction.

Police Powers in a Nutshell

Police Powers in India are stipulated in both, Union and State Police Acts and in the Code of Criminal Procedure (Indian CrPC 1973[4]). The Indian CrPC vests the police with broad powers in the prosecution of crime, thus related to presumed breaches of the Penal Act and related laws. This is the purpose of criminal justice. However, the Indian CrPC grants a broad set of powers to the police for the purposes of maintenance of public order and tranquility in Section 129 et seg. CrPC; i.e., law and order policing or preventive powers. This obviously is not per se against principles of rule of law. However, such amalgamation may lead to a lack of transparency and predictability of admissible police means and use of police powers giving the police a fair chance to switch from means under the BPA 1861 or

[4] In this paper, I will only refer to the CrPC but not to State amendments to this Code.

comparable Police Acts to the CrPC and back, depending on what seems to better fit in terms of lower thresholds for action.

Prosecution of crime is directed towards what happened in the past, assessed from an ex post perspective. This is the major subject of penal law and criminal procedure. To the contrary, police law, law and order policing, or maintenance of public order and tranquility are directed towards what might happen in the near future, starting from an ex ante perspective. Yet this topic is hardly discussed in scholarly writing in India.[5] From my point of view, it would be in the interest of an effective protection of fundamental rights under the Indian Constitution to "bundle" police powers in the field of law and order policing in one Act, precisely, narrowly, and exclusively describing which powers the police have to counter "public order" problems.

Limitations on the powers of police to interfere with one's constitutional and human rights are warranted by the Indian Constitution as well as by countless Supreme Court (SC) decisions on the realities of policing in India. However, most of these decisions have almost systematically been ignored by both the legislature as well as by the police, even though the police are supposed to obey the rule of law.[6] While a lot has been written on the shortcomings of policing in India over the decades[7], enriched and enhanced by many official Commissions and Committees on the Union as well as on the State level, it seems that statutory law on police powers as such does not generate much attention in scholarly writing in India.[8]

Starting in the 19th century and up to date many official committees and commissions have analyzed the state of policing in India, most of the time without "tangible" results in real life and on the legislative powers, neither during the British

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[5] Cf. Arshinder Singh Chawla, Separation of Law & Order and Investigation, Presentation at the 39th All India Police Sciences Congress.

[6] But see Bipan Chandra/Mukherjee/Mukherjee, India since Independence, New Delhi 2008, p. 21, referring to the "paradoxical" acceptance of the general concept of rule of law even by the colonial state, which was "basically authoritarian and autocratic".

[7] See, e.g., K. Alexander, Police Reforms in India, New Delhi 2006; Sankar Sen, Enforcing Police Accountability through Civilian Oversight, New Delhi 2010; Joshua Aston, Restructuring the Indian Police System: Need for Accountability and Efficiency, 2011; CHRI, Police Reform Debates in India, 2011.

[8] Exemplary exceptions are Uma B. Devi, Arrest, detention and criminal justice system, Oxford 2012, and N. Krishna Kumar, Human Rights Violations in Police Custody, New Delhi (2009).

Raj nor in modern India. Bayley in his early and fundamental study in 1969 concludes, "contemporary police philosophy in India is an ironic combination of British liberal tradition and British colonial practice".[9] Has policing in general and the respect of constitutional and fundamental rights by the police changed for the better since then? Police reform is a much-discussed topic in India with many books by active and former police officers and scholars. Interestingly, however, the legal means and statutory police powers are hardly ever mentioned in any of such books. Some authors mention the basic idea of the rule of law. Nevertheless, this hardly ever transcends a passing mention without going into much detail. When discussing limitations of police powers, reference is made rather to human rights than to fundamental rights under the Indian Constitution, which is astonishing from my point of view. It seems that a well-grounded legal analysis of police powers and their necessary limitations under the rule of law still is on the waiting list in academia in India.

Rule of Law and Realities of Policing

Talking about the police to the Indian aam aadmi will hardly ever result in a positive statement about the institution. Not different in academic writing. In short, unlawfulness, behavior and distrust in the police seem to be major problems of the Indian police.[10] Numberless examples of complaints about misbehavior, mala fide practices and unlawful action can be found in the media, in scholarly writing as well as in Jurisprudence. The National Human Rights Commission (NHRC) in 1999 alone received almost 55,000 complaints, of which many concerned the police.[11] Obviously, not satisfied with the police dealing with complaints, the Commission in a drastic step in November 2013 asked the Government of Maharashtra to arrest and bring the Commissioner of Police, Pune, before the Commission on a set date,

[9] Bayley, Police and Political Development in India, Princeton 1969, p. 422.

[10] See, e.g., G.P. Joshi, Policing In India – Some Unpleasant Essays, New Delhi, 2013; Kamalaxi G. Tadsad/Harish Ramaswami, Human rights and police administration, New Delhi, 2012; Sankar Sen, Enforcing Police Accountability through Civilian Oversight, New Delhi 2010.

[11] See Sankar Sen, Tryst with Law Enforcement and Human Rights, New Delhi 2002, p. 294-96.

because of his "casual and mechanical approach (…) in a matter relating to the human rights violation of a person of Scheduled Caste."[12]

In 2011 the SC, with reference to D.K. Basu v. State of West Bengal[13] summarized with most obvious discontent: "Policemen must learn how to behave as public servants in a democratic country, and not as oppressors of the people."[14] When studying the plethora of SC rulings on police misbehavior and use of illegal means, there remains little doubt that in many, perhaps most of the cases the victims belong to the poor and marginalized sections of society. Even though changes may have taken place in the police of at least some States, in general the Indian police still seem to face a major problem when it comes to adherence to human and fundamental rights as well as to the rule of law.[15] On the other hand, because of the widespread perception of a malfunctioning criminal justice system, probably quite a significant share of the public does not mind when the police resort to illegal means as far as fake encounters, i.e. extrajudicial killings[16]. As Sen puts it, the "police are encouraged to do the dirty work of society because the criminal justice system is not functioning and overhauling of the entire administration of justice is too big a task."[17]

Discussion on the use of illegal means by police is "standard" in books on policing.[18] The use of illegal means to produce evidence and to obtain confessions is commonly referred to as "third degree" methods of investigation. In addition, evidence not only in a few cases is said to be a product of padding and concoction,

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[12] NHRC press release, 25.11.2013, at http://nhrc.nic.in/dispArchive.asp?fno=13021.

[13] 1 SCC 416 (1997).

[14] Mehboob Batcha v. State, (2011) 7 SCC 45 (53), introducing the case against police officers with the remarks: "If ever there was a case which cried out for death penalty it is this one …" (ibid. p. 47).

[15] See, e.g. Sen, note 11, p. 333-379; see also NHRC reports on some individual cases at http://nhrc.nic.in/PoliceCases.htm.

[16] See, e.g., the case in Peoples Union for Civil Liberties v. Union of India, 1997 SCR (1) 923 at 929, where the police seized "two persons along with some others (…) from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the courts even in the case of disturbed areas." Most actual Rotash Kumar v. Haryana, AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. was granted.

[17] Sen, note 11, p. 352.

[18] See also NPC, 4th Report, at 27.26.

due to (too) high standards of evidence required by the courts.[19] This at least seems to be a broad perception on the side of police officers even though already in 1978 the SC pointed out that the "[c]redibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect (…). Why fake up?"[20]

Especially when it comes to "gang dacoity" or "terrorism", fake encounters (illegal killings by the police) as well as true encounters often seem to be the easiest device to earn rewards and recognition for a police officer.[21] It seems to be widely believed inside the police that the only effective strategy to deal with criminal and extremist violence is to "overcome" inadequacies and loopholes in the laws and procedures that govern criminal trials.[22] The National Human Rights Commission (NHRC) documented 555 cases of alleged fake encounters alone from October 2009 until February 2013 across India[23] while the number of cases registered with the NHRC amounts to almost 3000 for the period from October 1993 to April 2010. How many of this cases involved illegal killings by the police is highly controversial, however there is no doubt that such cases do exist[24] to a significant amount.[25]

People taken into arrest by the police, find themselves in a very vulnerable position, which the National Police Commission (NPC) appropriately betokens as the "trauma of arrest".[26] According to the Commission's findings, legal provisions granting

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[19] See, e.g., Kirpal Dhillon, Police and Politics in India, New Delhi 2005, p. 154.

[20] Inder Singh v State, (1978) 4 SCC 161 at 162-63.

[21] See NPC 8th Report, at 61.38; James Vadackumchery, Wounded Justice and the Story of the Indian Police, New Delhi 2001, p. 11-31; Sen, note 11, p. 352.

[22] Dhillon, note 19, p. 174-176 and 193, giving examples of official "approval" of such methods.

[23] India Today 4.7.2013 at http://indiatoday.intoday.in/story/fake-encounters-congress-ruled-states-narendra-modi-gujarat/1/286891.html.

[24] For some most recent cases see, e.g., Mehboob Batcha v. State, (2011) seven SCC 45 and Prakash Kadam v. Ramprasad Vishwnath Gupta, (2011) 6 SCC 189.

[25] Cf. Sanjeev Sirohi, Fake Encounters Must be Punished with Death, 2012 Criminal Law Journal, Vol. II, p. 164-67.

[26] NPC 3rd Report, at 22.22.

discretionary power of arrest to the police, which might be unavoidable in general, on the other hand lead to corruption and malpractices.[27] Therefore, the arrest of a person according to the NPC can only be governed by public interest and the actual requirements of an investigation and not by a "mere desire of the police to show off their power".[28] The NPC summarizes that public "fear of police essentially stems from the fear of an arrest by the police in some connection or other."[29] However, the NPC also points to the fact that not only the police may be responsible for a high number of arrests that at the end turn out to be unnecessary.[30] "Apart from a legal perception of the necessity to make arrests in cognizable cases, the police are also frequently pressed by the force and expectations of public opinion in certain situations to make arrests, merely to create an impression of effectiveness. (…)"[31]
The NHRC right after its constitution in 1993 ordered that all cases of deaths in police custody have to be reported to the Commission within 24 hours for further inquiry.[32] Cruel treatment and death of persons in custody or arrest give reason for many rulings in individual or Public Interest Litigation (PIL[33]) cases. PIL in these cases is a efficient means of human rights activists to bring cases even to the SC of India within short time under fairly low entrance barriers. Another effective and often used means of control of policing are suo moto cases, i.e., when the Courts take a case on their own. This action is warranted under Article 32 & Article 226 of the Indian Constitution. The SC in 1985 already urged, "to amend the law appropriately so that policemen who commit atrocities on persons who are in their custody are not allowed to escape by reason of paucity or absence of evidence

[27] Ibid at 22.20-21 and 22.28.

[28] NPC 4th Report, at 27.24.

[29] NPC 3rd Report, at 22.24.

[30] See NPC 3rd Report, at 22.23.

[31] NPC 3rd Report, at 22.27.

[32] See, e.g., http://nhrc.nic.in/cdcases.htm; see also Defining an Absence: Torture 'Debate' in India; Economic & Political Weekly 28/06/2014, p. 69.

[33] On the constitutional base of PIL see S.P. Gupta v. President Of India, AIR 1982 SC 149, at 188 et seq.

(…)."[34] In D.K. Basu v. West Bengal the SC raised the point: "Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. (…)."[35]

Not much seems to have changed in policing since then. Still the law of the land and its statutory foundations are in urgent need of close examination, something that does not attract much interest in academic writing however[36].

Since the Judiciary in cases of police misbehavior and infringements of fundamental and human rights often cannot provide for redress in due time,[37] the SC since the 1980s is putting an emphasis on financial compensation for police abuse of powers. This is also supposed to be a means of preventing illegal action and enforcing due compliance with human and fundamental rights by the police in the future.[38] Thus, financial compensation to some extent has become a remedy under public law which not only has the function to "civilize public power" but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved.[39] However, such compensation most probably will not have any effect unless police officers are personally made liable.[40]

Discussions on Police Reform

[34] State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416 at 421.

[35] D.K. Basu v. West Bengal, (1997) 1 SCC 416 at 424.

[36] One noteworthy exception is Devi, note 8, which remarkably has been published in the UK; see also Joshua N. Aston, Torture behind Bars, New Delhi 2020.

[37] Cf. Sebastian Hongray v. Union of India, (1984) 1 SCC 339.

[38] See Rudul Sah v. State of Bihar, (1983) 4 SCC 141, commonly referred as the first case; see also Sebastian Hongray v. Union of India, (1984) 1 SCC 339; Bhim Singh v. State of Jammu & Kashmir, (1985) SCC 677; D.K. Basu v. West Bengal, (1997) 1 SCC 416; Rotash Kumar v. Haryana AIR 2014 SC (Supp) 182, were compensation of 2 Mio. Rs. for illegal killing by police was granted.

[39] Durga Das Basu, Commentary on the Constitution of India, Agra 2007, p. 3215-16.

[40] Devi, note 8, p. 74; see also Arvinder Singh Bagga v. State of U.P, 1995 AIR SC 117 at 119: "… it will be open to the State to recover personally the amount of compensation from the police officers concerned".

Several official and high-ranking commissions and committees on police reform have been set up in India on the Union level[41] since Independence. However, the first such commission was inaugurated only 30 years after independence. This clearly demonstrates that at a "colonial hangover"[42] was accepted by government and legislators for a long time after independence. The Union government in 1977 installed the National Police Commission (NPC) 1977-81. It was given a very broad mandate, stating, "[f]ar-reaching changes have taken place in the country after the enactment of the Indian Police Act, 1861 and the setting up of the second Police Commission of 1902, particularly during the last thirty years of Independence."[43] The NPC produced no less than eight extensive reports, making wide-reaching recommendations on police reform.[44] 120 years after the enactment of the BPA of 1861, the NPC in 1981 also submitted the first comprehensive bill for a complete replacement said Act. Chapter IV deals with duties, powers and responsibilities of the police without clearly separating duties and powers of the police. The draft grants – inter alia – vast powers to the police to limit the exercise of fundamental rights, e.g., freedom of assembly or freedom of speech by mere police regulation. The ambitious project of the first NPC however never attracted much interest, however.[45]

Fifteen years later two former senior police officers filed a PIL in the SC requesting the Court to direct the governments of India to implement the recommendations of the NPC 1979-81,[46] which had not yet been implemented by the Union or by State governments. In response to the directions of the SC in May 1998, the Union government set up the so-called Ribeiro Committee. The Committee released two reports, which both focused on police organization and accountability, but not on

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[41] Many states set up State Police Commissions since Independence, which cannot be dealt with here.

[42] Dhillon, note 19, p. 52, using this notion in a slightly different context.

[43] NPC 1st Report, Preface.

[44] Short summary at CHRI, Police Reform Debates in India, p. 3-19 at www.humanrightsinitiative.org/publications/police/PRDebatesInIndia.pdf; full reports at http://bprd.nic.in/searchdetail.asp?lid=407.

[45] For a critical evaluation see Arvind Verma, The Indian Police: A Critical Evaluation, New Delhi 2005, p. 206-28.

[46] Prakash Singh & Ors. v. Union of India & Ors, Writ petition (civil) No. 310 of 1996.

the powers of the police. However, the Committee was closing ranks with the NPC in its call for a new Police Act. Shortly after the release of the two reports, the Union government installed yet another committee to look again into police reform. The Padmanabhaiah Committee was vested with a broad agenda to be finished within a few months. The committee released its only report in August 2000.[47] Yet another Committee, the Police Act Drafting Committee (PADC), also known as the Soli Sorabjee Committee, was set up by the Ministry of Home Affairs and concluded its works in October 2006. The draft prepared by the PADC was also published on-line to maintain transparency in the Committee's deliberations. The Preamble already outlines a rather new approach, inter alia stating "respect for and promotion of the human rights of the people, and protection of their civil, political, social, economic and cultural rights" to be "the primary concern of the Rule of Law". Yet this Model Act did not provide for powers of police at all but rather concentrated on organizational matters and others. This was not different with the Model Police Bill 2015 either; eventual subsequent State Acts cannot be scrutinized here.

The British Police Act of 1861 – Still a Landmark

Even though nowadays many Indian States have enacted new Police Acts[48], the BPA of 1861 to some extent still is a "blueprint" concerning powers of police. However, the following remarks can only refer to a few selected topics important with regard to the fundamental rights briefly dealt with above. According to Section 23 BPA it "shall be the duty of every police-officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority (…)." Section 23 is understood not only to implement "duties" but also to grant "powers" to the police.[49] The underlying assumption seems to be that any duty transferred to the police automatically includes the necessary powers. This, however, from my point of view is in conflict with the idea of the rule of law. Section 23 requires interpretation and needs to be construed according to the general rules for the

[47] As for the Ribeiro Committee no official documentation of this commission can be found.

[48] See https://pib.gov.in/Pressreleaseshare.aspx?PRID=1559100.

[49] See, e.g., Chandra Behari, Police Act 1861, Allahabad 1961, p. 18.

interpretation of legal rules.[50] In general, reference to the historical intentions of the lawmaker may also be helpful. In this case, however a reference to the pre-constitutional setting under the British rule does not appear to be justified in the context of a modern constitutional State. Here, it can only be emphasized here[51] that the equalization of "powers" and "duties" which is still widespread in legal discussion in India does not correctly reflect the legal setting but rather a lack of differentiation also present in the interpretation of Section 149 CrPC.

From a rights-based perspective, to impose certain duties on a police officer should not per se vest the officer with powers or authority to execute such duties. To protect fundamental rights, it is the legislative that has to decide under the rule of law and in the light of the Constitution, which powers are granted to the police and what should be the legal prerequisites and thresholds for such powers. From my perspective, it is disturbing, to find most rules on (preventive) powers of police for law and order policing in the CrPC, which essentially is a statute that deals with criminal justice but not with public order policing. In effect, there exists a parallel statutory "anchorage" of preventive police powers, both under police law as well as under criminal procedure law. Besides, other preventive powers are provided for under special law, e.g., on preventive detection or arms control, which cannot be analyzed here. Thus, the CrPC is not only adjective law of criminal justice, providing the rules for prosecution and punishment of offenders under the Indian Penal Code (IPC), but also comprises powers that constitute substantive law for the prevention of dangers, nuisance, or offences. From a systematic point of view this might call for a more articulate delimitation between preventive powers under Police Law on the one hand and Criminal Procedure Law on the other hand, both providing for significant powers of the police to encroach upon fundamental rights. Besides, legislative powers on criminal procedure are a Union prerogative while legislation on police law is a States issue according to Article246 Constitution and the Seventh Schedule. Again, this is a legal topic does not draw much attention in scholarly writing on the police in India. From my perspective, it might be in the interest of the protection of constitutional freedoms to combine preventive powers in only one

[50] Most sophisticated G.P. Singh, Principles of Statutory Interpretation, Agra 2008; see also Raichurmatham Prabhakar v. Rawatmal Dugar, AIR 2004 SC 3625 (3630).

[51] For a more detailed discussion see references in note 2.

Act, as elaborated above for systematical reasons preferably police law. This might help enhance a concept of clear-cut separation of duties and powers of the police. However, such delimitation for whatever reason does not seem to be in the focus of legal writing in India.[52]

The Indian Approach in Law and Order Policing

Discussion about the police in India is predominantly focused on accountability and professionalization of the police but with a few exceptions seems to neglect constitutional limits and standards under the rule of law when it comes to preventive police powers while police powers in criminal proceedings draw more attention in public and academic debate. The apprehension seems to be that granting the police a set of clearly stated but also delimited statutory preventive powers would inevitably lead to even more powers of the police, interestingly a controversial topic already in early 19th century debate on modernization of police in the UK.[53] Of course, any revision and modernization of statutory powers of the police implies the risk of an expansion of police powers detrimental to fundamental rights. While stressing rule of law values might lead to prioritizing fundamental rights, "police powers" rather point in the opposite direction.[54] Rule of law in this context obviously refers to a substantive,[55] not only a formal concept. Since most of the existing law stipulating police powers in India is still based on a pre-constitutional model of police, it does not seem to be premature in 2020 to discuss a fundamental rights-based concept of police powers in India. The purpose obviously has to be a better protection of fundamental rights by clear-cut statutory

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[52] Cf. R.V. Kelkar, Criminal Procedure, Lucknow, 2011, p. 743, stating: "it was felt expedient and necessary to include in the Code certain pre-emptive measures for the prevention of crime and certain other precautionary measures for the safety and protection of society"; without bothering to mention who felt such need in which context? See also Gulam Abbas v. State of Uttar Pradesh, 1982 SCR (1) 1077 at 1083: "The power conferred under section 144 Criminal Procedure Code 1973 is comparable to the power conferred on the Bombay Police under section 37 of the Bombay Police Act, 1951 - both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder …"

[53] Cf. David Dixon, Law in Policing, Oxford 1997, p. 56 et seq.

[54] Cf. Andrew Sanders/Richard Young, Police Powers, in: Handbook of Policing, Newburn (ed.), Cullompton 2008, p. 282, on "due process" vs. "crime control" values.

[55] Cf. D.K. Basu v. West Bengal, (1997) 1 SCC 416 at 424; see also M.P. Jain, Indian Constitutional Law, Gurgaon 2013, p. 1575.

limitations of police powers. From my point of view, this would add another important feature to the discussion on police reform in India.

Yet, if policing in India is supposed to comply with essential standards of a democratic society under the rule of law, police training, professionalization, better working environment, adequate payments schemes, attitudinal changes in the police etc. certainly are indispensable prerequisites of change for a modern police in a democratic society based on fundamental rights of its citizens. Nevertheless, for all that, the current law of the land, granting the police vast and not at all clearly delimited powers to encroach up fundamental and human rights, needs to be scrutinized, too.

The Namibian Experience in Contrast

Very different from India, Namibia with Independence in 1990 not only implemented a modern Constitution with an explicit Bill of Rights, but at once also laid the base for a modern post-colonial police by enacting the Police Act of 1990 [hereinafter: PA 1990]. Instead of accepting a colonial hang over, which here would refer to South African law, because German colonial law, de facto ending in WW I, did not have influence on the new legal setting. However, some links to basic ideas in modern German constitutional law can be traced, probably due to Germany's membership in the so-called Western Contact Group accompanying Namibian Independence.[56]

Namibia cut off the past by introducing the legal base for rule of law principles in policing. Since the police are, perhaps, "the most visible daily manifestation of the state and of the rule of law in civilians' lives"[57], powers of the police really matter. Police powers as a notion or legal category in a modern constitutional context[58] refer to means or measures used by the police for accomplishing their tasks, such

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[56] Cf. Nico Horn, note 75, p. 16; Loammi Wolf, The Constitutionality and Legality of Tax Incentive Programme questionable, UNAM Law Review 2017 Vol. 3 (2) p. 17; see also Stylianos-Ioannis Koutnatzis, Comparative constitutional law thoughts on the reception of the proportionality principle overseas, VRÜ 2011 Vol. 44(1) p. 47, referring to comparable German constitutional principles (Schrankenvorbehalt).

[57] Rama Mani, Contextualizing police reform: Security, the rule of law and post–conflict peacebuilding, in: International Peacekeeping, 1999, Vol. 6 (4), p. 22.

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

as questioning, arrest, search and seizure, entering of premises and houses, interception of phones etc., only as provided for by (statutory) law in a rights-based setting.

Police powers under a concept of rights-based constitutionalism require a legitimate and legal "foundation"[59], which has to adhere to constitutional requirements in Namibia, most prominently those in the "Bill of Rights" in Chapter 3 Namibian Constitution (hereinafter: NC), as well as under (international) human rights standards. Any use of a power of the police to a greater or lesser extent constitutes an intrusion upon such rights and freedoms of the person affected. For this reason, different from an approach in a Namibian Handbook for the Police, I do not consider police powers to constitute "rights"[60] of the police, as this might lead to an understanding of competing rights of citizens and police, which does not fit with the constitutional provisions on rights and freedoms of the individual.

Different from police powers under the new Namibian Police Act of 1990, criminal procedure is still governed by the (than) South African Criminal Procedure Act of 1977. However, this part of colonial law by legislative amendments and Court decisions in many instances was brought in line with the Namibian Constitution of 1990, while the draft of a new Criminal Procedure Act in 2004[61] never came into power. The relationship and interdependence between police powers on the one side and constitutional rights on the other side in criminal procedure has been analyzed and adjusted in scholarly writing[62] and Court decisions in Namibia. Specific powers and means of the police under the Police Act of 1990 to the contrary seem to attract little attention by legal scholars and in Court decisions in Namibia as it is the case in India. This is an interesting parallelism to India, which I could not inquire in depth so far unfortunately. The protection of fundamental and human

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

[60] But see Nicol-Wilson/Katamila in: Sam K. Amoo et al., A handbook on human rights for the Namibian Police, 2000, revised edition 2006, p. 50.

[61] On major differences of both Acts, see Nico Horn/Schwikkard, Commentary on the Criminal Procedure Act 2004.

[62] See Mapaure et al., note 59, on pretrial criminal procedure; Jamil Ddamulira Mujuzi, The admissibility in Namibia of evidence obtained through human rights violations, African Human Rights Law Journal 2016 Vol. 16, pp. 407-434.

rights of suspects in a criminal proceeding at least on a theoretical or abstract level seem to be accepted in both countries. Perhaps law and order policing seems to be something so broad and unspecific as well as in the general interest of society that it attracts less attention in legal theory and research in both countries. This interestingly is the case with policing freedom of assembly in Italy, too.[63]

Yet, 40 years after Indian independence, Namibia has introduced a new constitutional and statutory framework for its police[64], implementing from the very beginning "modern"[65] and liberal[66] standards of constitutionalism[67] and substantive[68] rule of law[69], as well as a bill of rights.[70] Consequently, Namibia is often considered to be one of the most elaborate examples of democratic government and human rights protection on the African continent. The status of rule of law and constitutionalism in Namibia has generated quite broad scholarly

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[63] In more detail see Arzt at note 2.

[64] On the transition in post-conflict settings see Mani, note 57, pp. 15-16; see also Laurie Nathan, Human Rights, Reconciliation and conflict in Independent Namibia: The Formation of the Namibian Army and Police Force, in: Rupesinghe (ed.), Internal Conflict and Governance, 1992, pp. 152-68; Colin Leys, State and Civil Society: Policing in Transition, in: Leys/Saul (eds.), Namibia's Liberation Struggle: A Two-Edged Sword, 1995, pp. 133-52

[65] Cf. Ntanda Nsereko, note 58, p. 470.

[66] Mapaure et al., note 59, p. 5.

[67] On the basic ideas of constitutionalism in Namibia see Sam K. Amoo, An introduction to Namibian law: materials and cases, 2008, pp. 313 et seq.; for an all-African context see André Mbata Mangu, The African Union and the promotion of constitutionalism and democracy in post-colonial Africa: Ten years on, in: Namibia Law Journal 2012, Vol. 4 (2), 25-56.

[68] See Mani, note 57, pp. 17-18.

[69] But see Marinus Wiechers, The Namibian Constitution: Reconciling legality and legitimacy, in: Anton Bösl/Horn/du Pisani, Constitutional Democracy in Namibia 2010, pp. 45-62, on rule of law versus legality and legitimacy in modern Namibia and South Africa.

[70] For an early analysis see Colin Kahanovitz, The Namibian Bill of Rights: Implications for the Promotion of Procedural and Substantive Justice in Criminal Cases, in: Criminal Law Forum Vol. 2 (3) 1991, pp. 569-94.

interest in the past.[71] Yet, following a rather enthusiastic first decade[72] after independence, more recently concerned observations[73] on the status of democracy[74], rule of law[75] and constitutionalism[76] can be found.

Human Rights and Freedoms in the Namibian Constitution

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

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[71] See, e.g., Nico Horn/Hinz (eds.), Beyond a quarter century of constitutional democracy, Process and Progress in Namibia; 2017; Chucks Okpaluba, State liability for acts and omissions of police and prison officers: recent developments in Namibia, in: Comparative and International Law Journal of Southern Africa 2013, Vol. 46 (2), pp. 184-210 (2014); Namibia Institute for Democracy/Institute for Public Policy Research (IPPR), The constitution in the 21st century: perspectives on the context and future of Namibia`s supreme law, 2011, Oliver C.; Ruppel/Ruppel-Schlichting, Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture? in: Journal of Legal Pluralism 2011 Vol. 64, pp. 33-63; Peter VonDoepp, Politics and judicial decision-making in Namibia: Separate or connected realms?, IPPR Briefing Paper No. 39, 2009; Nico Horn/Bösl (eds.), Human rights and the rule of law in Namibia, 2008 (2009 2d edition).

[72] See already: Raoul Wallenberg Institute, Human Rights Workshop Namibia., Melander [ed.], 1991.

[73] See, e.g., Gretchen Bauer, Namibia in the First Decade of Independence: How Democratic?, in: Journal of Southern African Studies 2001, Vol. 27 (1), pp. 33-55.

[74] Cf. Henning Melber, Melber, Understanding Namibia. The trials of independence, 2014 p. 57 et seq.

[75] On independence of the judiciary see VonDoepp, note 71; Nico Horn, Interpreting the Interpreters, The Namibian Constitution in the Courts, 2017, pp. 291 et seq.

[76] See, e.g., Nico Horn/Hinz (eds.), Beyond a quarter century of constitutional democracy, Process and Progress in Namibia, 2017. On Western constitutionalism as a concept perhaps foreign to African constitutionalism, Wiechers, note 69, p. 52.

21. On the broad agenda of constitutional protection of human rights[77], by way of example, Article 7 NC stipulates habeas corpus protection.[78] Article 11(1) NC provides that "[n]o persons shall be subject to arbitrary arrest[79] or detention", adding further safeguards in Sub-Articles (2) to (5). This is complemented by the guarantees of a fair trial in Article 12 NC. Article 8(1) NC finally opens up for a very broad concept of dignity: "The dignity of all persons shall be inviolable".

Fundamental rights meanwhile might be limited or furnished, but only following explicit provisions of the Constitution itself, of which Article 13(1) NC is just one example: "No persons shall be subject to interference with the privacy of their homes, correspondence or communications". These constitutional guarantees are limited however by a broad reservation: "save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."[80] Even though this reservation itself is limited to constraints admissible in a "democratic society" only, it quotes some rather broad and unspecific restrictions like the protection of morals or the prevention of disorder, which run the risk of excessive limitations of fundamental rights.

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[77] This notion, including rights and freedoms, will be used in this paper. On the different meanings see, e.g., Sam K. Amoo/Skeffers, The rule of law in Namibia, in: Nico Horn/Bösl, note 71, p. 18. See also, e.g., Francois X. Bangamwabo, The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework, 2008, idem, pp. 165-186; Salome M Chomba, The universality of human rights: Challenges for Namibia, 2008, idem pp. 187-212; Horn, The process of human rights protection in Namibia, in: Journal of Namibian Studies 2009 Vol. 5, pp. 99–116

[78] In more detail see Chucks Okpaluba, Protecting the right to personal liberty in Namibia: constitutional, delictual and comparative perspectives, in: African Human Rights Law Journal 2014 Vol 14 (2), pp. 580-608. Whether the NC also protects a residual (negative) freedom or „general freedom right", has yet to be decided by the Namibian Supreme Court; cf. Stefan Schulz, In dubio pro libertate: The general freedom right and the Namibian Constitution, in: Bösl/Horn/du Pisani , note 69, pp. 169-90.

[79] On powers of police to unlimited arrest without charge or trial see Ntanda Nsereko, note 58, p. 481.

[80] Cf. Joseph Diescho, The concepts of rights and constitutionalism in Africa, in: Anton Bösl/Horn/du Pisani, note 69, pp. 17-33; idem, The Namibian Constitution in Perspective, 1994/reprint 2007, p. 61, on similarities to European human rights law.

Restrictions of a general nature do not apply to fundamental rights, but only to fundamental freedoms as provided in Article 21(1) NC.[81] However, according to the subsequent Subsection (2), "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 a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." This, too, is an extremely broad "gateway" for limitations on fundamental rights and freedoms. Article 25 (1) NC stipulates that the executive and the agencies of Government shall not take any action that abolishes or abridges the fundamental rights and freedoms conferred by the Constitution. According to Article 25(2), any aggrieved person "shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require (…)".

Without being able to analyze differences of the constitutional approach and protection in detail in both Indian and Namibian, it seems to be fair to conclude, that the Indian Supreme Court is a most creative and active Court implementing a modern understanding of human and fundamental rights-based on the Indian Constitution, more precisely construing Art. 21 on the protection of life and personal liberty as the starting point for a most rights-based understanding and interpretation of its very short wording. Even though this would need much more in depth analysis in future, it seems to be fair to conclude for the moment that eventual differences in a rights-based containment or delimitation of police powers do not primarily depend on differences in constitutional protection.

Functions, Duties and Powers of the Police – A Constitutionalist Approach

Very different from India where the police are mentioned only once in Article 312 (2) without any further regulations, the Namibian Constitution explicitly sets up a constitutionalist frame for this organization and limitations to its powers.

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[81] Gino J. Naldi, Constitutional rights in Namibia: A Comparative Analysis with International Human Rights, 1995, p. 31.

According to Article 118[82] NC, by Act of Parliament a police force shall be established with "prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order". The Constitution thus emphatically propagates a rights-based approach to policing. The Namibian Constitution as well as statutory law thus prepared the path for a modern constitutionalist approach of the now Namibian Police Force (NAMPOL) and the Namibian Police Act No. 19 of 1990 (hereinafter PA).[83] In consequence, the Namibian Police in general can only refer to "powers" explicitly spelled out and entrenched as an Act of the Namibian Parliament. "The rationale behind this formulation is to prevent the police force from becoming an unruly horse with limitless powers. In keeping with the requirements of constitutionalism and the rule of law, police powers must be circumscribed and exercised only in accordance with the law, which is itself under the authority of the constitution. The goal is to prevent unwarranted intrusion by the police into the rights of the individual."[84]

Chapter II of the Police Act 1990 stipulates functions of the police as well as duties and powers of members of the police. The wording in Section 13 PA 1990 marks a clear-cut distinction between "functions" and "powers". From a rights-based perspective, this has to be construed in a sense that "functions" of the police do not per se imply any "powers."[85] According to this Section, functions of the police shall be the preservation of internal security of Namibia, maintenance of law and order, investigation of any offence or alleged offence, prevention of crime, and protection of life and property.[86]

Under rule of law standards, and more specifically with regards to principles of acuteness of wording and proportionality, police powers from my point of view need to be stipulated explicitly by statutory law. A clear-cut distinction of police powers in

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[82] Now Article 115 NC.

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

[84] Ntanda Nsereko, note 58, p. 470.

[85] Transition from colonialism to rule of law standards and subsequent law making in India neglected and neglects up to-date this very important distinction thus giving police unlimited powers beyond criminal proceedings, especially in law and order policing; see Clemens Arzt, Police Reform and Preventive Powers of Police in India, VRÜ 2016, 53.

[86] The protection of life and property was inserted in Section 13 by Act No 3 of 1999 only.

criminal procedure and preventive powers of police does not exclude that the police may, as far as provided for by pertinent law, use means that are similar in a rather physical or practical sense in both fields, such as, e.g., search and seizure. However, legal requirements and thresholds for such means in the Criminal Procedure Act 1977 might be different from those in the Police Act 1990. For instance, strict observance of the rule of law may allow the police to search a person or house in a specific criminal procedure or case, but not in the field of law and order policing and vice versa. Thus, it would be ultra vires to search under the premises of criminal procedure, while there is no reasonable ground to support that the searched person has committed a crime, but the police want to 'send a message' to a person who is considered to be a "trouble maker" or threat to public safety. Vice versa, searching a person's home under the pretense of law and order policing because the police suspect a person of having committed a crime but cannot yet establish reasonable ground for such suspicion, would be ultra vires too.

Section 14 PA 1990 establishes inter alia duties of the police. Under rule of law standards, it is argued here that "duties" cannot encompass implicit or unwritten police powers, e.g., to stop and search a person. On the contrary, such means are "powers" of the police, which constitute an intrusion upon a constitutional freedom or human right, admissible only if conceded to the police by explicit statutory provisions, as clearly set out in Article 118 NC. Any suggestion that no duty would be transferred to the police without at the same moment endowing them with all necessary powers - as is basically the case in the United States of America[87] and still an underlying argument in India[88] - grossly neglects substantive rule of law standards entrenched in the Namibian Constitution as well as in the Police Act itself. Section 14(1) PA 1990 specifies that any member of the police force shall only "exercise such powers and perform such duties as are by this Act or any other law conferred or imposed upon such member". While members of the police force perform their duties "in the execution of his or her office", they also have to "obey all lawful orders, which he or she may from time to time receive from his or her seniors in the Force (…)." Interestingly, the PA 1990 explicitly highlights the rule of

[87] Cf. Clemens Arzt, Data Protection versus Fourth Amendment Privacy: A New Approach Towards Police Search and Seizure, Criminal Law Forum 2005, Vol. 16, pp. 183–230.

[88] Cf. Clemens Arzt, Police Reform and Preventive Powers of Police in India, VRÜ 2016, 53 et seq.

law in as far as only "lawful orders" have to be executed. This very short outline already should demonstrate sufficiently that a "duty" is something imposed on a member of the police by law or by her/his superiors, which in no way however includes "powers" to accomplish such duty.

To conclude, the PA 1990 features some very detailed provisions on the delimitations of police powers by clear and unequivocal notions and regulations, while contrariwise some limitations on fundamental rights and freedoms are extensively broad. This is yet a very different setting compared to India. Obviously, policing and the acceptance of rule of law in policing can be two very different sides of the same medal. Yet, the Namibian Constitution as well as the Namibian Police Act very clearly and decidedly emphasize a concept of transparent and clear-cut delimitations of police powers. This is something that is almost totally missing in law and order policing and police law – as far as policing beyond criminal procedure is bound at all by standards of rule of law in India. In so far, Namibian Law could be a modern model of constitutionalism in policing India seven decades after Independence, accepting obvious differences of both countries, which however share a common burden of long colonial domination. While the Indian Constitution of 1950 is a strong model of constitutionalism, changing ruling parties in India obviously never were interested to implement a modern approach in policing, based on modern rule of law standards, despite of being requested to do so by many Supreme Court rulings.

Résumé

I want to conclude by citing a famous Indian scholar, Fali S Nariman: "The stark fact is that whenever there was a choice between common law and the Roman law (which is the basis of modern continental codes), the decision has always been in favor of Roman law. The main reason was that the Roman law is in the form of a code, and is far more convenient to understand than the common law, the latter being a strange amalgam of case law and statute law. In fact, the 'common law' is not much 'law' as it is a unique method [italics and quotation marks in original] of administering justice, a method which lawyers not reared in the system find difficult to comprehend!".[89]

[89] Fali S. Nariman, India's Legal System: Can it be saved?, New Delhi 2006, p. 26-27.

Indian lawyers, when giving reasons for the absence of a clear-cut and transparent system of police powers in law and order policing (which applies ex ante) on the one hand and a transparent and distinct delimitation from criminal procedure law (which applies ex post) on the other hand, will always point to the ostensible prevalence of common law in India. This however does not seem very persuasive. When it comes to police powers in criminal investigation in India, these powers are obviously subject to statutory law, be it the CrPC or more recent Acts on specific police powers. This is not convincing either when it comes to the maintenance of public order and tranquility under Section 129 et seg. CrPC. Even in the UK, today statutory law is nowadays prevalent if not exclusive when it comes to (preventive) police powers.[90] Common Law leaves a broad sphere of police powers undefined, giving too much leeway for decisions to be taken at the free discretion of the police. A rights-based overhaul seems to have been waiting for too long, given all the Commission Reports and Supreme Court Judgements on police powers in the last decades.

Namibia, on the other end not only of the world but also of the general legal approach in this field, can be seen as a good example for such an overhaul. Namibia certainly also has its problems with law and order policing and police powers from a rights-based perspective. Yet the very strict constitutionalist and rights-based approach, in my opinion, demonstrates the dedicated will of those in power not to seize the usufruct of a colonial hangover in police powers, as is the case in India.

[90] See "Police Powers" in: Dictionary of Policing, Tim Newburn/Peter Neyroud (ed.), 2008. On early deviations from common law powers in the UK in the 18th century see, e.g., David Dixon, Law in Policing, Oxford 1997, p. 54 et seq.