NATIONAL SECURITY AND THE RIGHT TO INFORMATION: THE CASE OF NAMIBIA

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(FIRST DRAFT)
Executive Summary

This cursory paper explores the topography of the national security policy landscape from a chronological perspective. The paper starts with a brief historical setting that locates the subsequent evolution and development of security policy frames, starting with Defence, followed by State Security (Intelligence), Foreign Policy, Financial Intelligence, Terrorism and the newly-developed National Security Policy Framework (NSPF).

The paper posits a link between national security and the connected processes of state- and nation-building and emphasizes both the symbolic and institutional charge of national security. In respect of access to information, the paper draws the media landscape, engages with some of the current policy directions and concludes that a number of key frameworks are in place that could conceivably culminate in a freedom of information law.

Based on the information at the disposal of the author, the paper concludes that on balance, more weight is accorded to the imperatives of national security than to the right to and access to information. Namibians however, are not starved of information relevant to national security and there are both executive and legislative oversight mechanisms in place, even if there is room for improvement. Civil society is engaging more with the primacy of having a freedom of information framework in place and there are signs that Government is not entirely unwilling to entertain such a demand.

The recently completed National Security Policy Framework (NSPF), if robustly implemented holds much promise for enhancing access to information and for improving inter-agency cooperation within the Namibian security system. At the same time there are meaningful efforts on the part of local civil society actors to bring about the introduction of a freedom of information law. Clearly, all is not lost.
Introduction

The construct of ‘National Security’ like that of ‘National Interest’ is contested. Since ‘security’ is a multi-dimensional and multi-level concept, which can usefully be conceptualized as having specific referent objects, threats and requires specific providers for actualizing and managing it, ‘National Security’ is embedded in complex policy, legal and institutional frameworks. This in turn, complicates policy coherence and often undermines the integrity of policy.

From a meta-politics perspective, National Security policy, like other public policies is contextual, invokes more than one method of design and implementation and is problem-oriented. Defined by policy areas or sectors, a specific institutional design, notably by a construct of ‘security’ and its relation to ‘national interest’, the setting is inter-and intra-institutional and multi-actor. More often than not, the executive frames such policy and this makes it inherently difficult to ensure robust legislative and civil society or other forms of extra-parliamentary oversight.

The Republic of Namibia is a secular, democratic and unitary state which is founded upon the principles of democracy, the rule of law and justice for all (The Constitution of Namibia, Article 1 (1)). These principles make possible the exercise and realization of fundamental human rights and freedoms as embedded in Chapter 3 of the Constitution. While comprehensive and enforceable by the courts, the country does not have a freedom of information act and Article 21 of the Constitution that provides for fundamental freedoms, does not include the right to freedom of information.

Constructs of ‘National Security’, also in liberal and social democracies stand in constant tension to civil liberties, because the latter, civil liberties, exist to protect individuals against the arbitrary use of state power, and inconvenience states in the exercise of their authority. But there is a good reason why civil liberties make the work of the authorities more difficult: namely to protect the great majority of people who are not bad. The chief point is one of principle: that the freedom of the individual is a precious moral and legal hard-won value which the absence of the right to information undermines

States are, almost by instinct, prone to invoke circumstances such as the construct of ‘National Interest’, however defined, to justify the erosion of civil liberties they cause by their security measures and legislative initiatives. The much abused mantra, the ‘War on Terror’ for example, is one such an excuse; irrespective of the harm this does to the values and social fabric of democracies.

Considered within its historical and institutional settings, the Namibian experience with national security is particularly instructive. It is to this aspect, that the paper next turns.
1.4 The Namibian experience with national security – the topography of the landscape

Namibia became independent in March 1990 after a protracted liberation war that lasted more than two decades and in a global context that saw the end of bipolarity. The new State had to be partly constructed on the debris of the old colonial state and inherited a deeply skewed social economy, with a Gini-Coefficient of 0.72 and a topography that privileged certain regions over others\textsuperscript{2}. The key economic and extractive resources were in the hands of foreigners. At independence, the civil service was racially stratified and there was a real prospect that conflict could ignite, not least of all because of the ethnic composition of the security system under the former apartheid state and the difficulties associated with the process of Demilitarization, Demobilization and Reintegration (DDR) of former combatants. Now, more than two decades after independence, the bitter fruits of war are ever-present in the form of sporadic protests by former combatants, demands for employment and education against the state by ‘children of the liberation struggle, and high levels of unemployment\textsuperscript{3}.

1.4.1 Defence and Nation-Building

Mindful of the corrosive legacies of apartheid and war, national security concerns loomed large and these were responded to at both the symbolic and the more substantive registers of the new state. At the symbolic level, the politics of national reconciliation became a string in the bow of the politics of Nation-Building, and the latter, although hampered by material conditions, has since developed a relatively independent dynamic of its own. In the founding and construction of the new State, the security system became an early and arguably, one of the key agencies. It was not coincidental that the Ministry of Defence was established at independence in 1990 as a department of state responsible for setting up the organizational and institutional structure necessary to manage the Namibia Defence Force (NDF). The creation of the NDF, was one of the key priorities of the new government, is provided for by Article 118 of the Constitution. Since then, the NDF and to a lesser extent, the Namibia Police (NAMPOL) has become the key arena for the reintegration of former members of the People’s Liberation Army of Namibia (PLAN) and the South West Africa Territorial Force (SWATF) into a unified NDF.

In February 1993 the first Minister of Defence of the Republic, the late Peter Mweshihange, himself a veteran of the liberation war, presented to Parliament a Statement on Defence Policy in the form of a White Paper. The Statement outlined the missions and roles of the Ministry of Defence (MOD) and the Namibia Defence Force (NDF) consistent with the provisions of the Constitution (Chapter 15, Articles 118-119). Subsequently, the Statement on Defence Policy has guided the NDF in respect of force structure and design, training, procurement and its roles nationally, regionally and internationally, notably participating in peacekeeping operations under the mandates of the Southern African Development Community (SADC), the Africa Union (AU) and the United Nations (UN).
The Defence Act 2002 (Act 1 of 2002), under Section 2, makes provision for the composition and organization of the NDF into three Arms of Service namely, the Army, Air Force and Navy.

In 2011 the Ministry of Defence (MOD) approved and published a Defence Policy as one of the constituent policies together with the 1997 National Security Policy, March 2004 White Paper on Namibia’s Foreign Policy and Diplomacy Management and more recently, in 2012, the Prevention and Combating of Terrorist Act (act No. 12 of 2012).

The 2011 Defence Policy was the product of extensive inter-agency consultations within the rubric of the security system, passed scrutiny by the Cabinet Committee on Security, Defence and International Relations and the Parliamentary standing committee on Foreign Affairs, Defence and Security and was ratified by Parliament. The deliberative process was executive driven and the wider citizenry had very limited opportunities to input into the process of policy design.

The Defence Policy has been designed with the aim of protecting and ensuring the ‘survival and national interests of the state’[4]. Moreover, it represents policy guidelines for the further development of the NDF, articulates its principal roles and outlines its principal development programmes. Anchored upon some principles of democratic civil military relations, the Policy embodies a statement of principles and orientation (based on Article 96 of the Constitution – the same principles that undergird foreign policy), proceeds to define both national values and national interests, the latter, national interests are disaggregated into ‘vital’ and ‘peripheral’ interests, paints the strategic environment and concludes by outlining the strategic response of the three Service Arms: the Army, Air Force and Navy.

The 2011 Defence Policy in paragraph 68 identifies the Parliamentary Standing Committees on Foreign Affairs, Defence and Security and the Cabinet Committee on Defence, Security and International Relations (CCDSIR) as the key defence oversight bodies.

1.4.2 State Security (Intelligence)

The second oldest legal frame that has a direct bearing on the conceptualization and management of national security is the Namibia Central Intelligence Service Act, 1997 (Act No. 10 of 1997). This Act not only repealed the earlier South African National Intelligence Act, 1987 (Act 19 of 1987), but significantly for purposes of this exploratory paper, amended rather than repealed, the Protection of Information Act, 1982 (Act No. 84 of 1982)[5] The original Act of 1982 is still on the statute books.

The Namibia Central Intelligence Service Act, 1997 advances a wide definition of what constitutes a “threat to the security of Namibia”. This includes:
(a) “any activity relating to espionage, sabotage, terrorism or subversion or intention of any such activity directed against, or detrimental to the interests of, Namibia, and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, terrorism or subversion, but does not include any lawful advocacy, protest or dissent not performed in conjunction with any such activity;

(b) Any activity directed at undermining, or directed at or intended to bring about the destruction or overthrow of, the constitutionally established system of Government;

(c) Any act or threat of violence or unlawful harm that is directed at or intended to bringing about or promoting any constitutional, political, industrial, social or economic objective or change in Namibia, and includes any conspiracy, incitement or attempt to commit any such act or threat; and

(d) Any foreign influenced activity within or related to Namibia that –
   (i) Is detrimental to the interests of Namibia; and
   (ii) Is clandestine or deceptive or involves any threat whatever to the State or its citizens or any other person lawfully resident in Namibia.

The Namibia Central Intelligence Service (NCIS) established in terms of the Constitution consists of:

(a) A Director-General appointed in terms of Article 32(3) (i) (ee) of the Namibian Constitution by the President on such terms and conditions as he or she may determine;

(b) A Director appointed in terms of section 5 (1) of the Public Service Act 13 of 1995 after consultation with the President; and

(c) Such persons appointed in terms of section 8(1) of the Public Service Act of 1995 as staff members.

The powers, duties and functions of the NCIS are outlined in the Namibia Central Intelligence Service Act, 1997, and these include, to:

(a) Investigate, gather, evaluate, correlate, interpret and retain information, whether inside or outside Namibia, for the purposes of –
   (i) Detecting and identifying any threat or potential threat to the security of Namibia;
   (ii) Advising the President and the Government of any threat or potential threat to the security of Namibia;
   (iii) Assisting the Namibian Police Force by gathering intelligence to be used in the detection and prevention of such serious offences as may be determined by the Director-General after consultation with the Inspector-General of Police; and
   (iv) Taking steps to protect the security interests of Namibia whether political, military or economic;
(b) Gather ministerial intelligence at the request of any interested office, ministry or agency, and without delay to evaluate and transmit as appropriate to that office, ministry or agency such intelligence and any other intelligence at the disposal of the Service and which constitutes ministerial intelligence;

(c) Regulate, in co-operation with any office, ministry or agency entrusted with any aspect of the maintenance of security in Namibia, the flow of security intelligence and the co-ordination between the Service and that or any other office, ministry or agency of functions relating to such intelligence;

(d) Assist with the carrying out of security vetting investigations for the security clearance of persons who hold or may hold vettable posts in offices, ministries and agencies or who may have access to any sensitive or classified information;

(e) Make recommendations to the President in connection with
   (i) Policies concerning security intelligence;
   (ii) Security intelligence priorities; and
   (iii) Security measures in offices, ministries and agencies; and

(f) Perform such other duties and functions as may from time to time be determined by the President as being in the national interest”

In addition to these wide-ranging powers and functions, the NCIS is mandated to undertake an Annual National Security Assessment for the President.

The aspect of access to information will be discussed under the next part of this exploratory paper, bearing in mind that the original Protection of Information Act, 1982 (as amended) is still in force.

1.4.3 Foreign Policy/Relations

The third policy framing that relates to and articulates with for example the Defence Policy of 2011 is the March 2004 White Paper on Namibia’s Foreign Policy and Diplomacy Management produced by the Ministry of Foreign Affairs and crafted by a retired Indian diplomat. Unremarkable for its content, the White Paper nonetheless is valuable in containing the archive of pre-independence diplomacy that left a deep imprint on the conceptualization of security in the post-colony.

The White Paper took its cue from the provisions of Article 96 of the Constitution that embodies the following principles as guiding for the country’s foreign relations: maintaining a policy of non-alignment; promoting international co-operation, peace and security; creating and maintaining just and mutually beneficial relations among nations; fostering respects for international law and treaty obligations’ and encouraging the settlement of international disputes by peaceful means.
A preeminently liberal/pluralist gaze on world politics, the White Paper waxed liberally on the principles and practice of diplomacy, the historical setting of Namibia’s diplomacy, visited a few contemporary global factors and identified ‘issues of national priority’. The latter, ‘issues of national priority’ came close to an articulation of security concerns. These were a mix of security and development-related issues extracted from the countries first two National Development Plans (NDP1 and NDP2), and included amongst a demanding list: the promotion of information technology, sustainable economic growth and development, employment creation, HIV/AIDS, land reform and resettlement, human resource development, gender equality and equity, and peace and security.

1.4.4 Financial Intelligence

The *Financial Intelligence Act, 2007* (No. 3 of 2007) signaled another marker in the legal framing of a specific dimension of national security, that of money laundering and resulted in the establishment of the Anti-Money Laundering Advisory Council (AMLC) within the Bank of Namibia. The latter, the Anti-Money Laundering Advisory Council was empowered to collect, assess and analyse financial intelligence data, which may be related to money laundering. The same Act also empowers the Anti-Money Laundering Council (AMLC) to impose duties on institutions and individuals engaged in money laundering.

The rump of the Act centered on money laundering control measures and the duties of financial institutions to identify clients, keep records and report specific dubious financial transactions that may in breach of the provisions of the Act.

The Act had important implications for access to information held by the Bank of Namibia and covered the protection of confidential information by persons, as well as the protection of informers and whistleblowers.

In 2012, the 2007 Act was replaced by a significantly more coherent and comprehensive *Financial Intelligence Act, 2012* (No. 13 of 2012). This new Act provided for the establishment of the Financial Intelligence Centre (FIC) as the national centre responsible for collecting, requesting, receiving and analyzing suspicious transaction reports and suspicious activity reports which may relate to possible money laundering or the financing of terrorism. The new Act defines the powers and functions of the newly-created Financial Intelligence Centre (FIC) and of the Anti-Money Laundering and Combating of the Financing of Terrorism Council (AMLCFT). The Act also provides for the registration of accounting and reporting institutions and for the powers of supervisory bodies. Finally, there is provision for an appeal board to hear and decide appeals against decisions of the Centre or supervisory bodies.
The new Act has profoundly important implications for the access to information, notably financial intelligence. This paper will return to these implications in the following section.

1.4.5 Terrorism

In 2012 in parallel with the promulgation by Parliament of the Financial Intelligence Act, the *Prevention and Combating of Terrorist Activities Act, 2012* (No. 12 of 2012) was passed and signed into law by the President.

The Act provides for the offence of terrorism and other connected or associated terrorist activities and prescribes measures to prevent and combat terrorist activities. The legal basis of the Act comes from a number of International Public Law Conventions of the United Nations that Namibia ratified. The Act also incorporates United Nations Security Council Resolution 1373 (2001): International Cooperation, Freezing and Restraining of Funds at the Request of a Third State.

The 2012 Act is comprehensive in scope and includes, among other provisions, the safety of maritime navigation, the protection of airports and aircraft, the protection of internationally protected persons (such as the Head of State), offences related to fixed platforms, nuclear terrorism and the financing of terrorism.

The key line ministry is Public Safety and Security and the key agency the Inspector-General of Police. For this purpose, a special Police unit has been established.

1.4.6 National Security Policy Framework (NSPF)

The most recent development in the security policy domain is the development of an integrated National Security Policy Framework (NSPF) as an attempt to enhance coherence and the information exchange among the various agencies that make up the national security system.

At the time of writing, the National Security Policy Framework (NSPF) has undergone various iterations and has been approved by the Cabinet Committee on Security, Defence and Foreign Relations. The Framework has not been submitted to Parliament for discussion and ratification. The NSPF advances a rationale for why such a framework would be needed, provides for an integrated national security strategy, a national security environmental assessment and monitoring framework, proposes the establishment of a National Security Council (NSC) and considers a robust policy monitoring and evaluation framework.

Since the proposed NSPF has not been made public yet, it lies beyond the scope of this cursory paper to engage it.
Having briefly sketched the national security policy terrain harnessing a chronological approach, the paper next considers the Namibian experience with access to information.

1.5 Access to Information

a) Brief historical overview

Namibia is a citizen-based democracy that values and protects Fundamental Human Rights and Freedoms in Chapter 3 of the Constitution. Measured against the indicators of the African Media Barometer[^10], Namibia has a vibrant, pluralistic media environment, with the country scoring moderately to well on most key indicators. In 2012 the country was designated to have the freest media landscape on the African continent.

Namibia is home to the formative and celebrated *Windhoek Declaration on Promoting Independent and Pluralistic Media* of 3 May 1991. Among its many resolutions, the Windhoek Declaration, reaffirmed ‘the trend towards democracy and freedom of information and expression’ as fundamental ‘to the fulfillment of human aspirations’[^11] More than twenty years after the *Windhoek Declaration* Namibia does not have a freedom of information act and in 2008 witnessed the provision of an interception clause in the draft Communications Bill.

Over the past two years there have been a number of important positive developments in the media environment; these include, but are not limited to:

- Greater diversity in the sector as evidenced by an increasing number of print publications, as well as commercial and community radio stations.
- The Namibian Editors’ Forum seems to be better organized than before and more inclusive.
- The transmission network of the Namibia Broadcasting Corporation (NBC) has been expanded.
- The digitalization of equipment is coming to the NBC.
- Civil society is starting to see the importance of the media, and this is evident in the way that members of the public have been uploading and protecting the SMS pages in a number of local newspapers, notably The Namibian.
- The Government rescinded its media ban on The Namibian in 2012.
- Under the aegis of the Namibia Nongovernmental Forum (NANGOF) and supported by the Media Institute of Southern Africa (MISA), the Institute for Public Policy Research (IPPR), the Namibian Editors’ Forum (NEF) and the Legal Assistance Centre (LAC), there is an active public campaign driven by civil society agencies for freedom of information legislation[^12].
b) Current policy and implementation dynamics

Namibia is a signatory to a number of regional and international agreements and declarations on freedom of expression and access to information. The key frameworks are the following:


Against the above, most of the key frameworks are in place for the country to progress towards a freedom of information law. More importantly, there is an active civil society campaign supported by MISA and others, to get government to accede to such a request for a freedom of information law, while Government itself issued a statement in 2008 on a ‘Provisional Policy Framework on the Development of Access to Information Legislation for Namibia’. In the absence of such a law and considering the legal and civil rights implications of some of the existing national security policy framings, on balance national security considerations outweigh the right to and access to information.

The 2008 draft Communications Bill, while not promulgated by Parliament, indicated an impulse on the part of government to exert more control over the media landscape. There have also been other markers that suggested more rather than less control on the part of Government. These include, most recently, the Regulations that govern research under the provisions of the Research, Science and Technology Act, Act No. 23 of 2004 that were published in November 2011, but have yet to be implemented by the newly-created National Commission on Research, Science and Technology (NCRST).

The older Protection of Information Act, 1982 (Act 84 of 1982) is still in place, so too, parts of the Criminal Procedure Act, 1977 (Act 51 of 1977), as amended, both conceived under the former South African administration. The Protection of Information Act, 1982 restricts the information civil servants can release to the public and the absence of a freedom of information law makes it difficult for the public, and particularly the media, to gain access to public information held by the State.
Conclusion

On balance then, Namibia is not doing the worst in Africa/SADC when it comes to access to public information held by the State. The country’s budget transparency, for example has improved of late, with Namibia scoring 55 on the Open Budget Index, as against 47 for Mozambique, 50 for Botswana, 52 for Malawi, 28 for Angola and 20 for Zimbabwe. It is only South Africa that scores a high 90 out of 100 in the 2012 Open Budget Survey 15.

The imperatives of national security, however, will continue to count for more than wide and meaningful access to information. At the same time there are meaningful pressure for the country to have a policy and legal framework that would provide for access to information.
References


3] *The National Labour Force Survey* 2008 published by the Ministry of Labour and Social Welfare, reported a 51% unemployment rate, with youth unemployment at even higher levels. Since then, the official unemployment rate has been adjusted to 39% nationally.


5] The amendment was of section 1 only of the *Protection of Information Act, 1982* (Act 84 of 1982) by the substitution in the definition of “security matter” with a) for the expression “Department of National Intelligence” with the expression “Namibia Central Intelligence Service”; and b) for the expression “Department” with the expression “Service”.


10] See *African Media Barometer Namibia 2012*. Windhoek: Media Institute of Southern Africa (MISA) in association with the Friedrich-Ebert-Stiftung (Namibia). The core indicators include: freedom of expression, including freedom of media, the media landscape in its diversity, independence and sustainability, broadcasting regulations and media practice.


