# BIODIVERSITY AND THE ANCESTORS:

## CHALLENGES TO CUSTOMARY AND ENVIRONMENTAL LAW

### CASE STUDIES FROM NAMIBIA

EDITED BY

MANFRED O. HINZ AND OLIVER C. RUPPEL

UNEP

BIOTA

This publication is dedicated to the memory of

**Nanzala Siyambango**

who was murdered on 31 March 2007.

Deadly bullets terminated her earthly life while she was preparing to enter an LL M programme under the BIOTA Project.

Her commitment as a promising student in African customary law, her commitment as a human being, and her commitment in the spirit of humanity will not be forgotten.

# TABLE OF CONTENTS

# Preface

*Hon. Netumbo Nandi-Ndaitwah, Minister of Environment and Tourism*

It is a pleasure for me to preface this timely exposition of case studies on customary law, biodiversity and the protection of the environment in Namibia. It is estimated that approximately 27,000 species of animal and plant life disappear from our planet every year. The issue of biodiversity conservation deserves serious attention because the irrevocable loss of species threatens the very basis of human life. Biological diversity provides the foundation for human basic needs such as food, water and other natural resources. A multitude of drugs and a wide range of industrial materials are derived directly from biological resources.

Since Namibia signed the Convention on Biological Diversity in 1992, the preservation of biological diversity has become a focus of environmental policy and legislative considerations. However, biodiversity conservation in Namibia has its roots not merely in the legal provisions issued in the last decades, but rather in the centuries-old customs of the people. This book shows, in an impressive manner, that an arc can be spanned between legislative efforts on global, regional, national and local levels and traditional methods of maintaining the environment and biodiversity.

This publication describes the legal foundations of biodiversity conservation in Namibia and serves as a useful guide to the broad range of provisions directly and indirectly relating to the protection of biological diversity. On the global, regional and sub-regional level, relevant conventions are described. On the national level, the Constitution of the Republic of Namibia as the supreme law of the country, as well as national policies and enactments and customary laws applied by the traditional communities of Namibia are analysed in terms of biodiversity conservation.

The case studies assembled here provide a unique insight into the practices and customs of people living in traditional settings. The publication will, therefore, be a valuable source of information and guidance for lawyers, anthropologists, students, policymakers and all those members of the public interested in environmental concerns, biodiversity conservation and customary law in Namibia. I wish to thank all who have contributed to the book and assisted in making it a reality. I highly recommend this book to be used in our schools and tertiary institutions.

Windhoek, August 2008

## The contributors

### *The editors*

**Prof. Manfred O. Hinz** studied law and philosophy at the University of Mainz (Germany), where he graduated in law. He passed his legal practitioner's examination in 1964, the year in which he also obtained his doctoral degree in law from the University of Mainz. After studying anthropology, sociology and African and Oriental languages at the same University, he became assistant lecturer, teaching anthropology and public law. In 1971, he was appointed full professor at the University of Bremen.

In 1989, he went to Namibia where, after independence, he assisted the Ministry of Justice in its projects to restructure the traditional administration of justice and to make an inventory of customary law. He was later seconded to the office of the first Vice-Chancellor of the University of Namibia (UNAM) to help build the first institution for legal education on Namibian soil: UNAM's Faculty of Law. He joined the Faculty upon its inception, and has served as its Deputy Dean and Dean. Prof. Hinz also holds the UNESCO Chair: Human Rights and Democracy in the Law Faculty's Human Rights and Documentation Centre.

Prof. Hinz has published widely in his areas of specialisation, in particular in the fields of legal and political anthropology, and constitutional and international (economic) law. He has been involved in the BIOTA Southern Africa Project since 2004 as a Work Package Leader, in which capacity he has supervised the research of the contributors to this publication. He was at the same time the leader of the *incofish* Project implemented by the UNAM Faculty of Law.

**Dr Oliver C. Ruppel** graduated in law after studies at the Universities of Lausanne (Switzerland) and Munich (Germany). He holds a Master of Laws degree (LL M / Public Law) from the University of Stellenbosch (South Africa), a doctoral degree in law from the University of Pressburg (Slovakia); a PG degree from the Munich School of Philosophy SJ (Germany) and he was one of the first lawyers to be awarded a Master of Mediation degree (M M) from the University of Hagen (Germany) with a specialisation in economic and environmental extrajudicial dispute settlement.

Dr Ruppel is the Director of the Human Rights and Documentation Centre and lectures environmental law, human rights law and public law aspects of international

trade at the University of Namibia's Faculty of Law. He is engaged in various national and international legal consultancies, is a founding member of the United Nations Environmental Programme's (UNEP) Association of Environmental Law Lecturers in African Universities (ASSELLAU), Nairobi (Kenya), a member of the Academy of the International Union for the Conservation of Nature (IUCN), Ottawa (Canada), and Regional Resource Person in Southern Africa for Trade and Environment to the World Trade Organisation (WTO), Geneva (Switzerland). His publications lie in particular in the fields of public international and environmental law.

***The other contributors***

**Ms Philanda Blockstein** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. She is currently a Magistrate in Keetmanshoop.

**Mr Victory Gabriel** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. He is currently employed as a Prosecutor.

**Ms Ainna Kaundu** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. She is currently employed by the Master of the High Court, Windhoek.

**Ms Tuilimeke Koita** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. She is currently employed by the Ministry of Justice, Windhoek.

**Mr Clever Mapaure** is a final-year LL B student at the University of Namibia. He graduated with a Baccalaureus Juris (B Juris) degree and the Specialised Certificate in Customary Law from the University of Namibia.

**Mr Ntinda Mbushandje** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. He is currently a legal advisor to a major Namibian company.

**Mr Mwendekwa Henry Muhongo** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia.

**Ms Julia Mushimba** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia.

**Mr Tomas Nekongo** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. He is currently employed by a firm of legal practitioners in Windhoek.

**Mr Ray-wood Mavetja Rukoro** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia. He is currently enrolled for a Master of Laws degree (LL M) with the same University. Mr Rukoro practises law at the law firm Lorentz Angula Incorporated in Windhoek.

**Mr Vetu Uanivi** graduated with the degrees of Baccalaureus Juris (B Juris) and Bachelor of Laws (LL B) from the University of Namibia.

# Editors' note

The starting point for this book was a number of case studies conducted within a project run in the Faculty of Law of the University of Namibia (UNAM) as part of the international Biodiversity Monitoring Transect Analysis in Africa (BIOTA) Project. The BIOTA Project is a cooperative research effort by African and German scientists aimed at generating knowledge relevant to decision-makers for the feasible and sustainable management of biodiversity.

UNAM's Faculty of Law has been involved in BIOTA for the past five years. The main task of the BIOTA component administered by the Faculty has been to enquire to what extent customary law and traditional knowledge are able to contribute to the protection of biodiversity.

The main body of research assembled in this publication was undertaken as an integral part of LL B (Baccalaureus Legum) dissertations, which are a requirement for the degree. The LL B is the second law degree students are obliged to obtain as a condition for admission into the training programme for the legal profession. So far, the Faculty has supervised a number of senior students doing research on BIOTA-related topics for their LL B dissertation. Ten of these dissertations are within the scope of this book, while an eleventh emerged from another Faculty project, namely *incofish*, which was implemented in cooperation with the Research Unit on European Environmental Law in the Faculty of Law at the University of Bremen, Germany. The aim of the *incofish* Project was to explore mechanisms for the sustainable use of marine resources. The contribution on the fishing practices of the coastal Topnaar community resulted from *incofish*, and is based on the relevant author's dissertation for the Specialised Certificate in Customary Law, which is also offered by UNAM's Faculty of Law.

For this publication, the editors had the difficult task of shortening the original dissertations, as the originally submitted texts contained many technicalities required by the rules of the University, but also repeated references to general law (international law, constitutional law, environmental law), which were better accommodated in an Introduction. The names of the interviewees have been anonymised with the exceptions of those who are public figures and/or hold traditional or government offices.

The results of some of the dissertations were presented at a Workshop on Customary Law and the Sustainable Use of Natural Resources, held in Windhoek in March 2007.

The Workshop as a whole and the presentation of the results of the dissertations in particular got very positive responses. However, one specific concern was brought up by the audience several times: the results of specific research projects – like the results of these customary law and biodiversity dissertations – are not easily accessible to the interested public.

In February 2008, when the various researchers had the opportunity to present some of their findings to traditional leaders and other community stakeholders in the northern Regions of Caprivi (*Masubiya, Mafwe, Mayeyi, Mashi*), Kavango (*Ukwangali,, Mbunza, Sambyu, Gciriku and Mbukushu*), and the *Oshiwambo*-speaking areas (*Ondonga, Uukwaluudhi, Ongandjera, Uukwambi, Ombalantu, Uukolonkadhi, Oukwanyama and Ombadja*), the possibility of publishing the research received a boost. The participants of the three feedback workshops not only assisted the work with very helpful comments and suggestions, but expressed their special desire to see the findings published.

The presented research covers a broad variety of topics that include the protection of herbs, grass as a general natural resource, grass for grazing, fish, and trees of interest for wood carving, but the list is certainly not exhaustive. Nevertheless, we hope that this publication will have a positive effect not only in respect of the research already conducted, but also on future research: The BIOTA Project is still ongoing. After the completion of the studies assembled in this publication, the focus has shifted away from questions about the effectiveness of customary law to protect natural resources and biodiversity to more general ones about the implication of the traditional concept of land as a holistic understanding that comprises everything below and above the surface, and the implication of this concept for the relationship between customary and statutory law. This new focus will benefit from another project that is being pursued by the Human Rights and Documentation Centre of UNAM's Faculty of Law: the ascertainment of customary law by the various traditional communities of Namibia. It is also with respect to the new direction of the BIOTA-related legal activities that special documents have been reproduced in the annexures to this publication, namely the Constitutions of the Nyae Nyae Conservancy and the Bukalo Community Forest Management Committee.

Windhoek, August 2008

*Manfred O. Hinz* *Oliver C. Ruppel*

## Acknowledgements

Over the course of writing a book, one accumulates more debts than can be acknowledged in a few lines. A multi-authored book such as this is always a complex and exhausting team effort.

First of all, the editors like to thank everyone who has participated in the research and influenced the following pages in one way or another. The framework of cooperation with traditional leaders in Namibia originally established by the Centre for Applied Social Sciences (CASS) in UNAM's Faculty of Law through research and many consultation projects over practically the past 20 years formed an important basis for the compilation and publication of the case studies. Without the existing relationship of mutual trust, the different research projects would not have borne the results documented in this book.

Many traditional authorities, individual traditional leaders and community members were available for interviews throughout the areas researched. They all have to be thanked. The list of Field Notes at the end of this book gives a full record of all the persons who contributed their knowledge and experience – although some of the names have been changed, as is customary in empirical research to protect individuals' identities. It is thanks to these interviewees and to our students that the outcomes of the dissertations were so many-sided, and gave new insights into several aspects of customary law and biodiversity protection in Namibia.

Furthermore, we are grateful to all those who contributed financially to this publication. Special thanks go to all colleagues and friends in BIOTA; Prof. Norbert Jürgens at the University of Hamburg, the principal promoter of BIOTA; Prof. Michael Kirk at the Phillips University of Marburg, who bears special responsibility for BIOTA Sub-projects in the field of social science; Dr Thomas Falk of the same University, and part of Prof. Kirk's team; Prof. Gerhard Winter, the *incofish* Project partner at the University of Bremen, and the coordinators of the *incofish* Project in the Christian-Albrechts University of Kiel; and last but not least, all the BIOTA and *incofish* colleagues in Namibia and elsewhere. The financial assistance from the German Government for BIOTA and the assistance from the European Union for *incofish* have to be noted with great appreciation as well.

Thanks are extended to our dear friend Dr Iwona Rummel-Bulska, Chief Legal Officer for the United Nations Environmental Progamme (UNEP) in Nairobi, Kenya. We are grateful to Dr Rummel-Bulska and UNEP's Division of Environmental Law

and Conventions for their financial support towards this publication. The additional financial assistance from UNAM's Publications Fund and the Legal Research and Development Trust is also appreciated with thanks.

Editorial assistance rendered by Dr Katharina Ruppel-Schlichting was crucial when we started the publication project, and again essential in finalising it. Apart from editorial assistance, Dr Ruppel-Schlichting contributed to various environmental law aspects of the publication. We thank her for this contribution. Helgard Patemann of the Centre for Applied Social Sciences in the Faculty of Law, is thanked for her anthropological advice, and Dr Isaac Mapaure from the Department of Biology in the Faculty of Science of the University of Namibia for botanical advice.

Ray-wood Mavetja Rukoro was the first Faculty of Law BIOTA Assistant. He was succeeded by the late Nanzala Siyambango, from whom Ndateelela Emily Namwoonde took over. They all contributed to this publication. Ndateleela Namwoonde, Angelique Groenewaldt, Clever Mapaure and Anne Schmitt assisted in streamlining the text, checked references and provided other technical assistance needed in the process of finalising the manuscript. Thanks to all of them! Sandie Fitchat's input as regards the English language editing, design and layout deserves a special word of appreciation. Last but not least, a word of thanks to the publisher, the Namibia Scientific Society.

The publication is dedicated to Nanzala Siyambango, a former student in the Faculty of Law. As the BIOTA Assistant, Ms Siyambango was responsible for the BIOTA Workshop referred to in the Preface. She was about to start work for her LL M dissertation when she was taken from us.

The Hon. Netumbo Nandi-Ndaitwah, Minister of Environment and Tourism, kindly accepted our invitation to provide a Foreword for the book. We thank her cordially.

*The Editors*

## List of abbreviations

| | |
|---|---|
| BIOTA (Project) | Biodiversity Monitoring Transect Analysis in Africa (Project) |
| CBD | Convention on Biological Diversity |
| CFNEN (Project) | Community Forestry in North-eastern Namibia (Project) |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| FMP | Forest Management Plan |
| ILO | International Labour Organisation |
| IUCN | World Conservation Union (formerly International Union for the Conservation of Nature and Natural Resources) |
| NDP | National Development Plan |
| NGO | non-governmental organisation |
| SADC | Southern African Development Community |
| SADCC | Southern African Development Coordination Conference |
| TRIPS | Agreement on Trade-related Aspects of Intellectual Property Rights |
| UN | United Nations |
| UNAM | University of Namibia |
| UNEP | United Nations Environment Programme |
| UNTAG | United Nations Transitional Assistance Group |
| WIPO | World Intellectual Property Organisation |
| WTO | World Trade Organisation |

## List of photographs



## Note on the use of words in African languages

In quoting words in African languages, it was decided to use prefixes wherever possible. Therefore *Oukwanyama, Ondonga, Uukwambi*, etc. are used to denote the respective traditional territories, with *omu, mu*, etc. being used for persons in the singular, and *aa, ova, va*, etc. for persons in the plural.

When referring to the respective supreme leaders of traditional communities, their traditional titles were used. The language of the Traditional Authorities Act, according to which supreme traditional leaders are "chiefs", applies in this publication where references are made to traditional leaders in general, or where traditional titles have not been recorded.

## Map of Namibia

# Part I:

# Legal protection of biodiversity in Namibia

# Legal protection of biodiversity in Namibia

*Manfred O. Hinz and Oliver C. Ruppel*

## 1. Biodiversity in perspective

In the 1980s, when the concept *biological diversity* (now more commonly *biodiversity*) was in its infancy, biological diversity comprised an estimate of roughly 1.5 million described species living on earth. Today's estimates range widely, largely because most living species are micro-organisms and tiny invertebrates. Most estimates fall between 5 to 30 million species. Roughly 1.75 million species have been formally described and given official names. The number of undescribed species is undoubtedly much higher.[1] The coinage of the term *biological diversity* can be attributed to Lovejoy[2], Norse and McManus[3] and Wilson[4]. Lovejoy was probably the first person to use the term, which he did in 1980.[5]

*Biological diversity* can be defined as the variability among living organisms from all sources, including terrestrial, marine and freshwater ecosystems, which includes diversity within species, between species, and habitats or ecosystems.[6] As the fundamental building blocks for development, biological resources provide the basis for local sufficiency. At the same time biological diversity is a global asset and is expected to benefit people in all parts of the world.[7]

For millennia, people have relied on ecosystems to meet their basic needs such as food, water and other natural resources. Apart from these, there are a multitude of further benefits of biodiversity. For instance, a significant proportion of drugs are derived, directly or indirectly, from biological sources. As early as the mid-19th century, the Scottish adventurer and missionary David Livingstone brought plants from the African continent, hoping they would serve as a basis for medicinal drugs.[8] Over the last decade, the interest in drugs of plant origins and their use in various

1 Heywood (1995).
2 Lovejoy (1980).
3 Norse & McManus (1980:32).
4 Wilson (1985:400).
5 Lovejoy (1980).
6 Article 2 of the 1992 Convention on Biological Diversity.
7 McNeely et al. (1990).
8 Blaikie (2004).

diseases has increased in many industrialised countries since plants used in traditional medicine are more likely to yield pharmacologically active compounds.[9] Indeed, in most cases, it is impossible to synthesise plant-based medicinal drugs in a laboratory setting.

Higher biodiversity also controls the spread of certain diseases as viruses will need to adapt to infect different species. Moreover, a wide range of industrial materials are derived directly from biological resources. These include building materials, fibres, dyes, resins, gums, adhesives, rubber and oil. Many people also derive value from biodiversity through leisure activities. And finally, many cultural groups view themselves as an integral part of the natural world and show respect for other living organisms.

Biological diversity has to be safeguarded and conserved. The term *conservation* is defined as the management of human use of the biosphere so that it may produce the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of the future generations. Thus, *conservation* embraces the preservation, maintenance, sustainable utilisation, restoration, and enhancement of the natural environment. While ecosystems may be used by present generations for their benefit, they should only be used in a way not depriving future generations of their right to use such ecosystems in the same manner for their survival. The maintenance of biological diversity at all levels is fundamentally the maintenance of viable populations of species or identifiable populations.[10]

Efforts to maintain the diversity of biological resources are urgently required at local, national, and international level Southern Africa and Namibia, as part of this region, is no exception.

Van Wyk and Gericke introduce their publication entitled *People's plants* by stating the following:[11]

> *Southern Africa is exceptionally rich in plant diversity with some 30 000 species of flowering plants, accounting for almost 10% of the world's higher plants. The region also has great cultural diversity, with many people still using a wide variety of plants in their daily lives for food, water, shelter, fuel, medicine and the other necessities of life.*

9 Paing et al. (2006:1).

10 Groombridge (1992:xvi). The book by Wulfmeyer (2006) is an interesting record on how this global task has been incorporated into Namibia's education system.

11 Van Wyk & Gericke (2000:7).

In the last few decades, the Southern African region has seen great changes in access to modern health care and education, shifts from rural to urban areas, changes from subsistence farming to cash-crop production, greater flows of migrant labour, and unprecedented environmental degradation. These changes in the socio-cultural and environmental landscape have severely eroded the indigenous knowledge base.

Namibia's biodiversity includes innumerable species of wild plants and animals. Indeed, as little as about 20% of Namibia's wildlife species have been described to date. More than 13,000 species have been described, of which almost 19% are endemic or unique to Namibia.[12] By 2006, the World Conservation Union (IUCN) classified 79 species in Namibia as threatened, which includes those species listed as critically endangered, endangered or vulnerable.[13]

The Global Biodiversity Strategy[14] has indicated, as one of its ten principles for conserving biodiversity, the principle that cultural diversity is closely linked to biodiversity. Humanity's collective knowledge of biodiversity and its use and management rests in cultural diversity; conversely, conserving biodiversity often helps strengthen cultural integrity and values.

For most of human history, the natural world has been protected from the most disruptive human influences by relatively humble technology; cultural/ecological factors, such as taboos preventing overexploitation; tribal welfare, which kept wide areas as wilderness 'buffer zones' between groups; land ownership by ancestors or lineages rather than individuals; relatively sparse human populations; and many other factors.[15] All but a handful of countries have national parks and national legislation promoting conservation. Most governments have joined international conservation conventions, and built environmental considerations into the national education system. Non-governmental organisations (NGOs) are active in promoting public awareness of conservation issues, including those dealing with biological diversity. But still the devastation continues; why?

Naturalists, including interested amateurs and trained biologists, have led the conservation movement. While their contributions have been fundamental, they are unable to fully address the basic problems of conservation because the problems

12 Republic of Namibia (2004a:164).

13 See composition of threatened species: mammals 10; birds 21; reptiles 3; amphibians 1; fishes 20; plants 24; World Conservation Union (IUCN) Red List at http://www.iucnredlist.org/info/tables/table5; last accessed 21 October 2007.

14 World Resources Institute, World Conservation Union & United Nations Environment Programme (2007).

15 McNeely et al. (1990:18).

are not biological, but rather political, economic, social and even ethical. Pressures influence the decisions, affecting the natural environment and incentives that go far beyond the relatively straightforward technical considerations of what might in theory be best for biological resources. Conservation action, therefore, needs to be based on the best available scientific information and be implemented by development practitioners, engineers, sociologists, anthropologists, agronomists, economists, lawyers and politicians. Local resource users are often the ones who make local-level decisions, and their decisions are, above all, affected by enlightened self-interest. Those seeking to conserve biodiversity need to be able to identify the legitimate self-interest of rural people, and design ways of ensuring that the interest of conservation and community coincides.

The aim of this overview about the legal protection of biodiversity in Namibia is to describe in broad terms the legal framework in which efforts to protect biodiversity have to be understood. The legal framework and its analysis informs whether societal activities are in line with the law of the land, whether gaps in the implementation of the laws are to be filled by law reform, and whether additional policies have to be developed that may require the attention of the lawmaker.

The focus of the essays collected in this study is on biodiversity, the protection of natural resources and African customary law, i.e. the local law developed and applied by local communities – or "traditional communities", as they are referred to in the Traditional Authorities Act.[16]

Customary law, being part of the tradition of the respective community, does not operate in isolation. It has its foundation in an environment distinct from the environment of general law. When people refer to customary law, they refer to something that has existed – as one respondent put it –

> *... since time immemorial: customary law is very much what the ancestors left to us and what we have to hold in respect.*

How important this is when investigating the use of natural resources, their protection in general and the protection of biodiversity in particular, will be seen in the case studies assembled in this publication. Questions about ownership of land and natural resources are very often answered by references to the chief as the supreme guardian of traditional culture and the living representative of a community's ancestors, but also to God as the Creator and owner of what He created.

16 No. 25 of 2000.

However, the special ancestral legitimacy of customary law does do not exempt it from also being part of the law of the land in the broader sense. Customary law, indeed, operates in the context of international, regional and national law. Customary law is bound to the constitution and statutory enactments, as is stated in Article 66 (1) of the Constitution.

The structure of the following discussion reflects this background. The sections after the introductory paragraphs above will give an account of the legal framework relevant to the protection of biodiversity on the global level (section 2), the regional level (section 3), and the national level (sections 4 and 5). Section 4 will view constitutional foundations and summarise various relevant policies, as these policies have to be seen as instrumental in the development of the various statutes to which the discussion will later refer. Section 5 analyses important statutory enactments and bills in preparation, introduced by a summary of important policy documents. The position and role of customary law in the overall legal framework and the potential of customary law in respect of the protection of biodiversity and natural resources will be highlighted in section 6. And finally, section 7 will elaborate on the assumptions that guided the focus on customary law.

The considerable length of this chapter was caused by all the essays having been developed out of work required in terms of certain rules by UNAM and its Faculty of Law for obtaining professional qualifications. The papers originally submitted contained substantial information, which was necessary in terms of the said rules, but it was decided that references to the global, regional and national level would be deleted from the essays in order to avoid unnecessary repetition. Nevertheless, the overview does not claim to have covered all aspects of law that one might consider in the interest of the protection of biodiversity and natural resources. This would have filled a book on its own. Instead, a selection was made of areas that were seen to be of primary importance in terms of the research initiated, done and designed for the current phase of UNAM's BIOTA Sub-project.[17]

## 2. The global level

On the global level, several multilateral environmental agreements have been developed that directly or indirectly contain provisions relating to the protection of biological diversity. Apart from the Convention on Biological Diversity (CBD), one of the most-known international biodiversity-related agreements[18] is the Convention

17 See below for work done and currently being undertaken on BIOTA's socio-economic subprojects, particularly the legal anthropological subprojects.

18 Among other international agreements pertinent to biological diversity protection are the 1979 Convention on the Conservation of Migratory Species of Wild Animals

on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES and the CBD have a shared goal of biodiversity conservation.[19] The reason for the existence of several biodiversity-related multilateral environmental agreements is that, over the last 30 years, specific biodiversity-related problems were addressed by specific agreements. The two Conventions in question address international concerns about the loss of biodiversity. Each reflects the period in which they were developed – both in focus and approach. CITES arose out of concern during the 1970s that the international wildlife trade was driving numerous species to extinction, taking the view that strong controls on international trade were required in order to address this threat. Nearly 20 years later, the CBD was created to address the use of and threats to biodiversity more widely, and includes development as well as conservation concerns.

Studies of the relationships between the two Conventions indicate that the overall goals of CITES and the CBD, while not identical, are broadly compatible. In particular, both are concerned with ensuring that the use of wild species is sustainable. In fact, CITES trade provisions provide a potential vehicle for managing trade in fauna and flora in the context of achieving CBD-related goals. Equally, the CBD provides a potential vehicle for supporting the conservation and sustainable use of CITES-listed species. In a wider context, both Conventions can contribute to the target agreed by the World Summit on Sustainable Development of achieving a significant reduction in the rate of biodiversity loss by 2010.

Before referring to these most relevant biodiversity-related agreements in more detail, it is important to give an outline of how international law is applied in Namibia, especially in terms of the effect of international law on the municipal level.

Under South African rule during the period of occupation from 1914 to independence in 1990, the South African approach to the application of international law within the municipal sphere applied to the then South West Africa. As to customary international law, the position then – no different from the position today – was that customary international law formed part of domestic law.[20] With respect to treaties, the South African position is as in other common law countries: the signing, ratification and

(CMS), and the 1971 Ramsar Convention on Wetlands of International Importance.

19 On the synergies of CITES and the CBD, see the paper on the results of the Workshop on Promoting CITES–CBD Cooperation and Synergy, held on 20–24 April 2004; text available at http://www.cites.org/common/cop/13/inf/vilm.pdf; last accessed 10 October 2007.

20 *Nduli v. The Minister of Justice* 1978 (1) SA 893 (A).

other stages of treaty-making comprise an executive act. In order to become part of municipal law, legislative incorporation is required.[21]

After Namibia's independence, the attitude towards the application of international law within the Namibian legal system changed.[22] Namibia became independent through the direct involvement of the international community. During the time when the Constituent Assembly was elected and the Constitution drafted, the United Nations Transitional Assistance Group (UNTAG) co-administered the territory. This took place on the basis of the UN Security Council Resolution 435 of 1978, and a package of international agreements were entered into for the implementation of the said Resolution, aiming at free and fair elections and resulting in a new democratic state. As to the application of international law, the Constitution of independent Namibia formulated a new approach. Article 144 of the Constitution provides that:

> *Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*

It is not only this provision which incorporates international law into the law of Namibia, but also other basic objectives. The Preamble in the Constitution pictures Namibia's future as among and in association with the nations of the world. Article 96(d) furthermore asks for respect for international law and treaty obligations, and provision is made that international disputes will be settled by peaceful means.

The Constitution explicitly incorporates international law and makes it part of the law of the land. Thus, public international law is part of the law of Namibia. It needs no transformation or subsequent legislative act to become so.[23] However, as the Constitution is the supreme law of Namibia, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.[24]

Article 144 of the Namibian Constitution mentions two sources of international law that apply in Namibia: general rules of public international law, and international agreements binding upon Namibia. General rules of public international law include rules of customary international law supported and accepted by a representatively large number of states. The notion of *international agreements* primarily refers to

21 Erasmus (1991:81ff).
22 Tshosa (2001:79ff).
23 Erasmus (1991:94).
24 (Ibid.).

*treaties* in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law,[25] but it also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchanges of notes, agreed minutes, memoranda of and agreements, amongst others.[26] It has to be noted that not only agreements between states, but also agreements with participation of other subjects of international law, e.g. international organisations, are covered by the term *international agreements*. International agreements are in general binding upon states if the consent to be party to a treaty is expressed by signature followed by ratification or by accession in case the state is not a signatory to a treaty or by declaration of succession to a treaty which was concluded before such a state existed as a subject of international law.

A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met. A treaty must have entered into force in terms of the law of treaties, and the constitutional requirements must have been met. International agreements, therefore, will become Namibian law from when they come into force for Namibia.[27] The conclusion of or accession to international agreements is governed by Articles 32 (3) (e), 40 (i) and 63 (2) (e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. However, the Constitution does not require a promulgation of international agreements in order for them to become part of the law of the land.

There was no consensus regarding biodiversity among the nations of this world until the 1992 Earth Summit in Rio, where Namibia submitted its Green Plan.[28] It was at this Summit, marked the first of its kind at international level, where consensus was reached among scientists, policymakers and civil society that humanity was in the process of unconsciously depleting an invaluably important resource central to our food, health and economic security. The consensus reached at the Summit was in the form of a legal instrument, the Convention on Biological Diversity, which

25 Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980.

26 Cf. the definition of *treaty* proposed by the International Law Commission; Article 2 (a) of the Draft Articles on the Law of Treaties with commentary available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; last accessed 15 October 2006.

27 Erasmus (1991:102f).

28 See http://www.met.gov.na/dea/about_dea/dea_profile.htm; last accessed 22 April 2008.

aims to regulate, protect and preserve global environmental resources. Its Preamble affirms that biodiversity is humankind's common concern and that it has to be conserved for continued human survival. However, rather than lay down substantive rules, the CBD rather sets up overall principles, objectives and goals, leaving it up to the contracting states to develop and adopt detailed means to achieve these. It leaves it up to individual countries to determine exactly how to implement most of its provisions. Thus, major decision-making is placed at national level. The CBD provides guidelines and directions to state parties as to how they should use these resources in a conservative manner for the benefit of present and coming generations. The objectives of the CBD comprise the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from the use of genetic resources.

Methods applied to ensure the maintenance of biological diversity are in situ and ex situ conservation. *In situ conservation* is defined as being –[29]

> *... where the maintenance and recovery of habitats, species and populations occur in their natural surroundings or, for domesticated or cultivated species, in the place where they developed their distinctive properties, ...*

while *ex situ conservation* refers to the conservation of components of biodiversity outside their natural habitats, for example in zoos and aquaria.[30]

The CBD provides that states have and should maintain their sovereign rights over their biological or generic resources, and they bear the power to determine access to these resources through established mechanisms for the fair and equitable sharing of benefits arising from their use. There was consensus on the need to protect, conserve and sustainably utilise the available biological diversity for the benefit of humanity.

Thus, the CBD becomes the basis of domestic legislation on the promotion, protection and preservation of biological diversity. It gives the green light to states to exercise full control over their natural resources, provided that proper mechanisms protecting biological diversity are in place. Article 8 (j) of the CBD provides that a state is obliged, –[31]

---

29 Article 2 of the CBD.

30 Glazewski et al. (1998:281).

31 Cf. here also Articles 10 (c), 17 (1) and (2), and 18 (4): The CBD does not differentiate between *indigenous*, *traditional* and *local*, although the terms may refer to different social situations. For example, compare the use of *indigenous* in the United Nations Declaration on the Rights of Indigenous People (to which we will refer below), which applies to specifically defined groups of people and not to all traditional communities

> *... subject to its national legislation, [to] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices.*

Although national sovereignty is recognised, states are obliged to conserve biodiversity and regulate the sustainable use of its component resources. They are also urged to cooperate with each other regarding areas beyond national jurisdiction and other matters of mutual interest. Article 5 of the CBD states that contracting parties are obliged to develop and adopt national biodiversity strategies, plans, or programmes, and integrate the conservation of biodiversity and the sustainable use of its components into relevant sectoral or cross-sectoral plans, programmes and policies. Namibia signed the CBD on 12 June 1992 in Rio de Janeiro, and ratified it on 18 March 1997.

Because the trade in wild animals and plants crosses borders between countries, the effort to regulate it requires international cooperation to safeguard certain species from overexploitation. CITES was conceived in the spirit of such cooperation. Today, it accords varying degrees of protection to more than 30,000 species of animals and plants, whether they are traded as live specimens, fur coats or dried herbs.

CITES was drafted as a result of a resolution adopted in 1963 at a meeting of members of the World Conservation Union (IUCN). The text of the Convention was finally agreed at a meeting of representatives of 80 countries in Washington, DC, in the United States of America, on 3 March 1973; and, on 1 July 1975, CITES entered in force. To date, CITES has 172 parties.[32]

Although CITES is legally binding on its parties, it does not take the place of national law. Rather, it provides a framework to be respected by each party, which has to adopt its own domestic legislation to ensure that CITES is implemented at national level. Namibia acceded to the Convention in 1990, and the Convention came into force for Namibia in March 1991.[33]

---

– and certainly not to all that could be called *local*. For the purpose of this study, the term *traditional* is preferred unless there is a need to differentiate.

32 For more information on CITES as well as the text of the Convention, see: http://www.cites.org/; last accessed 26 September 2006.

33 http://www.cites.org/end/disc/parties/alphabet.shtml; last accessed 20 January 2008.

Plant breeders' rights (PBRs), also known as plant variety rights (PVRs), are intellectual property rights granted to the breeder of a new variety of plant (or to another person or entity that can claim title in the new plant variety by, for example, agreement with the breeder or inheritance from a deceased breeder). Today, the revised International Convention for the Protection of New Varieties of Plants (UPOV Convention)[34] ensures that member states who are party to the Convention acknowledge the achievements of breeders of new plant varieties by making available to them an exclusive property right, on the basis of a set of uniform and clearly defined principles. As of October 2007, Namibia was, however, not party to the UPOV Convention.[35]

In the following, the discussion will involve how intellectual property rights are related to indigenous (local and traditional) knowledge and the protection of biological diversity.[36] The question is whether – and, if so, how – the traditional knowledge of local communities is protected, and whether local communities are at all aware of intellectual property rights.

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation (WTO), signed in Marrakesh, Morocco, on 15 April 1994. Section 5 of the TRIPS Agreement deals with patents, the most notable interconnection between intellectual property rights and biological diversity issues. By implication, the implementation of the CBD will impact on patent law:[37]

> *In particular to an extent to which an invention developed on the basis of a biological resource provides a valuable and practical means of exploiting that resource, the exercise of the rights in any patent granted on such an invention could have positive implications for benefit sharing. This is the reason why Art 16.5 of the CBD requires Parties to ensure that intellectual property rights are supportive of and do not run counter to the objectives of the CBD.*

Article 27 of the TRIPS Agreement generally provides that patents are obliged to be available for any inventions in all fields of technology. However, members may exclude specific inventions from patentability. In this regard, Article 27 (3) (b) is of specific importance when focusing on the protection of biological diversity. It reads as follows:

---

34 The International Convention for the Protection of New Varieties of Plants of 1961, as revised in 1972 and 1978.

35 http://www.upov.int/en/about/members/; last accessed 18 December 2007.

36 The following relies on Hinz (2002).

37 WIPO (2001b:Annex III,3).

> *3. Members may also exclude from patentability:*
>
> *... (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective* sui generis *system or by any combination thereof. ...*

The November 2001 Declaration of the Fourth WTO Ministerial Conference in Doha, Qatar, provided the mandate for negotiations on a range of subjects. Paragraph 19 of the Doha Declaration broadened the discussion on traditional knowledge and biodiversity, saying that the TRIPS Council should look at the relationship between the TRIPS Agreement and the CBD, as well as at the protection of traditional knowledge and folklore. Article 27 (3) (b) as well as the relationship between the TRIPS Agreement and the CBD are discussed controversially – not only by members of the WTO.[38]

Different arguments have been brought forward, but two principal opposing views illustrate the conflict. Whereas some argue that there is no conflict between TRIPS and the CBD, and that governments can implement both agreements in a mutually supportive way through national measures,[39] another view holds that there is inherent conflict between the two instruments, and that the TRIPS Agreement needs to be amended to remove such conflict.[40]

Two main reasons have been put forward to support the view that there is an inherent conflict between the TRIPS Agreement and the CBD. Firstly, the TRIPS Agreement,

---

38 See the Notes by the Secretariat of the WTO's TRIPS Council on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (IP/C/W/368/Rev.1; 8 February 2006 (available at http://www.wto.org/english/tratop_e/trips_e/ipcw368_e.pdf; last accessed 2 November 2007), as well as on Review of the Provisions of Article 27.3(b) (IP/C/W/369/Rev.1; 9 March 2006) (available at http://www.wto.org/english/tratop_e/trips_e/ipcw369r1.pdf; last accessed 2 November 2007).

39 This view has been formulated by the United States, amongst others; cf. Communication by the United States (IP/C/W/469; dated 13 March 2006); available at http://docsonline.wto.org/DDFDocuments/t/ip/c/w469.doc; last accessed 2 November 2007.

40 The group in favour of this view is represented by Brazil and India, and includes Bolivia, Colombia, Cuba, the Dominican Republic, Ecuador, Peru and Thailand. The group is also supported by the African Group (cf. Joint Communication from the African Group dated 26 June 2003; available at http://docsonline.wto.org/DDFDocuments/t/IP/C/W404.doc; last accessed 3 November 2007) and some other developing countries. In general, see also Abbott et al. (1999:1820ff); Dutfield (2000); various articles in Cottier & Mavroidis (2003:Part III,285ff) and also the summary provided in UNCTAD-ICTSD (2005:395ff).

by requiring that certain genetic material be patentable or protected by sui generis plant variety rights and by not preventing the patenting of other genetic material, provides for the appropriation of such genetic resources by private parties in a way that is inconsistent with the sovereign rights of countries over their genetic resources as provided for in the CBD. Secondly, the TRIPS Agreement provides for the patenting or other intellectual property protection of genetic material without ensuring that the provisions of the CBD, including those relating to prior informed consent and benefit-sharing, are respected.

Similar points have been made about the relationship between the TRIPS Agreement and the provisions of the CBD relating to the traditional knowledge of indigenous peoples and local communities. It has been suggested that Article 27.3(b) of the TRIPS Agreement be amended so as to oblige all Members to make life forms and parts thereof non-patentable. If this were not possible, at least patents for those inventions based on traditional knowledge and essentially derived products and processes should be excluded, and the TRIPS Agreement should be amended so that patents inconsistent with Article 15 of the CBD are not granted. With respect to the protection of plant varieties, it has been proposed that a balance be struck between the interests of the community as a whole and protecting farmers' rights and traditional knowledge and ensuring the preservation of biological diversity The group in favour of this view wants to amend the TRIPS Agreement so that patent applicants are required to disclose the country of origin of genetic resources and traditional knowledge used in their inventions.

In the opposite camp, it is argued that the TRIPS Agreement and the CBD have different, non-conflicting objectives and purposes, and deal with different subject matter; for this reason they can and should be implemented in a mutually supportive manner at national level. Correctly applying the criteria for patentability would ensure the grant of valid patents over inventions that use genetic material. This view also holds that such patents do not prevent compliance with the provisions of the CBD regarding the sovereign right of countries over their genetic resources, prior informed consent and benefit-sharing.

It has been said that no change is required to the TRIPS Agreement to accommodate the implementation of the CBD and that implementation of each should be pursued in separate frameworks. In fact, implementation of the TRIPS Agreement, according to this view, is supportive of measures that would implement the obligations of the CBD most effectively. For example, patents could be instrumental in the sharing of benefits and the conservation of biological diversity based on voluntary contracts; the requirements of the patent system material to patentability and inventorship could help prevent bad patents; the control over production and distribution given to patent owners and their licensees can facilitate the sharing of technology; and the protection

of undisclosed information could help the implementation of biosafety and benefit-sharing rules. Benefit-sharing provisions of the CBD could also be implemented through governmental fund-granting activities and the financial mechanism provided for under Articles 20 and 21 of the CBD.

Negotiations on this topic are ongoing – which also applies to the issue of the protection of traditional knowledge, which is at least indirectly relevant for the protection of biological diversity. It is widely recognised that international action should be taken to address the following major concerns:[41]

- One concern is about the granting of patents or other intellectual property rights covering traditional knowledge to persons other than those indigenous peoples or communities who have originated and legitimately control the traditional knowledge.
- Another concern is that traditional knowledge is being used without the authorisation of the indigenous peoples or communities who have originated and legitimately control it, and without proper sharing of the benefits that accrue from such use.

One reason for the need to protect traditional knowledge specifically in respect of biological diversity is related to the issue of food security. Over the years, local farming communities have developed knowledge systems for the conservation and sustainable use of biological diversity, including through the selection and breeding of plant varieties. The well-established practices of saving, sharing and replanting seeds sustain these communities, and ensure their food security. International recognition and protection of traditional knowledge help to maintain and promote such systems. Traditional knowledge includes knowledge systems, innovations and adaptations, information, and practices of local communities or indigenous communities relating to medicine or cures, agriculture, use and conservation of biological material and diversity, and other aspects of economic, social, cultural, aesthetic or other value.[42]

Intellectual property rights entitle the owner of these rights to prohibit trespassing. Therefore, *intellectual property rights* are defined as the boundaries that are set around claimed subject matter, and are asserted by preventing others from using

41 WTO TRIPS Council; Note of the Secretariat dated 9 March 2006; IP/C/W/370/Rev.1; available at http://www.wto.org/english/tratop_e/trips_e/ipcw370r1.pdf; last accessed 4 November 2007. In general, see the fact-finding report by WIPO (2001a).

42 Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement; Joint Communication from the African Group dated 26 June 2003; Draft Decision on Traditional Knowledge, p 9; available at http://docsonline.wto.org/DDFDocuments/t/IP/C/W404.doc; last accessed 4 November 2007.

or reproducing the protected subject matter. One method of securing biodiversity preservation is the protection of traditional knowledge by means of intellectual property rights.

The World Intellectual Property Organisation (WIPO) was established in 1967 to encourage creative activity and to promote the protection of intellectual property throughout the world. Article 2 (8) of the WIPO's enabling convention defines the notion *intellectual property* as rights relating to literary, artistic and scientific works; performances of performing artists, sound recordings, and broadcasts; inventions in all fields of human endeavours; scientific discoveries; trademarks, service marks, and names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[43]

Intellectual property can broadly be classified into two categories.[44] One is industrial property, which encompasses patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications, and the repression of unfair competition. The second category refers to copyrights, and includes literary and artistic works such as novels, poems and plays, films, musical works, drawings, paintings, photographs, sculptures, computer software, databases, and architectural designs. Where would traditional knowledge belong? To both, one could say: there is traditional knowledge that is closer to the nature of industrial property, at least as interpreted from the perspective of the economic philosophy underlying the law of intellectual property, but traditional knowledge could also belong to the second category, which refers to copyrights.[45]

Traditional knowledge holders are confronted with a variety of challenges relevant to many areas of law and policy.[46] The very survival of the knowledge is at stake, as the cultural survival of communities is under threat due to external social and environmental pressures, migration, the encroachment of modern lifestyles, and the disruption of traditional ways of life. Thus, a primary need is to preserve the knowledge that is held by elders and communities throughout the world. Besides this, a lack of respect and appreciation for traditional knowledge is another point that has to be addressed. Traditional knowledge holders are increasingly being

43 Cf. here Abbott et al. (1999:303ff).

44 (Ibid.:21ff); UNCTAD-ICTSD (2005:37ff).

45 It is not within the ambit of this study to elaborate on this. The limited scope of the study will, in particular, not allow venturing into the field of cultural heritage, including what is discussed as *folklore*. Protecting these goods has been the objective of many international, African and national Namibian efforts, which we will have to omit here.

46 Gupta (2007:27f).

commercially exploited, which raises questions of legal protection of traditional knowledge against misuse, the role of prior informed consent, and the need for equitable benefit-sharing.[47]

*Traditional knowledge* generally refers to the matured, long-standing traditions and practices of certain regional, indigenous, or local communities, and encompasses the wisdom, knowledge, and teachings of these communities. Protecting traditional knowledge helps strengthen the enhanced use of such knowledge to achieve social and development goals, such as sustainable agriculture, affordable and appropriate public health, and conservation of biodiversity. There are many forms of traditional knowledge, and no precise definition of the term *traditional knowledge* exists that can cover the diversity of knowledge within traditional communities.[48] Likewise, many different instruments can contribute to the protection of traditional knowledge. However, conventional regimes such as patent law experience difficulty in accommodating traditional knowledge. Traditional knowledge is often in the public domain of the community that claims the right to it. In many cases, traditional knowledge is not a commercially tradable commodity. Nevertheless, the discourse on the protection of traditional knowledge explores the use of conventional intellectual property regimes, partly in further developing its elements. Other than this, new avenues are being searched for with the intention of amending the established catalogue of intellectual property rights. Customary law is one of the new possible instruments on the unfinished agenda. Indeed, the WIPO's fact-finding mission highlighted the importance of customary law as an instrument to protect traditional knowledge.[49]

Several initiatives that focus on the protection of traditional knowledge held by indigenous peoples can be referred to here,[50] namely the International Labour

47 There is a vast amount of literature that focuses on all aspects of the use of traditional knowledge. *Biopolicy*, *biodiplomacy*, but also *biopiracy* are keywords in the ongoing debate. Cf. the *Biopolicy International Series* of the African Centre for Technology Studies in Nairobi; Sánchez & Juma (1994); Shiva (1997); Finger & Schuler (2004); Heath & Kamperman Sanders (2005); and Oguamanam (2006).

48 WIPO (2006).

49 WIPO (2001a:57ff). We will come back to this below in Section 5.

50 The rights of indigenous peoples have been on the international agenda for many years. The International Labour Organisation (ILO) Convention 169 of 1989 provides, in Article 1, for the Convention to apply to (a) "tribal peoples … whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions …"; and (b) "to peoples in independent countries who are regarded as indigenous on account of their descent from the population which inhabited the country … at the time of conquest or colonisation … and who … retain some or all of their own

Organisation (ILO) Conventions 107 of 1957 and 169 of 1989; the recently adopted UN Declaration on the Rights of Indigenous Peoples; and the Rio Declaration and the Rio Agenda 21 of 1992. The ILO Conventions call on governments to enact policies conducive to respecting socio-economic and cultural rights, including the religious, institutional, customary, legal, environmental and traditional practices of indigenous peoples.[51] The Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly as a Resolution in terms of Article 10 of the UN Charter.[52] Article 31 of the Declaration refers explicitly to traditional knowledge and says the following in its Sub-article 1:

> *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge ... as well as their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge ...*

Sub-article 2 requires governments to take effective measures to recognise and protect the exercise of these rights.

Principle 22 of the Rio Declaration deals with traditional knowledge in the following manner:

> *Indigenous peoples and their communities, and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.*

Chapter 26 of Agenda 21 makes elaborate provision on traditional knowledge. Paragraph 26.6 (a) expects governments to –

> *[D]evelop and strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their*

---

social, economic, cultural and political institutions". For more details cf. Hinz (1990a; 1990b).

51 See ILO Convention 169 Articles 2 (a), 4 (1), 5 (a) and (b), 7 (1), 8 (1) and (2), 13, 15, and 25.

52 Resolution 61/295 of 2 October 2007. Some 143 members of the UN voted in favour, 11 abstained, and 4 (Australia, Canada, New Zealand and the United States) voted against. Namibia played an important role in negotiating the final text of the declaration. Cf. *The Namibian*, 13 September 2007.

> *values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation …*

In summarising the ongoing debate, one can distinguish between two complementary forms of intellectual property-related protection. The first of these is *positive protection*, giving traditional knowledge holders the right to take action against the misuse of traditional knowledge. The option of positive protection includes the use of existing intellectual property laws and legal systems; extended or adapted intellectual property rights specifically focused on traditional knowledge (sui generis aspects of intellectual property laws); and new, stand-alone sui generis systems which give rights in traditional knowledge as such. The second form of protection is *defensive*, safeguarding against illegitimate intellectual property rights taken out by others. The focus of defensive protection measures has been in the patent system. Defensive protection aims at ensuring that existing traditional knowledge is not patented by third parties – ideally, by ensuring that relevant traditional knowledge is taken fully into account when a patent is examined for its novelty and inventiveness.[53]

The extent to which the BIOTA research presented here has added to the protection of traditional knowledge will be explored at the end of this publication.

## 3. The African and regional level

Various African regimes contain biodiversity-related aspects within their legal frameworks.[54] In order not to go beyond the scope of this study, the focus will be limited to the more relevant African Conventions on the Conservation of Nature and Natural Resources of 1969 and 2003, and on the regional level, to specific Protocols of the Southern African Development Community (SADC).

The original African Convention on the Conservation of Nature and Natural Resources was adopted in Algiers, Algeria, in September 1968 and entered into force in June 1969.[55] Of the 53 member states, 30 of the 40 that signed the Convention have ratified it.[56] In recognition of the fact that soil, water, flora and faunal resources constitute a capital of vital importance to mankind, the Convention's fundamental

53 Cf. Abbott et al. (1999:1836ff).

54 For example, the African Regional Intellectual Property Organisation (ARIPO), formerly the African Regional Industrial Property Organisation, is an intergovernmental organisation for cooperation among African states in patent and other industrial property matters.

55 Text available at http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm; last accessed 1 April 2008.

56 Namibia is not a signatory to this Convention.

principle is that the contracting states undertake to adopt the measures necessary to ensure the conservation, utilisation and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people. The Convention contains several provisions related to the conservation and perpetuation of species. Special provisions as to protected species and trade in specimens are formulated as well.

The Revised African Convention on the Conservation of Nature and Natural Resources was adopted by the Second Ordinary Session of the Assembly of Heads of State and Government of the African Union in Maputo, Mozambique, in July 2003.[57] It specifically commits parties to managing their natural resources more sustainably. However, the Convention has not yet come into force, as the requirements for this have so far not been fulfilled: according to Article 38, the Convention comes into force on the 30th day following the date of deposit of the 15th instrument of ratification, acceptance, approval or accession with the Depositary. Namibia has signed but not yet ratified the 2003 Revised Convention. Although 34 of the 53 member states have so far signed the Convention, it has only been ratified by 7 states.[58] Provisions directly related to the protection of biodiversity are contained in Article IX on Species and Genetic Diversity; Article X on Protected Species; Article XI on Trade in Specimens and Products thereof; and Article XII on Conservation Areas.

The parties to the Convention are obliged to maintain and enhance the species and genetic diversity of plants and animals whether terrestrial, freshwater or marine. They are further obliged, for that purpose, to establish and implement policies for the conservation and sustainable use of such resources. Parties are also obliged to undertake to identify the factors that are causing the depletion of animal and plant species that are threatened or which may become so, with a view to the elimination of such factors and to accord a special protection to such species. Furthermore, domestic trade in as well as the transport and possession of specimens and products has to be regulated by the parties, and appropriate penal sanctions, including confiscation measures, are to be provided. To ensure the long-term conservation of biological diversity, the parties are also bound to establish, maintain and extend conservation areas.

57 Text available at http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm; last accessed 1 April 2008.

58 Burundi, Comoros, Libya, Lesotho, Mali, Niger and Rwanda. Cf. http://www.africa-union.org/root/au/Documents/Treaties/List/Revised%20Convention%20on%20Nature%20and%20Natural%20Resources.pdf; last accessed 1 April 2008.

SADC was established in 1992, and succeeded the Southern African Development Coordination Conference (SADCC) which was created in 1980.[59] SADCC was formed as an alliance of nine majority-ruled states in Southern Africa, with the main aim of coordinating development projects in order to counter economic dependence on the then apartheid South Africa. The members of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The Seychelles was a member of SADC from September 1997 until July 2004.[60]

In accordance with the Declaration and Treaty of the Southern African Development Community (the SADC Treaty), the parties can conclude protocols as may be necessary in each area of cooperation.[61] The protocols are subject to signature and ratification by the parties thereto. So far, 23 such protocols have been concluded.[62]

The Protocol on Forestry, which was signed on 3 October 2002, provides for the basic policy framework that promotes sustainable forest management and conservation, including the production and trade in forest products. The objectives of the Protocol, set out in Article 3, are to –[63]

> *(a) promote the development, conservation, sustainable management and utilisation of all types of forests and trees;*
> *(b) promote trade in forest products throughout the Region in order to alleviate poverty and generate economic opportunities for the peoples of the Region; and*
> *(c) achieve effective protection of the environment, and safeguard the interests of both the present and future generations.*

In recognition of the objectives of regional cooperation, the above include promoting public awareness of forestry;[64] harmonising approaches for member states to sustainably manage and safeguard their forest resources;[65] promoting increased efficiency in forest resource utilisation;[66] facilitating the development of trade in

59 SADCC was formed in Arusha, Tanzania, in 1979 and launched in 1980 in Lusaka, Zambia.
60 The Seychelles have expressed their intention to rejoin SADC.
61 Article 22 of the Declaration and Treaty of SADC.
62 The most relevant Protocols for the protection of biodiversity include those on Fisheries, Forestry, Wildlife Conservation, Law Enforcement, and Shared Watercourse Systems.
63 Article 3 of the SADC Protocol on Forestry.
64 Article 19 (1), SADC Protocol on Forestry.
65 Articles 9 (2) and 19 (2), SADC Protocol on Forestry.
66 Articles 18 (2) (a), 19 (2) and 20 (2), SADC Protocol on Forestry.

forest products;[67] protecting traditional knowledge;[68] and enhancing forest research, extension, education and training.[69]

State parties are obliged to ensure that national processes and procedures for preparing and revising national forest plans, classifying forests, and establishing management plans for forests and protected areas containing forests involve consultation and coordination and, where appropriate, joint decision-making between all relevant sectors of government, including the authorities responsible for conserving biological diversity. Common criteria and indicators for sustainable forest management also have to be developed in order to allow the evaluation of biological diversity in forest lands.

One important use of wildlife resources in the SADC Region is wildlife-based tourism. In a broader sense, wildlife can be regarded as a combination of wild animals and wild plants, offering an important and diverse range of consumptive and commercial products indispensable to rural livelihoods. These include wild fruits, mushrooms, honey, fish, and building materials. The SADC approach is to manage wildlife resources in an integrated manner and for the direct benefit of conservation and peoples, by providing consumptive products as well as incomes from commercial consumptive and non-consumptive products.[70] This includes the management of wildlife as wild populations in large ecosystems as conventional protected areas. It also includes the community wildlife management areas and other initiatives in the SADC Region.

SADC has adopted the Protocol on Wildlife Conservation and Law Enforcement as the basic platform for regional cooperation and integration in wildlife management. The Protocol clearly identifies two aspects that guide regional cooperation and integration in wildlife management. The first is the establishment of common approaches to the conservation and sustainable use of wildlife resources, and the second is on law and enforcement, i.e. the effective enforcement of laws governing the use of resources. The Protocol was signed by Namibia in 1999, and entered into force on 30 November 2003.

67 Article 18 (2) (b) (ii) of the SADC Protocol on Forestry, regarding harmonised standards for international trade in forest products from sustainably managed forests, including sanitary and phytosanitary standards relating to imported, exported and internally marketed forest products in accordance with sanitary and phytosanitary measures and standards and technical regulations on trade, as contained in the Protocol on Trade.

68 Article 16, SADC Protocol on Forestry.

69 Article 19 (1), SADC Protocol on Forestry.

70 See Articles 1 and 6, SADC Protocol on Wildlife Conservation and Law Enforcement.

The Protocol applies to the conservation and sustainable use of wildlife, excluding forestry and fishing resources. Each state party has to ensure the sustainable use of wildlife resources under its jurisdiction and put measures in place so that activities within its jurisdiction do not cause damage to the wildlife resources of other states or in areas beyond the limits of national jurisdiction. Effective laws in dealing with culprits who do not comply with the laws set to ensure conservation and sustainable use of wildlife are to be promulgated. The parties have agreed upon the Protocol aware of the fact that the conservation and sustainable use of wildlife in the SADC Region contribute to sustainable economic development and the conservation of biological diversity.

## 4. The national level (I): Constitutional foundations and policies

### *4.1 Constitutional foundations*

The root causes of biodiversity degradation recognised on the global level also apply to Namibia. Biodiversity loss is closely related to human actions, economies and policies.[71] The direct causes of the extinction of species are the destruction of habitats, overexploitation, over-consumption, pollution, and the wide range of activities which have a direct impact on the environment. Other unintended factors can be added, such as the incidental taking of species and the introduction of foreign species into local habitats. In Namibia, the direct causes of biodiversity loss include population growth and increasing resource consumption as well as the loss, fragmentation and conversion of natural habitats due to deforestation, land degradation, urban development, etc. The most severely threatened habitats are riparian forests along the banks of the perennial rivers, and wetland, woodland and savannah biomes. The unsustainable harvesting of wild plants and animals and wildlife products is one of the major threats to Namibian biodiversity, as is air, soil and water pollution and the introduction of alien invasive organisms that threaten the survival of indigenous species.[72] Ignorance about the role of species and ecosystems should not be neglected in terms of threats to biological diversity in Namibia.[73]

Namibia's National Biodiversity Strategy and Action Plan were developed through consultation by the thematic working groups of the National Biodiversity Task Force. The Plan consists of an introduction to biodiversity and sustainable development options for Namibia; a core text with strategic aims and targets (the National Strategy); and supportive annexes which identify priority activities, timeframes, lead agencies, supporting institutions, the logical order of implementation, and

71 Kiss & Shelton (2004:192).
72 For more on invasive alien species in Namibia, cf. Bethune et al. (2004).
73 See Republic of Namibia (2004a:164f).

indicative budgets (the National Action Plan). Core sections of the strategy include conserving biodiversity in Namibia's priority areas, especially the *Sperrgebiet* and Namib escarpment regions; the sustainable use of habitats and species; monitoring, predicting, and coping with environmental change in an arid country; sustainable land and wetland management; sustainable coastal and marine management; integrated planning for sustainable development; Namibia's role in the larger world community; and implementation and action.[74]

The success of Namibia's efforts to control, manage, and conserve the sustainable use of biodiversity depends on different legal instruments. The most relevant of these exists to protect biological diversity, and will be discussed in the following paragraphs.

The Constitution of the Republic of Namibia is the law above all laws.[75] Therefore, all legislation ought to be consistent with the provisions of the Constitution. The Constitution lays the foundation for all policies and legislation in Namibia, and contains two key environmental clauses relevant to the sustainable use of natural resources.

The first key clause is Article 95 (l), which is found in the chapter on principles of state policy.[76] The Article stipulates that –

> *[t]he State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:*
>
> *... (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; ...*

The second key clause is Article 91 (c), which includes the concern for the environment into the functions of the Ombudsman:

> *the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia; ...*

74 See http://www.met.gov.na/programmes/biodiversity/strategy.htm; last accessed 5 April 2008.

75 Article 1 (6) states that the Constitution shall be the supreme law of Namibia.

76 Chapter 11, Namibian Constitution.

Both Articles are supported by Article 100, according to which all natural resources, including water, vest in the state, unless otherwise legally owned. This Article supports the quoted key clauses as it strengthens the responsibility of the state over all natural resources, which are, by virtue of the Article, prevented to the widest possible extent from falling outside human jurisdiction and, thus, becoming no man's goods.

The Constitution also sets the framework for the revision of laws inherited from the time before independence, namely that they remain in force until amended, repealed or declared unconstitutional.[77] This, together with the emphasis placed on environmental concerns at the Rio Summit in 1992 and the increasing awareness of them, triggered widespread legislative reform in terms of natural resource management. As a result, a considerable number of legislative projects have been completed since independence, while others have advanced enough to allow them to be forwarded to the lawmaker.

Legislative efforts are supported by comprehensive policies. These policies will also be noted in this part of the study as they offer a background to the enactments, and may even generate discourse on whether or not the legislative implementations are sufficient to meet the expectations of such policies.

Before the study turns to relevant policies as the guidelines for legislative action, another quasi-constitutional Act has to be considered, namely the Traditional Authorities Act,[78] which is a revision of the original 1995 Act.[79] The Traditional Authorities Act is, albeit seen within the framework of the constitution of the state, the *constitution* of traditional governance.[80] It implements the confirmation of customary law as provided for in Article 66 (1) of the Constitution,[81] the implicit recognition of traditional governance in Article 102 (5),[82] and, in a wider sense, the right to culture as stipulated in Article 19.[83]

The extreme importance of traditional governance in the overall socio-political system of the country is best expressed by what the Founding President of Namibia,

77 Article 140 (1), Namibian Constitution.
78 No. 25 of 2000.
79 No. 17 of 1995.
80 Cf. Hinz (2008:73).
81 Article 66 (1) of the Constitution talks of customary law and with this, incidentally, also of traditional governance being part of customary law.
82 The recognition is implicit, as Article 102 (5) requires the establishment of a council of traditional leaders and, with this, presupposes the existence of traditional governance.
83 The right to culture can be interpreted as the right to manifest culture through traditional governance; see Bennett (1996:45ff).

Dr Sam Nujoma, said about the role of traditional authorities in his opening statement on the occasion of the First National Traditional Authority Conference: [84]

> *We must always remember that Article 102 (5) of the Constitution of Namibia provides for the establishment of various organs of Local Government and a Council of Traditional Leaders … This is vivid proof that the institution of Traditional Leaders is a central component of the state machinery in this country … I must state categorically that any legislation affecting Traditional Leaders that my Government has promulgated and will promulgate has one singular purpose, and that is to create proper conditions for Traditional Authorities to participate fully in nation-building and socio-economic development in the country …*

The Namibian Parliament enacted the first version of the Traditional Authorities Act[85] in 1995. The original Act was amended in 1997,[86] and repromulgated in a further revised version in 2000.[87]

In pursuance of the Act, a process of recognition of traditional authorities began. This process included all traditional authorities, including those that had enjoyed recognition before independence. The process was intended to take stock of the existing structures, to make changes where they were needed, and to make public who and where the traditional authorities were. This process of recognition was linked to several consequences, such as the implementation of a new remuneration system for traditional leaders, financial assistance for building traditional authority offices, and representation in the Council of Traditional Leaders.[88]

To date, 42 traditional authorities have been published in Namibia's *Government Gazette*.[89] As they appear in the *Gazette* of 1998, these formed the members of the Council of Traditional Leaders launched on 3 June 1998. Since then, a number of new traditional authorities have entered the traditional scene. However, some communities still struggle for recognition, but have not achieved it.[90]

Section 3 of the Traditional Authorities Act of 2000 deals with the powers, duties and functions of traditional authorities. All the powers and duties have to be seen as part

84 Bruhns & Hinz (1997:12f).
85 No. 17 of 1995.
86 By Act No. 8 of 1997.
87 No. 25 of 2000.
88 Cf. Patemann (2002).
89 *Government Notice* No. 64 of 1998.
90 Hinz (2008:79ff).

of the overall responsibility of traditional authorities, which is *to promote peace and welfare amongst the members of their communities*.

It is the overall responsibility of traditional authorities to supervise and ensure the observance of the customary law of that community by its members.[91] According to section 3 (3) (c) of the Act, traditional authorities may *make* customary law.[92] This confirms that customary law is not static: it develops as societal developments require changes in customary law.[93] It is obvious that the lawmaking capacity of traditional authorities is of utmost importance for this study as it empowers local stakeholders to embark on the necessary legislative translations of the rapidly growing concerns with regard to the environment, biodiversity and the sustainable use of natural resources. Section 3 (2) (c) of the Act pays special attention to the environmental responsibilities of traditional authorities. The provision stipulates that a member of a traditional authority –

> *... shall ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystem for the benefit of all persons in Namibia ...*

Although the wording of this provision is reminiscent of the wording in Article 95 (l) of the Constitution, the legal status of section 3 (2) (c) of the Traditional Authorities Act reaches beyond the limits of the principle of constitutional state policy. Section 3 (2) (c) is not bound in the same way as state policy principles are bound by Article 101 of the Constitution. Contrary to what Article 101 of the Constitution provides for state policy principles, section 3 (2) (c) is fully legally enforceable in a court of law, be it a traditional court[94] or state court.[95]

91 Section 3 (1).

92 The making of customary law is complementary to other duties set out in the Act. Section 3 (1) (a) requires traditional authorities not only to ascertain the customary laws that apply in that traditional community after consultation with the community members, but also to assist in their codification; see section 3 (1) (b) on administering and executing the customary law of a community.

93 D'Engelbronner-Kolff (1998).

94 However, pursuing the obligations in accordance with section 3 (2) (c) of the Traditional Authorities Act in a traditional court would need further elaboration, also in view of the debatable scope of jurisdiction of traditional courts, as the Community Courts Act, No. 10 of 2003, has repealed the law in place before it, but has not yet been fully implemented. Cf. here Hinz (2008:71ff).

95 Another more political aspect in the quoted section will be dealt with in the concluding part of this publication.

The last-quoted part of the Traditional Authorities Act has to be read together with the more general task of section 3 (2) (c), which requires the members of a traditional authority to –

> *... uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community.*

This obligation can be understood as an expression of the socio-political background in which the environmental obligation is grounded. At the same time, the Traditional Authorities Act expects that traditional authorities, by implementing the duties and tasks expected of them, support the policies of the government, regional councils, and local authority councils.[96]

The registration of traditional healers was part of the tasks of traditional authorities in accordance with the first version of the Traditional Authorities Act of 1995.[97] However, this task was not taken into the revised Act of 2000. A Traditional Healers Bill is in preparation. A Traditional Healers Board was established in 1996[98] under the now repealed Allied Health Services Professions Act.[99]

### *4.2 Policies*

Many policies build the foundation for biodiversity protection in Namibia. This subsection will only focus on policies relevant to the protection of natural resources and biodiversity.[100]

---

96 Cf. section 16 of the Act. As to problems with the interpretation of this section, see Hinz (2008:82ff).

97 Section 10 (1) (h).

98 No. 52 of 1998. For more on the legal status of traditional healers, see LeBeau (2003:35ff).

99 No. 20 of 1993. The 1993 Act was repealed by the Allied Health Professions Act, No. 7 of 2004. According to its section 62 (2), any rule, notice, authorisation or order made under the repealed Act remains in force. This applies in particular to the many health professional boards that were put into operation under the repealed Act.

100 Several other policies that cannot be discussed here in detail might at least indirectly also contain aspects of biodiversity protection. This applies, for instance, to the 1999 Policy for Prospecting and Mining in Protected Areas and National Monuments, which recognises that mineral exploitation can result in significant negative environmental impacts, including habitat destruction, loss of biodiversity, and impacts that will threaten growth within the tourism industry. The 1995 National Policy and Strategy for Malaria Control also contributes to the maintenance of biodiversity, recommending personal protection against malaria through the use of low-impact repellents which, when compared to pesticides like DDT, are considered to be more environmentally

### *4.2.1 Vision 2030 and National Development Plans*

Namibia's Vision 2030[101] was launched in June 2004. The Vision's main rationale is to provide long-term alternative policy scenarios on the future course of development in a country at different points in time up until the target year of 2030.[102]

Chapter 5 of Vision 2030 generally deals with the sustainable resource base, and refers to freshwater and associated resources; production systems and natural resources; land and agricultural production; forestry; wildlife and tourism; fisheries and marine resources; biodiversity; and the urban environment. As far as biodiversity is concerned, one sub-vision of Vision 2030 specifically relates to biodiversity:[103]

> *The integrity of vital ecological processes, natural habitats and wild species throughout Namibia is maintained whilst significantly supporting national socio-economic development through sustainable low-impact, high quality consumptive and non-consumptive uses, as well as providing diversity for rural and urban livelihoods.*

The aim of preserving and maintaining Namibia's biodiversity is directly or indirectly formulated in all other parts of Chapter 5 of Vision 2030. One of the long-term aims of Vision 2030 with regard to freshwater and associated resources[104] is, for instance, the availability of clean, unpolluted water as well as productive and healthy natural wetlands with rich biodiversity.[105]

Namibia's Vision 2030 visualises the National Development Plans (NDPs) as the main vehicles for achieving its objectives. The successive NDPs contain the goals and intermediate targets (milestones) that eventually lead to the realisation of the Vision. The Second National Development Plan[106] (NDP2, spanning the period 2001/2 to 2005/6) sought sustainable and equitable improvement in the quality of life for all in Namibia. Its objectives were to reduce poverty, create employment, promote economic empowerment, stimulate and sustain economic growth, reduce

---

friendly. In the context of the latter policy, emphasis was placed on maintaining and enhancing indigenous populations of bullfrogs, bats and fish to reduce the incidence of malaria.

101 Republic of Namibia (2004a).

102 Ruppel (2008a:108ff).

103 Republic of Namibia (2004a:167).

104 Aims regarding freshwater and associated resources, as well as a collection of things that have to be done in order to achieve these aims, are listed in Namibia's Vision 2030 (Republic of Namibia 2004a:138).

105 For more detailed information on wetlands in Namibia, cf. Ruppel & Bethune (2007).

106 Republic of Namibia (2002a).

inequalities in income distribution and regional development, promote gender equality and equity, enhance environmental and ecological sustainability, and combat the further spread of HIV/AIDS.

NDP3[107] spans the five-year period from 2007/8 to 2011/2. The draft guidelines for the formulation of NDP3 were prepared in the latter part of 2006, and approved by Cabinet in December 2006. The overall theme of NDP3 is defined as accelerated economic growth through deepening rural development.[108] The productive utilisation of natural resources and environmental conservation are key goals for NDP3. Such environmental concerns include water, land, the sea, natural resources, biodiversity and ecosystems, drought, and climate change. With increasing industrialisation, waste management and pollution will grow in significance.

NDP3 recognises that, with the country's scarce and fragile natural resource base, the risk of overexploitation is considerable and, therefore, that sustained growth is highly dependent on the sound management of those resources. The guidelines for preparing the NDP3 stipulate that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by the reinvestment of benefits in natural resources by diversifying the economy away from resource-intensive primary sector activities, and by increasing the productivity per unit of natural resource input. To ensure the protection of environmental concerns, the optimal and sustainable utilisation of renewable and non-renewable resources has to be achieved through sustainability.

The coordination of the NDP3 goals is the responsibility of the Ministry of Agriculture, Water and Forestry and the Ministry of Environment and Tourism. As far as biodiversity and ecosystems services are concerned, NDP3 specifies that –[109]

> *Namibia's biodiversity is largely intact, with very few recorded extinctions. Though numerous protected areas and measures for the protection of vegetation types, habitats, and species exist, some species may already be severely threatened. The distribution of many major taxonomic groups is totally excluded, with development initiatives and land use posing threats to biodiversity. Habitat destruction is the common thread threatening all taxonomic groups. The National Biodiversity Task Force established under Namibia's National Biodiversity Programme contributed to the mainstreaming of cutting-edge biodiversity issues and produced the globally-recognized National Biodiversity Strategy and Action Plan.*

107 Text available at http://www.npc.gov.na; last accessed 6 August 2007.
108 (Ibid.).
109 (Ibid.).

Since Namibia's Independence in 1990, one goal has been to achieve a new era of environmental management and development. The UN Conference on the Environment and Development (UNCED) in Rio de Janeiro in 1992, two years after Namibian's Constitution came into force, formally marked this new era. From the beginning of Namibia's young democracy, the twinning of environment and development issues has been pivotal. As Namibia is an arid country and strongly dependent on natural resources, this association is critical to the country's future. Therefore, the Constitution explicitly promotes development through sustainable resource use and the protection of biological diversity and ecosystems for present and future generations.

In fulfilling this task, Namibia has a National Biodiversity Strategy and Action Plan that coincides with the World Summit on Sustainable Development. Furthermore, with its Vision 2030, Namibia plans to transform itself from a developing, lower-middle-income country to a developed, high-income country by 2030. The National Biodiversity Strategy and Action Plan is a milestone of strategic planning on the way to 2030, meaning that the achievement of the essential targets for Vision 2030, NDP2 and NDP3 works with, and not against, Namibia's natural resource base. The Namibian government is committed to the principle that resource users, when enabled, are the best managers and custodians of resources. The National Biodiversity Strategy and Action Plan focuses on strengthening capacity at these levels, and on incentives for good management of the resources on which people depend for their survival and livelihoods. Namibia has taken up the challenge to conserve species and ecosystems to limit the increasing rate of loss of biological diversity in various aspects. The challenge is not an easy one, and it takes time to realise this ambitious aim in the best possible manner. While some of the laws contributing to the conservation of biological diversity might be outdated from the vantage point of the present, with its respective ministries, the government is endeavouring to improve, perfect and adjust existing legislation and, where necessary, enact new laws. Without any doubt, this process demands time and continuity.

The goal of the Action Plan is to protect ecosystems, biological diversity and ecological processes through conservation and sustainable use, thereby supporting the livelihoods, self-reliance and quality of life of Namibians in perpetuity.[110] The Action Plan intends to provide overall strategic guidance for the implementation of Article 95 (I) of the Constitution, and detailed, practical activities through which sustainable development, e.g. through wise management of biological resources, can be achieved. Furthermore, the Action Plan attempts to provide a national strategic framework for natural resource management activities involving biological resource management, including trade and economic incentives. It aims to prioritise activities

110 Barnard et al. (2000:13).

and measures needed to implement this strategy effectively for the next decade. One objective in strategic aim 1.2 of the Action Plan is the implementation, promotion and support of communal and freehold conservancies. Conservancies are critical assets: they supplement the protected area network, harness the energy and skills of landholders, and bring about sustainable development to communal areas.

The Action Plan also advocates for the facilitation of sustainable natural resource management throughout Namibia as a fundamental theme for development planning, through appropriate ecosystem management and land use practices, and the selective, sustainable harvesting of species. Government is urged to develop monitoring and incentive systems for sustainable natural resource use. It is proposed that the users themselves become the monitoring agents, practising adoptive management, since they are the custodians of resources. Incentive systems should be aimed at making the sustainable management of natural resources profitable.[111]

Apart from the Action Plan, the National Biodiversity Task Force and the National Biodiversity Programme contribute to the conservation of biological diversity. The latter body is comprised of various supporting groups, including BIOTA. Each of these groups looks at specific biodiversity-related issues/problems. The National Biodiversity Task Force and the National Biodiversity Programme, together with the other stakeholders, formulated a Strategic Plan of Action for sustainable development through biodiversity conservation which spans the period 2001 to 2010.[112] This plan aims –

> *... to facilitate sustainable natural resource management throughout Namibia as a fundamental theme of development planning, through appropriate ecosystem management and land use practices and selective, sustainable harvesting of species.*

This includes the use of traditional knowledge systems for the sustainable management of biodiversity by seeking a participatory evaluation of relevant customary law and practice.

### *4.2.2 Environmental assessment and biotechnology*

The Environmental Assessment Policy[113] approved by Cabinet in 1994 obliges Namibia to place a high priority on maintaining ecosystems and related ecological processes, maintaining maximum biological diversity. The Policy recognises

111 Sub-strategic aim 2.2.
112 Barnard et al. (2000:13).
113 Republic of Namibia (1995b).

that environmental assessments are a key tool towards implementing integrated environmental management. The Policy has also gained legislative support by the Environmental Management Act.[114]

The National Policy on Enabling the Safe Use of Biotechnology[115] was prepared by the Namibian Biotechnology Alliance and the Ministry of Higher Education, Vocational Training, Science and Technology in October 1999.[116] Pertinent to this review are two of the major objectives of this Policy. The first is to guide the judicious use of modern biotechnology in Namibia for sustainable development in ways which do not in any way jeopardise human and environmental health, including Namibia's biodiversity and genetic resources. A second objective is to ensure the effective control of transboundary movements of genetically modified organisms or products thereof resulting from modern biotechnology, through exchange of information and a scientifically based transparent system of advance and informed agreement. The Policy recognises that, in addition to a competent lead authority, cooperation from several other ministries is essential to ensure regulation. Several institutions will be involved in conducting risk assessments, advising on permit issues, and ensuring effective control and law enforcement.[117]

*4.2.3 Tourism and decentralisation*

The 1994 Tourism White Paper[118] commits the government to, inter alia, develop the tourism industry without threatening Namibia's biodiversity. It requires part of the income derived from tourism be reinvested in the conservation of natural resources, including those associated with wetlands. The Policy identifies ecotourism for foreign visitors as the primary product, and assigns the Ministry of Environment and Tourism the lead role in coordinating inter-ministerial activities relevant to tourism and in cooperating with the private sector to create a national tourism identity.[119]

The 1999 draft National Tourism Policy[120] aims to secure and develop important tourism areas so that their value is not undermined by other, unsustainable land use options.

114 No. 7 of 2007.
115 Republic of Namibia (1999a).
116 For environmental law and policy education in Namibia, see Ruppel (2008c).
117 Republic of Namibia (1999a).
118 Republic of Namibia (1994a).
119 Section 3.13 of the 1994 Tourism Policy.
120 Republic of Namibia (1999b).

In 1995 the Community-based Tourism Policy[121] was developed by the Ministry of Environment and Tourism to recognise the fact that tourism could bring significant social and economic benefits to previously disadvantaged people, whilst also promoting biodiversity conservation. Under the terms of the Policy, the Ministry of Environment and Tourism is obliged to ensure that development of the community-based tourism sector is environmentally sustainable, and that no development takes place without the participation of the people affected. This objective is geared to emphasise environmental sustainability, biodiversity conservation and community participation in tourism.

Finally, in 2001, the Ministry of Environment and Tourism issued the Revised Draft Tourism Policy 2001–2010.[122] This Policy stresses that no tourist development should be at the cost of biodiversity, and requires that some of the income derived has to be reinvested into natural resource conservation.

According to the Regional Councils Act,[123] regional councils are responsible for planning regional development. At the end of 1996, Cabinet adopted a Decentralisation Policy,[124] which was launched as a decentralisation programme in March 1998. The Ministry of Regional and Local Government, Housing and Rural Development (MRLGHRD) is responsible for the coordination of the overall decentralisation process. Close communication between the regional councils and local authorities is required in the process. Decentralisation initiatives are conducted government-wide, aiming at the eventual devolution of all public services to the 13 regional councils and to local authorities. There are three main types of decentralisation:[125]

- *Deconcentration* refers to the shifting of functions and authorities within a line ministry from the centre to the operational level, whereas overall responsibility remains with the centre.
- *Delegation* refers to the shifting of functions and authorities on an agency basis to the regional councils or local authorities (secondment), whereas the responsibility remains with the central line ministry.
- *Devolution* refers to the handing over of functions/services, authority and responsibility to the regional councils, local authorities or other agencies.

121 Republic of Namibia (1995a).
122 Republic of Namibia (2001a).
123 No. 22 of 1992.
124 Republic of Namibia (1998a).
125 (Ibid.).

Decentralisation follows a process approach and is guided by gradual phasing-in of decentralised authority.[126] Line ministries have identified the functions that are to be delegated in the first phase of decentralisation. The MRLGHRD has also put guidelines and legislation in place in the form of the Decentralisation Enabling Act.[127]

### *4.2.4 Land and agricultural policies*

The land-use planning policy document[128] drafted by the Ministry of Environment and Tourism in 1994 defines five physiographic land forms, namely *communal state land*, *privately owned commercial farmland*, *proclaimed state land*, *urban areas*, and *wetland systems*, including their catchments. The Policy emphasises the sustainability of natural resources, biodiversity and essential ecological processes.

The National Land Use Planning Policy[129] was drafted by the Ministry of Lands and Resettlement in 2002. It provides a framework for the implementation of regional integrated land use plans.

In 1998, the Ministry of Lands and Resettlement issued the National Land Policy,[130] which is based on constitutional principles and on the national commitment to redress the social and economic injustices inherited from Namibia's colonial past. The Policy calls for the establishment and proclamation of urban areas, and strives to promote decentralisation and community involvement. The Policy proposes financial and tax incentives for the protection and rehabilitation of natural environments, e.g. planting of indigenous trees and using alternative energy to reduce rates of deforestation and pollution. In accordance with Article 95 (1) of the Constitution, it promotes environmentally sustainable land use, stating that failure to demonstrate environmental sustainability may be grounds for the denying or termination of a title. One of the aims of this Policy is to establish a Land Use and Environmental Board to promote environmental protection and contribute towards coordinated planning and management at national and regional levels. This Board is obliged to ensure that environmental protection is promoted in order to guarantee environmental, social and economic sustainability.

126 Hopwood (2005).
127 No. 33 of 2000.
128 Republic of Namibia (1994b).
129 Republic of Namibia (2002b).
130 Republic of Namibia (1998b).

The 1997 National Resettlement Policy[131] regulates that resettlement is to be institutionally, socially, economically and environmentally sustainable to enable the beneficiaries to become self-supporting.[132]

The 2003 National Land Tenure Policy[133] covers all land tenure systems in urban, communal, commercial (freehold) and resettlement areas, and is intended to guide all land tenure rights in Namibia. Important to this review is that the Policy promotes the sustainable utilisation of land and other resources. By regulating different land tenure rights, it provides secure tenure for informal urban settlers, farm workers and occupiers (those who have been employed less than ten years on a single farm and do not have secure tenure elsewhere). Furthermore, it provides guidelines on compensation for occupiers of expropriated land. In line with the 1995 National Agricultural Policy,[134] the National Land Tenure Policy recognises the environmental limitations of the country. Some 22% of Namibia's land surface area is desert, receiving less than 100 mm of rainfall a year. Another 33% of the land is classified as arid, with a annual rainfall of between 100 to 300 mm. Some 37% of the land is semi-arid, meaning it receives between 300 and 500 mm rainfall a year, leaving only 8% classified as semi-humid and sub-tropical, i.e. with 500–700 mm annual rainfall.[135]

The aims of the 1995 National Agricultural Policy are largely economic, focusing on increasing agricultural productivity. The principles underlying the Policy contribute to national and household food security,[136] while recognising the limitations imposed by the country's climate and soils. The Policy seeks to promote sustainable utilisation of the land and other natural resources within the context of a vulnerable ecosystem. Potential problems such as deforestation, soil erosion, bush encroachment and overgrazing are also addressed.

The Regional Planning and Development Policy was drafted by the National Planning Commission in 1997.[137] The Policy acknowledges the trend of the increasing degradation of pastures, rangelands and woodland, with special attention to soil, water and forest management as development tools. The Policy promotes strategies such as soil conservation and controlled grazing cycles, which are important to agriculture.

131 Republic of Namibia (2001c).
132 Woeller (2005:141).
133 Republic of Namibia (2002c).
134 Republic of Namibia (1995d).
135 See World Bank (2007:100ff).
136 Jones (2000a:11).
137 Republic of Namibia (1997).

### *4.2.5 Water and fishery policies*

The following policy documents are the most relevant to water and wetland resources in Namibia:[138]

- The 1993 Water and Sanitation Policy deals with water supply and sanitation issues. It aims to improve sustainable food self-sufficiency and security, and provides a foundation for the equitable and efficient development of water supply in Namibia.[139] The Policy promotes the supply, improved sanitation and irrigation of water at an affordable cost to all Namibians, with the objective that such sustainable developments are subject to environmental impact assessments. As to the conservation of biological diversity, the Policy states that improved provision of sanitation should contribute to improved health, ensure a hygienic environment, protect water sources from pollution, promote water conservation, and stimulate economic development. The Policy laid the foundations for the establishment of a Directorate of Rural Water Supply, the community-based management of rural water supplies, and over 200 Water Point Committees countrywide. The Policy grants communities the right, with due regard for environmental needs, to plan, maintain and manage their own water supply and choose their own solutions and levels of service. Yet, the Policy makes it clear that this right is subject to the obligation that beneficiaries should contribute towards the cost of the water provision services. Furthermore, the Policy stresses the environmentally sustainable development and utilisation of water resources. The Water Point Committees are obliged to raise concern about any developments or alterations that may pose a threat to the water supply and their water resources. They are also responsible for implementing specific management measures, such as the strict allocation of an ecological water reserve and water demand management measures. With these provisions, the Policy places strong emphasis on community involvement, participation and responsibility.

- In 2002 Cabinet approved the National Water Policy White Paper,[140] which formed the foundation of the Water Resources Management Act.[141] The Policy provides a framework for equitable, efficient and sustainable water resources management and water services, and stresses sectoral coordination, integrated planning and management as well as resource management aimed at coping with ecological and associated environmental risks. It states that water is an

138 Heyns (2005:89–106, at 95f and 105).
139 (Ibid.:89–106, at 95).
140 Republic of Namibia (2000b).
141 No. 24 of 2004.

essential resource to life and that an adequate supply of safe drinking water is a basic human need. The Policy makes it clear that water concerns extend beyond human needs for health and survival. Water is essential to maintain natural ecosystems, and the Policy recognises that, in a country as dry as Namibia, all social and economic activity depends on healthy aquatic ecosystems. The National Water Policy stresses that the management of water resources needs to harmonise human and environmental requirements, recognising the role of water in supporting the ecosystem. One of the strategies to ensure environmental and economic sustainability is that in-stream flows are adequate – both in terms of quality and quantity – to sustain the ecosystem.

- The vision of the 2004 Draft Wetland Policy[142] is to manage national and shared wetlands wisely by protecting their vital ecological functions and life-support systems for the current and future benefit of people's welfare, livelihoods and socio-economic development.[143] The objectives of the policy are to protect and conserve wetland diversity and ecosystem functioning to support basic human needs, to provide a framework for endurable use of wetland resources, to promote the integration of wetland management into other sectoral policies, and to recognise and fulfil Namibia's international and regional commitments concerning shared wetlands and wetlands of international importance.

- The basic principles of the Policy are intended to provide a framework for the development of all water-related policies. In terms of ecosystem values and sustainability, the Policy follows the Ramsar Convention on Wetlands' definitions and guidelines regarding the wise use of wetlands.[144] The environment is a legitimate water user and, in order to safeguard water quality, minimise the loss of livelihood options and the high financial costs associated with wetland rehabilitation, sufficient water of good quality has to be available to maintain essential ecological functions, goods and services, and biological diversity provided by wetland ecosystems.

- Namibia's 2001 Aquaculture Policy[145] deals with the responsible and sustainable development of farming aquatic plants, fish, molluscs and crustaceans, and advocates responsible aquaculture developments. This Policy deals directly with the potential impacts of alien and other invasive species and seeks to minimise the impacts on aquatic ecosystems. Impacts specifically mentioned include the release of introduced species and genetically modified organisms, the mixing

142 Republic of Namibia (2004c).
143 On wetlands in Namibia, cf. Ruppel & Bethune (2007).
144 The text of the Ramsar Convention can be found at http://www.ramsar.org.
145 Republic of Namibia (2001b).

of farmed and wild stock (genetic pollution), and the risk of disease transfer. The Policy aims to insure the protection of the living resources of national and international waters, both marine and freshwater. Sustainable aquaculture development includes maintaining genetic diversity and the integrity of aquatic ecosystems, and ensuring responsible aquaculture production.

- Namibia's 2004 Aquaculture Strategic Plan[146] was developed to provide guidance on the regulatory framework, business climate, public acceptability, and strategies to ensure training, research, marketing and infrastructure development for aquaculture. The Plan indicates targets for employment creation, investment, training and the value of production. Recommended actions, if implemented, will overcome existing constraints and take advantage of opportunities in the aquaculture industry. Diverse needs call for sustainable economies in rural areas, both inland and coastal; improved viability of non-productive areas; poverty reduction; and pollution prevention supporting renewable natural resource-based food production. With regard to environmental considerations, the Plan emphasises the importance of site selection prior to developing any aquaculture facility, and the permanent assessment of good water quality as the most important prerequisite for successful aquaculture.

*4.2.6 Forestry policies*

The Forestry Strategic Plan was issued by the Ministry of Environment and Tourism in 1996.[147] It is the major instrument for implementing the 2001 Development Forestry Policy. The plan aims to promote development of community level natural forest management which including community management of the riparian forests and woodlands.

Biodiversity conservation is central to the 2001 Development Forestry Policy for Namibia,[148] which aims to reconcile rural development with biodiversity conservation by empowering farmers and local communities to manage forest resources on a sustainable basis. The Policy identifies effective property rights; a supportive regulatory framework; good extension services; community forestry; and forest research, education and training as instruments essential to the successful implementation of sustainable forestry management in Namibia. The Policy also paves the way for the establishment of community forests and their custodianship by the people most dependent on such resources.

146 Republic of Namibia (2004b).
147 Republic of Namibia (1996).
148 Republic of Namibia (2001d).

In 2005, the Ministry of Agriculture, Water and Forestry's Directorate of Forestry introduced the Community Forestry Guidelines.[149] The main objective of these Guidelines is to provide all stakeholders with a standard for establishing and managing community forests, by –[150]

- *[d]escribing the legal procedures involved in setting up a community forest;*
- *[d]escribing the organisational arrangements and administrative procedures necessary for the sustainable management of community forests; and*
- *[s]pecifying the respective roles of government forestry officials, communities and other stakeholders involved.*

## 5. The national level (II): Statutory enactments and bills in preparation

So far, no specific Act dealing with the conservation of biological diversity as a main topic has come into force, although an Access to Biological Resources and Associated Traditional Knowledge Bill was completed as an in-house draft by the Ministry of Environment and Tourism in 2000.[151]

Sectoral legislation covering the protection of biodiversity is wide-ranging in Namibia. Different statutes comprise legal methods of conserving biodiversity in Namibia. Namibia has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. Within its legislative framework, Namibia has provided extensively for safeguard measures to protect the environment. The implementation of this legislative framework is a mammoth task. As far as biodiversity is concerned, a multitude of factors hamper its full implementation. These factors include a lack of sector-specific policies that deal with issues such as land degradation, overgrazing, and land carrying capacity management. The main reason for the lack of policies that adequately deal with these issues is that the instruments that are the bloodline for such protection are divided and cut across different sectors, thus making it difficult to find common ground. Conversely, each sector is more concerned with the furtherance of its own interest. It might be appropriate to find common ground for all the sectors and to come up with a comprehensive cross-cutting policy to cater for biodiversity protection. This has always been the Namibian government's aim, but factors such as a lack of resources to finance an inter-ministerial policymaking organ have deterred these noble intentions.

149 Republic of Namibia (2005).
150 (Ibid.).
151 See infra.

Only the most relevant enactments for the protection of biological diversity can be discussed here. The legislation applicable to the following case studies falls under the spotlight of this study. For clarification purposes, legal instruments will be classified into the following broad thematic categories:

- Legislation of a more general nature protecting the maintenance of biological diversity;
- Legislation on biodiversity on land;
- Legislation on marine, coastal and inland waters; and
- Legislation on forest biodiversity.

Not all enactments possibly relevant for the maintenance of biological diversity can be discussed here as this would go beyond the framework of this study.[152] Furthermore, some of the legal instruments notably contain provisions of a cross-sectoral nature.

For the purpose of this study, *land biodiversity* primarily refers to species and habitats. *Marine, coastal and inland water biodiversity* as well as *forest biodiversity* will be dealt with in separate subsections. Ecosystems on land include both natural and modified habitats, and the native species that live there. Such ecosystems can be inside or outside protected areas like national parks. They can be rural landscapes, urban towns or cities. The Republic of Namibia is divided into 13 Regions over an area of 824,116 km$^2$, 44% of which is allocated to freehold land where utilisation is predominantly commercial farming. While 41% of the land serves as communal land,[153] the remaining 15% is owned by government, comprising mainly environmentally protected areas and areas set aside for mining activities and exploration.[154]

### *5.1 Legislation of a general nature protecting biological diversity*

The Environmental Management Act requires adherence to the principle of optimal sustainable yield in the exploitation of all natural resources. The Act gives effect to Article 95 (l) of the Namibian Constitution by establishing general principles for the management of the environment and natural resources. It promotes the coordinated and integrated management of the environment and sets out responsibilities in this

152 Legislation on minerals, such as the Minerals Prospecting and Mining Act, No. 33 of 1992, does not fall within the focus of interest of this study. The same applies to the Mountain Catchment Areas Act, No. 63 of 1970, which provides for the conservation, use, management and control of land situated in mountain catchments.

153 *Communal land* is state-owned land occupied and used by community members who are subject to the rules or laws of their particular community, and marked by a collective ownership and control of goods and property.

154 See *Namibia Vision 2030* (Republic of Namibia 2004a:142).

regard. Furthermore, it intends to give statutory effect to Namibia's Environmental Assessment Policy, and to enable the minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions; and to provide for associated matters. The Act promotes inter-generational equity in the utilisation of all natural resources. Environmental impact assessments and consultations with communities and relevant regional and local authorities are provided for to monitor the development of projects that potentially impact on the environment.

According to the Act, Namibia's cultural and natural heritage – including its biological diversity – is required to be protected and respected for the benefit of present and future generations. A Sustainable Development Advisory Council is to be established to advise the minister on the development of a policy and strategy for the management, protection and use of the environment, as well as on the conservation of biological diversity, access to genetic resources in Namibia, and the use of components of the environment, in a way and at a rate that does not lead to the long-term decline of the environment.

The term *biosafety* describes efforts to reduce and eliminate the potential risks resulting from biotechnology and its products. *Biosafety* is also defined as the assessment of the impact and safety of genetically improved/modified organisms, and the development of protective policies and procedures for adoption to ensure this. In recognising the worldwide diversity situation, the Namibian government enacted the Biosafety Act[155] after having signed the Cartagena Protocol on Biosafety to the CBD, which was adopted in 2000. The Biosafety Act provides for measures to regulate activities involving research, development, production, marketing, transport, application and other uses of genetically modified organisms, and to establish a Biosafety Council. The objective of the Act is, inter alia, to introduce a system and procedures for the regulation of genetically modified organisms in Namibia in order to provide an adequate level of protection to the conservation and the sustainable use of biological diversity.

Activities that are of a medicinal nature are regulated by the Medicines and Related Substances Control Act.[156] This Act makes provision for the establishment of a Medicines Control Council. The Council is entrusted with the powers and functions to advise the minister and report to him/her on any matter referred to it by such minister for consideration, and arising from the application of the Act. The Council also registers medicines and any other substance that is required or prescribed to be registered. Thus, the Council is in a position to detect any medical-related activity that

155 No. 7 of 2006.
156 No. 13 of 2003.

is destructive to the biological environment, e.g. the harvesting of certain herbs in a manner where the whole tree or plant has to be removed, without the replacement of the tree/plant. Because of the measures imposed by the Act and the controlling body in place, the Act contributes to the preservation and conservation of the environment. The conditions and restrictions expressed in the Act are subject to various forms of contravention by herbalists, pharmaceutical companies and people who harvest plants in order to sell them.

One of the major biodiversity-related laws in Namibia is the legislation governing the conservation of wildlife and protected areas, namely the Nature Conservation Ordinance 4 of 1975. The Ordinance was amended by the Nature Conservation Amendment Act.[157] One of its principal highlights is the creation of conservancies in communal areas. In terms of the amendment, rural communities need to form a conservancy in order to be able to acquire the use-right over wildlife. *Conservancies* can be defined as land units managed jointly for resource conservation purposes by multiple landholders, with financial and other benefits shared between them in some way. Conservancies occur on both communal and commercial land.[158] Communal conservancies have added substantially to the network of conservation areas in Namibia. At the end of 2006, they covered 14.4% of Namibia. The total land surface area under conservation management amounts to 37%, while the number of conservancies – including communal conservancies, national parks, game reserves, freehold conservancies, concessions and community forests – is constantly increasing. The Ordinance deals with in situ and ex situ conservation by providing for the declaration of protected habitats as national parks and reserves, and for the protection of scheduled species. It regulates hunting and harvesting, possession of, and trade in listed species.

The Etosha National Park is protected as a game park for the propagation, protection, study and preservation therein of wild animal life, wild plant life, and objects of geological, ethnological, archaeological, historical and other scientific interest and for the benefit and enjoyment of the inhabitants of Namibia and other persons. The Ordinance also makes provision for the proclamation of other game parks or nature reserves.[159] As of January 2006, 19 national parks and 44 communal conservancies had been registered in Namibia. The Ordinance makes provision for the declaration of private game parks and nature reserves on application of the landowner.

157 No. 5 of 1996.

158 Barnard (1998:45). Moreover, section 1 (b) of the Amendment Act defines a *conservancy* to mean any area declared a conservancy in terms of section 24A (2) (ii).

159 Cf. maps of the Ministry of Environment and Tourism, available at http://www.met.gov.na/maps/Attractions.htm; last accessed 29 September 2007.

Specific species are protected by the Ordinance in terms of general prohibitions and permit requirements for scheduled species. The import and export of raw skins and raw meat are allowed by permit only. Moreover, the Ordinance contains specific rules as to wild animals and indigenous plants. Unfortunately, this legal instrument does not appear to be as effective as it might seem at first glance, which is due to its weak enforcement mechanisms. Two facts support this statement: firstly, the fines are attached to offences. A person who is convicted of an offence in terms of the Ordinance is liable on conviction to fines of up to N$2,500 and/or up to six years' imprisonment. These fines only apply to hunting protected game in private game parks, however. Fines for other types of offences are even lower. For the offence of picking and transporting protected plants, the offender is only liable to fines of between N$100 and N$750 and/or to imprisonment for a period not exceeding 12 months. Whereas these fines might deter members of local communities, this is most probably not the case for professional plant pickers who act on behalf of companies using the plants for pharmaceutical purposes. The latter will easily pay the fines.

Secondly, the courts have so far been reluctant to apply the available mechanisms of the Ordinance. One recently decided case by a Magistrates' Court[160] serves as an example. The subject of this case was the picking of almost 400 kg of hoodia. *Hoodia gordonii*, a cactus-like plant native to the Namib Desert, is widely believed to be an appetite suppressant that was already known to traditional communities.[161]

The hoodia plant is protected under CITES. Accordingly, it is listed as a protected plant under Schedule 9 of the Nature Conservation Ordinance. Thus, according to section 73 (1) of the Ordinance, no person other than the lawful holder of a permit

160 The case was decided at the end of 2007 by the Mariental Magistrates' Court; cf. *Allgemeine Zeitung*, 8 January 2008.

161 Members of the San community used this plant for centuries when hunting. As hunting usually took several days, they used to eat the hoodia to still their hunger. The San name for the hoodia is *!khoba*. The events related to the hoodia plant are one of the cases dealing with bioprospecting (also described as *biopiracy*), describing the appropriation, generally by means of patents, of legal rights over indigenous biomedical knowledge without compensation to the indigenous groups who originally developed such knowledge. However, hoodia is registered in the name of the Council for Scientific and Industrial Research (CSIR). In 2003, after years of disputes with the CSIR, the latter concluded an agreement with the San, granting them 6% of the royalties paid to the CSIR by Phytopharm, in addition to 8% of the 'milestone income' paid by Phytopharm in case the development of the product made substantial progress. This agreement was the first of its kind, granting participation in profits to indigenous people resulting from traditional knowledge. Nonetheless, the CSIR, despite having signed the agreement with the San for good reasons, at a later stage alleged within proceedings before the European Patent Office that it was doubtful whether the San really did have knowledge about the effect of the hoodia. See also Hoering (2004).

granted by the Executive Committee is permitted at any time to pick or transport any protected plant. The Magistrates' Court, however, discharged two alleged thieves of almost 400 kg of hoodia. In its ruling, the Court held that it could not be proved that the confiscated plants were of the specific *Hoodia gordonii* species. Taking into consideration that Schedule 9 of the Ordinance lists all *Hoodia* species as protected plants, the reasoning for the ruling in this case is hardly traceable.[162]

Currently, the Ministry of Environment and Tourism is drafting a new piece of legislation, specifically aiming to increase the fines for illegal trade in protected plants. Moreover, it seems important to create and support more public awareness with regard to biodiversity protection. Finally, courts will have to assure that offences related to biodiversity degradation are not just treated as trivial offences.

Also of specific relevance for the protection of biological diversity is the Decentralisation Policy. This Policy was given legal force through a series of new laws, most notably the Decentralisation Enabling Act. Decentralisation contributes to creating participatory democracy in which people at the grass roots can have a direct say in decisions that affect their lives. Thus, the Act's objective is to give more powers to regional councils. Regional councillors, having clear links with constituents, can play an important role in this process.[163]

### *5.2 Legislation on land*

Various national land-related enactments contain provisions that may at least indirectly contain aspects that are relevant to biodiversity, but these are not the subject of this study.[164] In order not to go beyond its scope, only the most relevant enactments will be highlighted.

This Communal Land Reform Act[165] provides for the allocation and administration of all communal land. This Act makes provision for the allocation of rights in land in the areas described in the first Schedule to this Act or in any area declared to be communal land under section 16 (1) (a). The minister is obliged to establish communal land boards to perform the functions conferred on such a board by the

162 This corresponds to the view held by Ben Beytell of the Ministry of Environment and Tourism (see newspaper article in the *Allgemeine Zeitung*, 8 January 2008). It is expected that an appeal will be made against this ruling.

163 Hopwood (2005).

164 For example, the Agricultural Pests Ordinance 11 of 1927; the Agricultural Pests Act, No. 38 of 1973; the Plant Quarantine Act, No. 76 of 2007; the Soil Conservation Act, No. 76 of 1969; and the Soil Conservation Amendment Act, No. 38 of 1971.

165 No. 5 of 2002.

Act within the area for which each board is established. The boards are to exercise control over the allocation and the cancellation of customary land rights by chiefs or traditional authorities. They have to consider and decide on applications for the right of leasehold, establish and maintain a register and a system of registration of customary land rights and leasehold rights, and give advice to the minister.

The President of Namibia may declare unalienated state land to be a communal land area. Communal land areas are vested in the state, in trust, for the benefit of the traditional communities residing in those areas, and for the purpose of promoting the economic and social development of the people of Namibia, especially the landless and those with insufficient access to land. Customary land rights are to be allocated upon application for a limited period. Only specific customary land rights may be allocated in respect of communal land, and size limits are imposed.

The Act also provides for the recognition of existing customary land rights, and the granting of a right of leasehold for agricultural purposes or a right of grazing on communal land. The Act makes provision for the prevention of land degradation and, therefore, indirectly contributes to the preservation of biological diversity. Of note is the provision for communal land boards, on which officials from both the Ministry of Environment and Tourism and the Ministry of Agriculture, Water and Forestry will serve, together with conservancy representatives. Fundamental environmental provisions of the Act refer to the allocation of customary land rights. If a land right is being used predominantly for a purpose not recognised under customary law, customary land rights may be cancelled according to section 27 of the Act. Furthermore, special provisions are made with regard to grazing rights. A chief or traditional authority is vested with the power to prescribe conditions relating to the kind and number of stock that may be grazed on communal land, as well as to the section or sections of the commonage where stock may be grazed, and the grazing in rotation on different sections. This provision, in particular, ensures the sustainable use of grasses and herbs.

### *5.3 Water and fishery legislation*

Water is a critical factor and water supply is a serious problem throughout Namibia. Sustainable water management is, therefore, a major challenge for the government. According to Article 100 of the Constitution, Namibian water is owned by the state, but it is supposed to be used for the benefit of all citizens.[166] Several national water- and fishery-related enactments contain provisions that at least indirectly contain

166 Republic of Namibia (2007).

biodiversity-relevant aspects. Again, only the most relevant will be discussed in this context.[167]

Although Parliament approved the new Water Resources Management Act[168] in 2004, the rather outdated Water Act[169] remains in force until the new Water Resources Management Act comes into force upon signature by the minister. The new Act is currently being amended to take into account certain practical aspects of its implementation. Thus, the Water Act of 1956 is generally referred to as the '*old*' Water Act and often in the past tense, although, strictly speaking, it remains applicable until officially repealed.[170]

The old Water Act does not directly refer to the protection of biological diversity. Nonetheless, it contains provisions relating to water quality and conservation which are at least indirectly beneficial for the maintenance of biodiversity. The Water Act gives the minister the power to investigate water resources, plan water supply infrastructure, develop water schemes, control pollution, protect, allocate and conserve water resources, inspect waterworks, levy water tariffs, and advise on all matters related to the water environment in general. It makes the Department of Water Affairs responsible for the use, allocation, control, and conservation of Namibia's surface water and groundwater resources. It made provision for the protection of river catchments and the drilling of boreholes and making of wells; it controls effluent discharge into rivers and weather modifications such as cloud seeding; and outlines regulations that govern the optimal use of water resources. It clearly defines the interests of the state in protecting water resources.

Furthermore, the Water Act makes provision for the ownership, control and use of water, and categorically distinguishes between *private* water and *public* water. Section 5 of the Act states that the sole and exclusive use and enjoyment of private water is vested in the owner of the land on which such water is found. This means that owners of land through which water flows are vested with riparian water rights. This contradicts what has since been stated in the Namibian Constitution and in the National Water Policy. The latter states that Namibia's limited and vulnerable water resources are an indivisible national asset, whose ownership is vested in the state on

167 For example, the Prevention and Combating of Pollution at Sea by Oil Act, No. 6 of 1981, is not of interest for this study, although it has an impact on the maintenance of biodiversity.

168 No. 24 of 2004.

169 No. 54 of 1956.

170 The Water Act, No. 54 of 1956, was still applied by the High Court in Windhoek in the recently decided case concerning the use of groundwater by the Valencia Uranium Mine; see Menges (2008).

behalf of the whole society: it makes no provision for private ownership or water rights.

According to the Water Act, private entities are entitled to user rights for water as exercised through a permit issued by the state. The permit outlines these rights, and stipulates the quantity of water to be used for specific purposes. Individual irrigation projects found along perennial rivers are allocated water through permits as well, thereby controlling the quantity of water used from shared rivers. Permit holders are required to submit monthly returns to the Department of Water Affairs, stipulating the quantity of water used. In addition, the amount of water used for domestic supply along perennial shared rivers is regulated by specific agreements between the Government of Namibia and other riparian basin states. The Water Act also determines the quality of effluent to be disposed of in public waste-water systems, and it forbids the disposal of effluents in any ephemeral or perennial rivers, thus ensuring the maintenance of the receiving water quality standards.

Despite ensuring basic water supply requirements and that water quality standards are maintained, the Water Act does not address issues relating to securing water to maintain ecosystem health, protection of long-term sustainability of freshwater flows, and accessibility of data on water to all parties; nor does the Act adequately cover issues important to shared watercourses, such as ways to prevent and resolve conflicts over water, and ways to ensure wide stakeholder participation in water planning and decision-making. These issues, together with the constitutional issue of ownership, will be addressed in the new Water Resources Management Act.

The 2004 Water Resources Management Act was passed by Parliament, signed by the President and published in terms Article 56 of the Constitution. However, it has not yet come into force as a date for commencement of the Act as prescribed by section 138 (1) (b) has not yet been determined by the minister. Once the Act is in force, the Water Act of 1956 will be repealed. The new Act is based on the National Water Policy, and provides for the management, development, protection, conservation, and use of water resources. The objective of the new Act is to ensure that Namibia's water resources are managed, developed, protected, conserved and used in ways which are consistent with or conducive to certain fundamental principles set out in section 3 of the Act. It must be consistent with and promote –

- *equitable access to water resources by every citizen, in support of a healthy and productive life;*
- *access by every citizen, within a reasonable distance from their place of abode, to a quantity of water sufficient to maintain life, health and productive activities;*
- *essentiality of water in life, and safe drinking water a basic human right;*
- *harmonisation of human needs with environmental ecosystems and the species*

*that depend upon them, while recognising that those ecosystems must be protected to the maximum extent;*

- *integrated planning and management of surface and underground water resources, in ways which incorporate the planning process, [and] economic, environmental and social dimensions;*
- *management of water resources so as to promote sustainable development;*
- *facilitating and encouraging awareness programmes and participation of interested persons in decision-making;*
- *prevention of water pollution, and the polluter's duty of care and liability to make good; and*
- *meeting Namibia's international obligations and promoting respect for Namibia's rights with regard to internationally shared water resources and, in particular, to the abstraction of water for beneficial use and the discharge of polluting effluents.*

As far as biological diversity is concerned, specific provision is made as to the reservation of water resources. According to section 27 of the Act, the minister may reserve part or all of the flow of a watercourse, including any groundwater resource and the water stored in a public reservoir, to reasonably protect aquatic and wetland ecosystems, including their biological diversity, and to maintain essential ecosystem functions.

Water supply is a major challenge in Namibia, especially in the rural areas. The water supply infrastructure has to be maintained, facilities have to be managed, and fees are to be collected in order to organise the water supply.[171] According to part V of the Act,[172] so-called water point user associations[173] are established at community level, consisting of those rural community members who permanently use a water point. Their function is to operate and maintain the water point in question. Water point user associations are at liberty to make their own decisions about water use regulations. A water point committee monitors and enforces compliance with such regulations. The ultimate punishment against any offence is the suspension of membership in the association, meaning exclusion from the water supply. In case of conflict, a mediator is appointed. Depending on the wish of the residents, this may be a traditional authority, government officials, church leaders, or anyone else.[174]

The Marine Resources Act[175] provides for the conservation of the marine ecosystem and the responsible utilisation, conservation, protection and promotion of marine

171 On water management problems, especially in the Kavango Region, see Falk (2007:102).
172 Sections 16–22 of the Act.
173 For more details on water point associations, see Falk (2007:102).
174 Cf. Republic of Namibia (2001e).
175 No. 27 of 2000.

resources on a sustainable basis. Therefore, it provides for the exercise of control over marine resources and related matters.

The Inland Fisheries Resources Act[176] deals with the conservation and utilisation of inland fisheries resources, and allows for the updating and development of new policies for the conservation and sustainable utilisation of Namibia's inland fisheries. It encourages cooperation with neighbouring countries regarding the management and conservation of shared waterways. No fishing is allowed in parks or by net within 100 m from a bridge, culvert or spillway, or in a manner that obstructs more than half the width of any watercourse. Furthermore, the Act prohibits the use of destructive fishing methods such as the use of poisons, explosives and night lights, and the introduction and/or transfer of non-indigenous fish species. Fines or imprisonment are prescribed for destructive fishing and the use of nets where they are banned. Of importance in terms of shared water resources is that the Act prohibits the introduction, transfer, import and export any species of fish or crustacean without written permission (section 19 (a) and (b)), and that anyone convicted of this may be fined or imprisoned. The Act makes provision for the establishment of an Inland Fisheries Council, and although no environmental officer is specified to serve on this, it makes provision for the appointment of honorary inspectors from the ministry charged with environmental affairs 23 (2) (a) and sets out the powers of fishery inspectors.

The Act makes it compulsory to have a fishing licence to fish in any inland water using any regulated fishing gear, specified as a rod, line, hook and/or nets, and requires the registration of nets. The Act allows for the protection for endangered fish species as well as the declaration of fisheries reserve areas where no one may fish, pollute the water, dredge the area, or disturb the natural environment of fish and related ecosystems. The Act allows the minister to make regulations as necessary to manage inland fishery resources that range from methods allowed and gear limitations, through allowable fish sizes, to types of surveys to be conducted and what data should be collected.

The Aquaculture Act[177] regulates and controls aquaculture activities and the sustainable development of aquaculture resources. It allows the minister to formulate policy based on social, economic and environmental factors; the best scientific information and advice from the Advisory Council to, inter alia, promote sustainable aquaculture and manage, protect and conserve aquatic ecosystems. No specific requirement exists for someone from the environmental sector to serve on the Advisory Council, although the Act specifies that –

176 No. 1 of 2003.
177 No. 18 of 2002.

- environmental impact assessment requirements should be determined with the concurrence of the minister responsible for environment, and in accordance with such legislation or policy dealing with environmental assessments (section 12 (2));
- an environmental clearance be issued in accordance with the relevant laws (section 13 (1c)), and
- that environmental impact assessments be undertaken prior to the designation of an Aquaculture Development Zone (section 33 (2)).

All aquaculture ventures are subject to strict licensing. Section 27 is of most relevance for the protection of biodiversity. A person may not, without the minister's written permission, introduce or cause to be introduced into Namibia or any Namibian waters any species of aquatic organism or any genetically modified aquatic organism, or transfer any species of aquatic organism from one aquaculture facility to another or from any location in Namibia to another. The minister is barred from issuing any approval under this section unless the impact of any introduction or transfer of any aquatic species or genetically modified aquatic organism has been assessed, if so required, in accordance with the legislation or policy dealing with environmental assessments.

### *5.4 Legislation on forests*

Namibian forest legislation and policies acknowledge the collective ownership of forests and woodlands. Such collective ownership is designed to encourage good management by local communities, as rural people are heavily dependent on a natural resource base.[178]

In 2005, almost 7.7 million ha of Namibia was covered by forests. This corresponds to 9.3% of the total land surface area. Almost 2% of the forest area has disappeared since 1990, however. Major threats to forests in Namibia include the expansion of land for agriculture; the use of fuel wood and charcoal for domestic use; tobacco curing and brick kilning; land clearing for infrastructure development; uncontrolled wild fires; selective logging through timber concessions and unlicensed curio carving; and habitat destruction by elephants.[179]

The Forest Act[180] consolidates the laws relating to the use and management of forests and forest produce, provides for the control of forest fires, and creates a Forestry

178 Kojwang & Chakanga (2002).
179 Cf. FAO (2005).
180 No. 12 of 2001.

Council. It replaces the Preservation of Trees and Forests Ordinance[181] and the 1968 Forest Act[182]. Protection of the environment is found in part IV of the Act. Part IV deals with protected areas, the protection of natural vegetation, and control over afforestation and deforestation. The Act is centred on the sustainable management of forests, and the purpose for which forest resources are managed.[183] In Namibia, the purpose for which forest resources are managed and developed – including the planting of trees, where necessary – is to conserve soil and water resources, maintain biological diversity, and use forest produce in a way which is compatible with the forest's primary role as the protector and enhancer of the natural environment. If it is necessary, on any area of land, to protect the soil, water resources, protected plants and other elements of biological diversity, a protected area is to be created by the Minister of Environment and Tourism in consultation with the Minister of Lands, Resettlement and Rehabilitation; the Minister of Agriculture, Water and Forestry, the owner or occupier of the land in question and, in the case of communal land, the chief or traditional authority for that communal land, or the authority which is authorised by law to grant rights over that communal land.

Section 15 of the Forest Act deals specifically with community forests, and requires consultation with the chief or traditional authority responsible for communal land. This, together with the 1996 Nature Conservation Amendment Act, promotes the devolution of rights over natural resources, including forestry resources, to communities to manage their own conservancies.

The Act prohibits anyone from cutting, injuring, destroying, or removing protected trees or other forest products; and from destroying or damaging vegetation or harvesting forest produce in a classified forest unless authorised to do so by a management plan, a forest management agreement, or a licence issued under the Act.[184] This implies that the Act provides for the protection and management of forests within Namibia, and empowers the state to protect any tree or species of tree on any land, whenever deemed necessary in the public interest. It also gives the state wide-ranging powers to regulate trade in forest products and to set limits on the commercial use of the forest. However, the Act makes allowances for the collection of wood and other tree products from protected species for domestic purposes, including firewood and construction materials. At present, the allowed limit of fuel wood for personal consumption is one metric ton per year.[185]

181 No. 37 of 1952.
182 No. 72 of 1968.
183 Section 10.
184 Section 24.
185 Davelid & Hast (1998:25).

### *5.5 The bills on access to biological resources, parks and wildlife management, and pollution control*

The Bill on Access to Biological Resources and Associated Traditional Knowledge, drafted in 2000, aims at the protection of biodiversity and traditional knowledge. The Bill contains the following elements, inter alia.

The starting point is that there is a resource comprising genetic materials. The Bill applies to biological resources in both in situ and ex situ conditions, the derivatives of the biological resources, community knowledge and technologies, local and indigenous farming communities, and plant breeders.[186] However, the Bill does not apply to the traditional systems of access; use or exchange of biological resources; and access to, use of and exchange of knowledge and technologies by and between local communities.[187] This means if local communities in the country exchange information on the use of a specific resource for their own use, as long as they are doing it in their own traditional ways of access, the provisions of the Bill do not apply to them. The Bill went further as well – dealing with the issue of the sharing of benefits.[188] The sharing of benefits is based on the customary practices of the local communities concerned, although the provisions of the Bill do not apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of biological resources. Therefore, the benefit derived from the resource that is found within a specific area is limited to the inhabitants of that area.

The Bill prohibits patents over life forms and biological processes.[189] Thus, no one will be allowed to apply for patents over life forms and biological processes. According to the proposed legislation, the collector will be prohibited from applying for such patents, including doing so under any other legislation regulating access to and use of a biological resource, community innovation, practice, knowledge, or technology, and regulating the protection of rights therein. It protects the community from being prohibited from using a resource if the resource is patented for life.

Furthermore, the Bill recognises the rights of local and indigenous communities,[190] and lays down a platform for the application of customary law to community rights.[191] The rights of local and indigenous communities that are recognised include the right

186 Section 1 of the Bill.
187 Section 2 of the Bill.
188 Section 3 of the Bill.
189 Section 9 of the Bill.
190 Section 17 of the Bill.
191 Section 18 of the Bill.

to collectively benefit from the use of biological resources, as well as from such communities' innovations, practices, knowledge and technology acquired through generations.

Local and indigenous communities' right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies, and such communities' right to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity, are also protected. The Bill went further, stating that the exercise of collective rights as legitimate custodians and users of their biological resources are recognised by the state. Local communities will be entitled to exercise their inalienable right to access, use, exchange, or share their biological resources in sustaining their livelihood systems, as regulated by their customary practices and laws.[192] Among these rights, benefit-sharing is recognised and emphasised, but the Bill does not indicate as to how such activities should be administered.[193] Thus, it is left to individual community to adopt ways in which benefits derived from the use of biological diversity can be administered and used. In addition, the Bill emphasises that the state recognises and protects the community as they are enshrined and protected under the norms, practices and customary law found in, and recognised by, the local and indigenous communities concerned, whether such law is written or not. As a result of this provision, the communities' customary law is well protected.

The proposed Parks and Wildlife Management Bill of 2005 will protect all indigenous species and control the exploitation of all plants and other wildlife. The preamble of the Bill clearly states that it intends to give effect to paragraph (l) of Article 95 of the Constitution by establishing a legal framework to provide for and promote the maintenance of ecosystems, essential ecological processes, and the biological diversity of Namibia; and to promote the mutually beneficial coexistence of humans with wildlife, to give effect to Namibia's obligations under relevant international legal instruments, including the CBD and CITES. In keeping with the Constitution, the principles underlying the Bill are simply that biological diversity and essential ecological processes and life support systems are to be maintained. Should the proposed Act come into force, it repeals the Nature Conservation of 1975.[194] In its Principles of Conservation (section 3), the Bill recognises that biological diversity has to be maintained – and, where necessary, rehabilitated, and that essential ecological processes and life support systems also have to be maintained.

192 Section 22 of the Bill.

193 However, section 23 of the Bill elaborates on how the benefit should be obtained, and who should deal with the issue of contracts as far as the collector, the state and the local community or communities involved are concerned.

194 No. 4 of 1975.

The Pollution Control and Waste Management Bill of 2003 aims to promote sustainable development; to provide for the establishment of a pollution control and waste management unit; to prevent and regulate the discharge of pollutants to the air, water and land; to make provision for the establishment of an appropriate framework for integrated pollution prevention and control; to regulate noise, dust and odour pollution; to establish a system of waste planning and management; and to enable Namibia to comply with its obligations under international law in this regard. As pollution is one of the main threats to biological diversity, the envisaged legislation provides for the conservation of such diversity.

## 6. The protection of biodiversity under customary law

*African customary law* is the law administered by traditional communities. Customary law enjoys a special constitutional status. Article 66 (1) of the Constitution states the following in this regard:

> *Both the customary law and common law of Namibia in force on the date of independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution and any other statutory enactment.*

Article 66 of the Constitution has changed the position of customary law. Under apartheid, customary law was a set of second-class laws – if any legal order at all. Under Article 66, however, customary law is at the same level as the Roman-Dutch common law imported into Namibia under South African rule.

What is *customary law*? The Traditional Authorities Act describes *customary law* in section 1 as the –

> *... norms, rules of procedure, traditions and usages of a traditional community ... .*

This definition is a clear indication of the difficulties the jurisprudence of general (Western) law has in determining the nature of African customary law.

Colonial rule created dual legal systems in most African countries: the system of imported law, and the system of inherited African law(s).[195] African customary law was usually only applied subject to the so-called repugnancy clause. This clause implied that, where customary law was understood to be against public policy or natural justice, it would not give way to the imported colonial law.

195 Hinz (2003a:11).

This state of affairs led to substantial inroads into and deformations of customary law, to which remedies had to be found after African countries gained their independence from colonial domination. In the case of Namibia, it was already stated in the blueprint of independence developed under the guidance of the United Nations Institute for Namibia that the customary laws of the country had to be given special attention. Customary law neglected during the apartheid era required space and freedom to develop out of the stagnation into which it had been forced by South African jurisprudence, centred as it was on Roman-Dutch law.[196]

Namibia enacted a number of statutes that provided the necessary space for the development of customary law in line with the country's new constitutional dispensation. Of these, the abovementioned Traditional Authorities Act is the most important.

The fact that customary law suffered from interventions by the colonial administration led scholars to distinguish between *official* customary law, including the customary law interpreted by the courts established under colonial rule for the adjudication of customary law cases, and the *unofficial* or *living* customary law. This unofficial and living law continued to govern the lives of Africans.[197] There is a strong opinion by scholars who analyse the operation of customary law within the framework of the new African constitutionalism,[198] which calls for the application of the living law and to ignore official customary law. The implications of this approach, i.e. applying the living law and ignoring official customary law, for the establishment of customary law, in particular by way of empirical research, have not yet been fully explored. While a considerable amount of research concentrates on the perceptions found at the level of traditional leaders (of whatever level in the respective communities), the interest in the living law goes beyond that level: indeed, it encompasses the perceptions of the ordinary man and woman. However, where lawyers will draw the line in assessing the living customary law, in order to distinguish it from mere opinions that will not be accepted as law, is one of the questions that arises within a framework that subscribes to the concept of *legal pluralism*.[199]

Cultural diversity is closely linked to biodiversity. The collective knowledge of biodiversity, its use and its management rests in *cultural diversity*. Therefore, customary law can play an important role in the sustainable development of natural resources and the protection of biological diversity.

196 Hosten et al. (1977:218ff); UNIN (1988:963); Hinz (2003a:42ff).
197 Hinz (2003a:41ff).
198 Cf. Hinz (2006b:17ff).
199 Griffiths (1986:1ff); Hinz (2006c:35ff); and Menski (2006:82ff).

As explored above in dealing with traditional knowledge and its protection, customary law is the law closest to the very peculiarities of traditional knowledge.[200] Customary law has the capacity to accommodate what is special to traditional knowledge: its grounding in tradition, and its being bound to a societal (collective) network.

Albeit in a limited manner, enactments during the colonial period recognised the need to involve traditional leaders in environmental matters. The Native Reserve Regulations[201] stipulated the duty of traditional leaders to assist in the combating of fire and the eradication of noxious weeds. The Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen[202] added the duty to preserve game and forests and to prevent soil erosion.

Most of the customary rules are not written down, but transmitted orally from generation to generation. However, some exceptions exist in Namibia in terms of what have become known as the *self-stated*[203] laws of traditional communities.[204] It is interesting to note that many self-stated versions of customary laws contain rules that directly or indirectly contribute to the conservation of biological diversity.

The *Laws of Oukwanyama*[205] provide for the protection of trees – fruit trees in particular, plants and water. It is an offence to cut fruit trees, and all water has to be kept clean.[206] The *Laws of Ondonga*[207] provide for the protection of trees with specific reference to fruit trees, palm trees and the marula tree (section 8), and the use of fishing nets in the river is prohibited without permission from the traditional authority (section 19). The *Laws of Uukwambi* provide for the protection of water (section 13), the protection of trees (section 14A), wild animals (section 14B), and grass (section 14C). The *Laws of Sambyu* provide for the protection of water: anyone who pollutes or contaminates water commits an offence (section 16). In the Caprivi Region, the *Laws of Masubiya* prohibit the cutting of fruit trees (section 37), causing veld fires (section 36), and the use of fishing nets to catch small fish (section

200 Hinz (2003b:8ff).
201 *Government Notice* No. 137 of 1924.
202 *Government Notice* No. 60 of 1930.
203 As to the concept of *self-stating customary law*, cf. Hinz (2008:84ff).
204 The ascertainment of customary law is currently in progress within a project of UNAM's Human Rights and Documentation Centre (HRDC). A first collection of self-stated customary laws will be published towards the end of 2008. The draft versions of the self-statements can be viewed at the HRDC. For further information, see Ruppel (2008b:131ff); Hinz (2008:84ff).
205 *Eevetamango dhOukwanyama*; a copy of the laws can be inspected at the HRDC.
206 Sections II 8 and 15, *Laws of Oukwanyama*.
207 *OoVeta (OoMpango) dhoShilongo shOndonga*; Elelo (1994).

39).[208] These are only some examples. Since the quoted self-stated laws are not a codification of the respective customary law, meaning that they reflect only certain principles of customary law while the body of unwritten law remains in force,[209] one can anticipate that, in addition to what has been referred to, there are many unwritten rules of importance for the protection of natural resources and biodiversity.[210]

## 7. The BIOTA framework, research design and assumptions

The UNAM Faculty of Law's BIOTA Sub-project, from which the essays collected in this publication emerged, is part of an international research consortium that operates in West, East and Southern Africa. Cooperation agreements link universities in African countries with several universities in Germany, in which the University of Hamburg plays a major role.[211] The funds for the BIOTA Project as a whole are provided by the German Ministry of Education and Research.[212]

BIOTA started with its first (pilot) phase in 2000;[213] the second phase lasted from 2003 to 2006.[214] The Project is currently in its third phase, the end of which will be in 2009.[215] The relevance of the Project and its output will most probably lead to a fourth phase.[216] The German Government, and many involved in environmental matters globally, have demonstrated an interest in the BIOTA Project, not least because of the growing awareness about threatening developments caused by climate change.

The assessment of biodiversity, its structural features and spatial patterns, and the analysis of the changes of biodiversity due to anthropogenic land use, climate change, and biotic and eco-systematic processes and factors, were the overall objectives of BIOTA.[217]

One of the key elements in BIOTA is to work on or around so-called observatories. *Observatories* are demarcated plots of 1 ha each in size, on which mostly natural

208 Copies of various self-stated laws can be inspected at the HRDC.
209 Hinz (2003a:46ff).
210 Ruppel (2006).
211 The Law Faculty's BIOTA Sub-project partners with the University of Marburg.
212 *Bundesministerium für Bildung und Forschung* (*BMBF*).
213 BIOTA (2004); the administration of the Faculty of Law's BIOTA Sub-project is facilitated by the Desert Research Foundation of Namibia.
214 Cf. BIOTA (2003; 2007). For the Law Faculty's Sub-project, see BIOTA (2003:371ff) and BIOTA (2007:153ff).
215 BIOTA (2006a; 2006b). For the Law Faculty's Sub-project, see BIOTA (2006b:553ff).
216 This was revealed in reports after recent visits by German officials to Southern Africa.
217 BIOTA (2004:III).

scientists collect data and conduct research in a manner that allows comparison with other results gained at other observatories. Observatories (starting in South Africa and going through Namibia) are placed on what are called south–north and west–east transects. Some observatories have been established on commercial farms or state-owned land, others on communal land administered by traditional leaders and under the jurisdiction of traditional authorities.[218]

To what extent the concentration on observatories is conducive to socio-economic, socio-political and socio-legal research has been debated within BIOTA for some time. It is obvious that human-free observatories are not suitable for research that relates the environment to human beings and their behaviour. Therefore, the radius of social research has been drawn wider than the narrow space determined by observatories.

BIOTA was originally predominantly a natural science project. Social scientists (economists, anthropologists and lawyers) played a less prominent role, but received increasing support as it was also increasingly understood that the human factor should not be neglected.[219] Indeed, it is precisely the human factor which, for politicians and other stakeholders in development, needs attention in view of possible human interventions!

Apart from the general call to contribute to capacity-building, progress in BIOTA strengthened the drive to feedback activities. Capacity-building was a particularly important aim for African countries, for universities with a need for experts in the field, but also for societies at large. The BIOTA initiative to train so-called para-ecologists has to be seen as an attempt to develop a task force at the local level that would be able to assist in the overall interest of the Project. Researchers from the natural and social sciences have been involved in training exercises for these para-ecologists.[220]

From the beginning, the Faculty of Law's BIOTA Sub-project focused on the role and potential of customary law in respect of protecting the environment, natural resources and biodiversity. Compared with the law of the state, customary law appears to be much closer to the very peculiarities of traditional practice and knowledge.

218 See here BIOTA (2003:21ff).

219 Cf. here BIOTA (2006a:2ff). The orientation towards the socio-political side of the protection of biodiversity appears in the new subtitle of the BIOTA Project: "Scientific support for conservation and sustainable use of biodiversity".

220 Cf. BIOTA (2006b:651ff).

The focus on the potential of customary law led the research framework of the Sub-project to questions about traditional knowledge. These questions reached beyond what was raised above as regards the problem of the legal protection of traditional knowledge in the proper legal sense. Traditional knowledge, and thus the very basic assumption of the BIOTA Sub-project, is seen to be the societal foundation, the socio-political philosophy, which informs customary law, its interpretation and its development.[221] Linking traditional knowledge to customary law has its special appeal: customary law has the capacity to accommodate what is special to traditional practices and knowledge. In addition, customary law is grounded in tradition (thus it does not focus on being novel), and it is bound in a societal (collective) network (thus it is different from highly individualised and market-oriented *modern* intellectual property rights).

The first background document for the Sub-project[222] says the following: [223]

> *Indigenous knowledge on values of biodiversity and mechanisms to protect and to hand over this knowledge in communities are property rights-based, strongly depend on workable collective action and serve as a self-insuring mechanism against risk: all with strong feedback mechanisms on the future development of this kind of* idiosyncratic, nested *knowledge in a context of eroding socio-economic institutions, a more demanding role of the state, [and] the implementation of international conventions and regimes. The Namibian partners who concentrate on the socio-political context of local knowledge ... will fill this gap ...* .

Many problems arise from this. Why is the project interested in traditional knowledge? The interest is to understand what causes the generation of traditional knowledge; its change and transformation; and also aspects of its professionalisation. The interest is also to analyse the mechanisms that contribute to the sustainability of traditional knowledge; the mechanisms that inform the application of traditional knowledge practically; the mechanisms that support and secure the application (including concepts and norms of customary law; and the societal conditions to maintain traditional knowledge, i.e. to keep it implementable).

From a methodological point of view, questions of this nature have to be reflected in a componential analysis of the various societal correlations relevant to such an analysis.[224] In view of this, the assumptions underlying the essays that are presented after this Introduction can be summarised as follows:

---

221 Cf. Hinz (2004b).

222 The Faculty of Law joined BIOTA in the second phase of the Project.

223 BIOTA (2003:371).

224 Cf. the research design proposed by Pospíšil (1971:193ff).

- Firstly, the assumption is that traditional communities (understood as socially defined societal entities with a distinct sub-statal structure of governance – called *traditional governance* – which follows legitimising strategies that are guided by the respective traditions) posses a repertoire of (legal or mere social) norms suitable for the protection of biodiversity;
- Secondly, that traditional communities possess knowledge (understood as a comprehensive code of not necessarily traditional, i.e. ancient, information maintained and administered by the community in accordance with accepted rules) about the societal value of biodiversity and, thus, the need to protect biodiversity against non-sustainable external and internal exploitation;Thirdly, that the said (traditional) knowledge entails the potential to be transformed into societally efficient norms; and
- Fourthly, that the normative mechanisms administered by traditional communities have a more sustainable impact on the protection of biodiversity than concurrent norms of the state administered by agents of the state.

# Part II:

# Land

# Land allocation and the protection of biodiversity: A case study of *Mbunza*

*Tulimeke M. W. Koita*

*The earth is not ours; it is a treasure we hold in trust for future generations.*[225]

## 1. Introduction

In Namibia's Green Plan, land was identified as one of the three essentials of life, the others being clean air and clean water.[226] Land provides the basis of existence for about 85% of the Namibian population; the quality of the land, therefore, is crucial for the present and future well-being of all Namibians. Nearly 85% of Namibian land is zoned for potential or actual agricultural use, so effective biodiversity protection also means working outside the formal protected area network to improve the sustainability and diversity of farming practices. A vast number of people live directly from the land and rely heavily on its biological resources and habitats for the satisfaction of different needs. These needs include food, housing materials, tools, medicines and livelihood.[227]

Different land uses have different impacts on the land, and this includes land uses regarded as normal in the traditional way of life, i.e. grazing, land clearing and cultivation. Some believe that the current practice of land use should be reviewed to curb the destruction of biodiversity.[228] Land needs to be used in a way that does not destroy biodiversity.

The fact that each community has its own system of knowledge regarding land use makes it important to study the knowledge of different communities and, at the same time, emphasises the importance of traditional authorities as the stakeholders at grass-roots level. Hence, this case study of *Mbunza* was conducted; *Mbunza* is one of the five recognised traditional authorities in the Kavango Region.[229]

225 Dr Sam Nujoma, Namibia's Founding President, in his Foreword in Barnard et al. (2000).
226 Republic of Namibia (1992).
227 Barnard (1998:51).
228 Barnard et al. (2000:26).
229 *Government Notice* No. 65 of 1998.

In *Mbunza*, people do not simply occupy land as they please and on their own terms. The traditional authority plays an important role in allocating communal land rights. This paper attempts to find out whether land is being used in a sustainable way, and whether the sustainable use thereof is taken into consideration when land is allocated.

There are a number of legal instruments in place with regard to the protection of biodiversity, to which reference will be made. These include the Constitution of the Republic of Namibia, the Convention on Biological Diversity, the Forest Act,[230] the Communal Land Reform Act,[231] and the Traditional Authorities Act.[232]

Namibia's fragile environment places a special responsibility on the present generation to protect the land to ensure that future generations will also benefit from it. *Degradation* can be seen as a reduction in the capacity of land to satisfy a particular use. Therefore, the role of land management is clear: it consists of applying known or discovered skills to land use in a way that minimises or repairs land degradation, and ensures that the capacity of the land is continued beyond the present so as to be available for the next generation. But how well do people take care of the land? This is a question that anyone concerned with land management will pose.

This paper seeks to answer whether sustainability really matters to the people of *Mbunza*. It is important, therefore, to determine the extent to which customary law is helpful or could be made helpful for the protection of land. If so, questions about the enforcement of customary law have to be asked.

Although traditional leaders have always believed that communal land was owned by the chief or king, and have allocated land in terms of customary law,[233] communal land is actually vested in the state in trust for the traditional community for its use.[234] The traditional authority, as the custodian of land, is vested with the power of allocating rights on communal land. No one can acquire freehold ownership of communal land.[235] In other words, residents of communal land have what could be called *usufruct* over the land and its resources such as grazing.

Responsibility towards the environment does not rest exclusively on the shoulders of the government. The Traditional Authorities Act tasks a traditional authority with

230 No. 12 of 2001.
231 No. 5 of 2002.
232 No. 25 of 2000.
233 See Hinz (1998:183ff).
234 Section 17 (1), Communal Land Reform Act.
235 Section 17 (2), Communal Land Reform Act.

the duty of ensuring that members of their community use the natural resources at their disposal on a sustainable basis, and in a manner that conserves the environment and maintains the ecosystems for the benefit of the people.[236] However, the mere allocation of land does not guarantee the sustainable use of it.

When rights in communal land are allocated to residents in the *Mbunza* community, what mechanisms exist to ensure that such land is utilised in a sustainable manner? Do rules and regulations in *Mbunza* customary law ensure sustainable land use? If so, are they accompanied by mechanisms that ensure that the land is indeed used in a sustainable manner? Do the residents of the *Mbunza* understand the concept of *sustainable land use* and the role they play in sustaining the land?

A total of 14 interviews were conducted in the *Mbunza* community during July 2006 to answer the above questions. Amongst those interviewed were *Hompa*[237] Alfons Kaundu of *Mbunza*, members of the Communal Land Board for the Kavango Region, traditional leaders, and recipients of land. The interviews were conducted at Gcamade, Kasote, Kayira-yira, Mupini, Rundu and Sigone in the *Mbunza* area, and in Windhoek. All informants were adults whose ages ranged from 26 to 74. Two of the informants were females. One female interviewee was a land recipient, while the other was a member of the traditional authority who had previously served on the Communal Land Board as a representative for women farmers.

The choice of *Mbunza* for conducting the research was mainly due to the writer's familiarity with the area and its language, *Rukwangali* (the Kwangali language, which is the language also spoken in the *Mbunza* area[238]). This facilitated the interview process as communication occurred without the need for an interpreter. The questionnaires designed for the interviews were not strictly followed; they were rather used as guidelines to be adapted as the situation demanded. The field research was also time-consuming and challenging. Some interviewees asked for payment in exchange for the information they provided. In certain cases, the writer had no choice but to pay these informants for their information. Patience had to be exercised as the interviewer had to work according to the informants' schedules. Besides a few exceptional cases, the informants were generally cooperative and willing to answer the questions posed to them.

236 Section 3 (2) (c), Traditional Authorities Act.

237 *Hompa* is the traditional title of the supreme traditional leader of the *Mbunza*, and can be translated as "king".

238 Scholars maintain that the *Mbunza* had their own language, distinct from *Rukwangali*, but by the end of the first half of the 20th century only a few *Mbunza* elders were conversant with this language (McGurk 1981:84).

As regards the area and its people, the *Mbunza* and the Kwangali share a common origin, but not much has been written about the origin of the *Mbunza*. Indeed, the history of the *Mbunza* is often attached to the history of the Kwangali. The people from whom the *Mbunza* emerged are believed to have lived along the upper reaches of the Zambezi River, from where they moved south and then west to the Kwando or Mashi River. One clan eventually travelled to settle along the Cubango River in Angola, but was forced by others who already lived there to move downstream. The clan then settled in what is today the western part of the Kavango Region. This group had two leaders who happened to be sisters. A disagreement later divided the clan into two groups, now known as the *Vakwangali* and *Vambunza*. The former settled in the extreme west of the Kavango Region, while the latter settled next to them in the east.[239] As the story goes, the disagreement was about cattle.[240]

The *Mbunza* have an officially recognised Traditional Authority. The *Mbunza* Traditional Authority is obliged to carry out tasks within the ambit of the enacted laws of the country as well as under customary law.

## 2. The protection of land under *Mbunza* customary law

The customary laws of Namibia are the laws that govern the day-to-day activities of most Namibians. Customary law is part of the law of Namibia. Both customary and common law are placed on an equal footing in terms of Article 66 (1) of the Constitution. The customary law of *Mbunza* is not codified;[241] nonetheless, parts of it are self-stated.[242] Article 3 of the *Mbunza* laws reads as follows:

> *The Mbunza Traditional Authority is encouraging its residents to use its natural resources in a good and sustainable manner.*

Article 4 stipulates the following:

> *The Mbunza Traditional Authority has the responsibility to conserve all natural resources in the river and on the land.*

From discussions with members of the *Mbunza* Traditional Authority, it became evident that the concept of *sustainable land use* has existed as far back as the era of

239 Mendelsohn & Obeid (2003:34).
240 Fleisch & Möhlig (2002:181).
241 Field notes 2, 5, and 8.
242 *Self-stated customary law* is customary law as ascertained by the communities themselves in writing. Cf. Hinz (1995b); Hinz (1997:69ff); Hinz & Kwenani (2006:203ff).

*Hompa* Kasiki zaKatembo.[243] *Hompa* Kasiki zaKatembo's rule was three kingships before the current king came into power.[244] In 1903, Nampadi was *Hompa*; he was succeeded by Karupu, Muduni and Kasiki.[245]

Sustainable land use is a relatively old concept to the *Mbunza*, and cannot be claimed to have been imported to the community by 'modern' law. One of the traditional leaders noted that, in the past, people were always warned not to fell trees without having a distinct purpose for them. People were only permitted to cut down trees for their own use. Today, people tend to utilise wood for commercial purposes as well. One male informant also referred to the uncontrolled cutting down of trees as a thing of the past; he said it was currently controlled, because it led to soil erosion.[246] This lends weight to the belief that the protection of biodiversity in *Mbunza* was not born with 'modernisation'.

The Kavango Region has been identified as one of the densely populated communal areas.[247] The *Mbunza* Traditional Authority recognises that the number of people living on the land there has been on the increase. This means that land is slowly becoming overpopulated. The Traditional Authority sees this as a threat to sustainable land use, as people may ignore the needs of the land. When asked about this, the *Hompa* responded as follows: [248]

> *Yes, there is not much land for farming. There are too many people. The land set aside for farming is not enough for everyone who needs such land.*

Other traditional leaders and the *Hompa* himself had the following to say about overpopulation as the interviews progressed: [249]

243 Field note 5. *Hompa* Kasiki zaKatembo succeeded *Hompa* Muduni zaKatembo and the two brothers. After *Hompa* Kasiki's rule, Elizabeta Nepemba zaKatembo (who happened to be *Hompa* Muduni and *Hompa* Kasiki's sister) assumed leadership. Thereafter, *Hompa* Leevi Hamatwi Hakusembe (*Hompa* Nepemba's grandson) ruled. Frans Haingura (*Hompa* Leevi's brother) succeeded *Hompa* Leevi Hakusembe, while the current leader is *Hompa* Alfons Kaundu.

244 This information is extracted from an unpublished article by Rev. Asser Kazumba Lihongo, entitled "*Histoli zovaKavango zoHompa wokoutokero*" ("History of the Kavango kings of the West"). Unpublished manuscript.

245 McGurk (1981:84).

246 Field note 8.

247 Adams & Devitt (1992:5,10).

248 Field note 5.

249 (Ibid.).

> *Some of our people are overpopulating the land. There are too many people: the land is small.*

Overpopulation is one feature of *Mbunza* today that was not there in the past; therefore, it is seen as a threat.[250]

The Regulations of the Communal Land Reform Act[251] provide for a specific form to be filled in by applicants for customary land rights. The information requested on this form relates to the applicant, the nature of the right applied for, the size and location of the land, the current use of the land, whether any other person has a customary right to the land, and whether the applicant has any other land rights under the Act. The traditional authority evaluates the application, i.e. they assess whether the land applied for is unoccupied, whether such land may not be needed for other developmental projects, and whether the allocation will create tension among community members in the area.

Land and Farming Committees were established shortly after Independence by the Ministry of Lands, Resettlement and Rehabilitation. These Committees, which comprise 10 to 12 members, act on behalf of traditional authorities and are mainly concerned with the allocation of land away from the river. In an interview with the *Hompa* and traditional leaders, it came to light that these Committees still exist in order to assist traditional authorities in administering land. The *Mbunza* Land and Farming Committee has the following responsibilities:

- Reviewing applications for land;
- Granting approval for land acquisition;
- Settling land disputes among *Mbunza* community members;
- Updating the community concerning any government or NGO programmes for development on land issues;
- Planning for correct and viable land utilisation and the conservation of natural resources; and
- Advising the *Hompa* on land management and administrative matters.

This Committee assists the *Hompa* with the allocation of customary land rights, and is accountable to the *Hompa* and the *Mbunza* Traditional Authority. The Committee cannot take any decision without consulting with the *Hompa* or obtaining his approval. Whenever a matter of land degradation in *Mbunza* is reported, the *Hompa* is required to attend to the matter.

250 (Ibid.).
251 *Government Notice* No. 37 of 2003, amended by *Government Notice* No. 120 of 2003.

The Communal Land Board only sits once every two months. The members of the Board do not serve on a full-time basis. The meetings usually last for the whole day, depending on the number of applications being processed. The Board's task is to consider applications in terms of the requirements of the Communal Land Reform Act, and to ratify allocations where applicable.[252] The Land Board may veto an allocation if a right has already been allocated, or if the size of the land exceeds the prescribed limits.[253] Once an allocation of customary rights has been ratified, the Board issues the applicant with a certificate to the effect that specific rights have been allocated to him/her.[254]

Although the Communal Land Reform Act does not explicitly oblige Communal Land Boards to take environmental issues into account when allocating land or leases, they have a general responsibility to adhere to the National Environmental Assessment Policy, which describes the activities for which environmental assessments should be carried out.[255] The Communal Land Reform Act requires that any person holding a customary land right or right of leasehold has to manage such land in accordance with the Soil Conservation Act.[256] Landholders are obliged to prevent soil erosion or any disturbance of the soil that creates conditions that could lead to erosion, amongst other things. If land held under a customary right is being used in a way that causes soil erosion, the *Hompa*, traditional authority or the Communal Land Board may, in consultation with the Minister of Agriculture, Water and Forestry, suspend or cancel that right.[257]

While some people use their land for residential purposes only or for the cultivation of gardens, others use it for farming on a larger scale. These different types of land uses play a role in how people treat and protect the land. Food gardens are usually fenced off. One interviewee with such a garden saw, in addition to the need to protect his field against intruders, the need to sustain the soil of the garden, but felt there was not much that could be done as the crops grew by themselves.

A land recipient who used the land for keeping livestock and cultivation as well as for residential purposes said he had as yet not had problems with land degradation on his land. When asked how he took care of the land, he stated the following:[258]

252 Section 24 of the Communal Land Reform Act read together with its section 23 and section 3 of the Regulations to the Communal Land Reform Act, No. 37 of 2003, which provide for the limitations on the size of communal land that may be allocated.
253 Section 24 (4) (ii).
254 Section 25 (1) (b).
255 Field notes 3 and 4.
256 No. 76 of 1969.
257 Section 27 (1).
258 Field note 1.

> *There is no protection. We just wait for the rain to come so that the animals have grass to eat, so that we can also eat.*

This land user also fenced his farm in order to keep out wild animals that would destroy his crops and kill or harm his livestock.

Although land recipients also see the need to protect the land, there is either no imminent danger for them to react to, or they are unable to do so because they lack the resources. However, the respondent also mentioned the problem of fires that started on other farms, and people using farms as a thoroughfare. He said he had no control over such things. With regard to whether fencing the land off helped to protect it, and whether he was aware of what the law said about fencing communal land, the recipient responded as follows:[259]

> *No; actually, this thing of communal areas can be traced back to the old days. That was the way we have always lived. In the past one would not find fences around property because it was everybody's land. The exceptions would perhaps be the around the fields, just to keep the cattle out. Communal land is a traditional concept; after all, people could live anywhere.*

The respondent also mentioned that educating people was important:[260]

> *They need education regarding sustainability of the land. Education is the first priority. It won't help if people are uneducated about land. It is vital to know what to do if land becomes degraded.*

One land recipient's view of how to protect the land entailed the following:[261]

> *No exploitation of the natural resources, no wild fires, and no overgrazing.*

The definitions of *land degradation* mostly focus on the land itself: when land is degraded it suffers a loss of intrinsic qualities or a decline in capacity. When land is degraded it loses value and cannot effectively carry out what it is entrusted to do. The general impression from the interviews was that sustainable land use exists – as it has *since time immemorial*, and has been linked to as far back as the era of *Hompa* Kasiki. The rationale is that, if it were not for the great care land received from those who had lived on it, there would be none for anyone to live on today.

259 (Ibid.).
260 (Ibid.).
261 Field note 9.

Although people need to be educated with regard to what constitutes bad land practices, it can also be said that people do not intentionally employ methods that degrade the land. Although land recipients are directed as to how they ought to use the land, there is little in place to ensure that this is followed through. The information gathered from respondents indicates that although people knew sustaining the land was important, they were unable to do anything about it – due, amongst other things, to a lack of resources.

When questioned about what *sustainable land use* meant, some of the land recipients responded as follows: [262]

> *A person needs to know how to use the land. There needs to be education of some sort when someone gets a farm, to tell them that they need to do this and that. There is a need to care for the land if the land is bad. Things like buying fertiliser: we don't do it because we don't have the resources.*

The *Mbunza* Traditional Authority indicated that the community was aware that land needed to be protected. It was explained to land recipients that they were obliged to use the land in a sustainable manner. Some of the recipients interviewed did not see the necessity of this, however; they saw sustainable land use as something else:[263]

> *God takes care of the land ... The land is by its own nature capable of sustaining itself.*

This attitude does not portray a community that comprehends the vitality of sustainable land use – a fact that has to be attributed to a lack of education. The interviews demonstrated that the majority of land recipients did not fully understand the role they played in sustainable land use. Perhaps the users needed to feel more in charge in order for them to realise the responsibility they bore. Indeed, some informants felt that it was not only the individual land user's responsibility to sustain the land, but everybody's: land was a public asset. Others again believed that land was a national asset and, therefore, simply by virtue of being a Namibian one needed to take responsibility for it.

Whether or not these responses can be attributed to human nature or whether they are merely an excuse not to look after the land, much still needs to be done to sensitise the community about the importance of sustainable land use. Stringent measures also need to be put in place to deal with contraventions of national and customary

262 Field note 1.
263 (Ibid.).

laws that ensure the land is used sustainably. As far as this is concerned, because the *Mbunza* Traditional Authority sees the need to for sustainable use, it is determined that land is used appropriately to ensure the *Mbunza* community's future.

The *Mbunza* Traditional Authority also raised the concern that people did not respect the customary law on the protection of land as it currently applies. Several reasons for this spring to mind, amongst which is that the set punitive measures are not sufficient to deter those who would break the law. Such measures under customary law, for example, need to punish transgressors more harshly. Under section 3 (3) (c) of the Traditional Authorities Act, traditional authorities are empowered to make laws. In this way, customary law can be made useful in the protection of land. A traditional authority can make laws that strengthen the laws making the contravention of current laws on the protection of land harsher and stricter so that the law serves more as a preventative measure. People will respect customary law if they are aware that the fines imposed in the case of contravention are high and that law enforcement is ensured. Community awareness campaigns could be helpful in this respect.

## 3. Conclusion

It is clear from the research that many members of the *Mbunza* community are not aware of the need to protect biodiversity, although they generally obey the self-stated laws provided to them by their traditional authority. Thus, it stands to reason that the successful protection, conservation and sustainable use of natural resources will depend strongly on traditional authorities, as the custodians of their environment.[264]

Conventional wisdom has it that prevention is better than cure. In this sense, too, land needs to be protected in order to avoid degradation. It would be worse for people to wait until the damage has been done before they actually start looking for a cure: it may no longer be available to them. Thus, land recipients and those who allocate land use rights need to have a fair amount of knowledge regarding the need to protect the land.

It also seems quite certain that the trend towards land becoming overpopulated will bring with it the threat of land degradation. Nonetheless, in the absence of actual danger, people are very reluctant to protect the land. Some regard it as 'God's duty' to protect the land and that 'nature will take its course'.

It is also noted that land recipients do not have the necessary resources for effective land protection. Farmers in particular need to be educated about land protection in order for them to identify and avoid bad land practices. Most importantly, people have to be educated about the consequences of possible land degradation.

264 Tiffen (1996:169).

# Disputed land: Owambo cattle farmers in *Ukwangali*

*Julia Mushimba*

## 1. Introduction

Land in Namibia, especially communal land, has a very complex legal history. It dates back to the time of land-grabbing treaties by the first European colonialists, continued with the expropriation of Herero and Nama lands, and culminated in the birth of Native Reserves.[265]

Land was a central element in Namibia's struggle for independence. It is not only a sensitive issue, but also a bone of contention that is treated and discussed with much apprehension. In many of the debates regarding land, it is convenient to blame many of today's land problems on the former colonialists and white farmers. However, this paper will not engage in finger pointing, as this will not bring us to the reason why the conflict erupted.

One question asked frequently during the research was how the land dispute relates to the protection of biodiversity in Namibia. The answer to this question lies in the roots of the dispute. The determining factor in the dispute is not the lack of land, but rather of fertility and grazing capacity. Moreover, this conflict centres on contrasting views between traditional communities regarding the use of the land, farming practices, the role that livestock plays in the community, the pattern of communal expansion, and fencing practices in communal areas.

A case in point regarding conflict about land is the land dispute between the *Ukwangali* Traditional Authority and the Owambo cattle farmers in the western Kavango Region. The tension over grazing rights in the Mpungu Constituency in western Kavango began a long time ago. In fact, problems were predicted to arise because Owambo cattle farmers had begun expanding their grazing area.[266] Evidence of this prediction and concern dates far back, and was recorded in Fuller's 1996 study.[267] Fuller's report advised that a follow-up study be conducted in western Kavango in order to investigate the friction that the Owambo cattle farmers were causing in the

265 Kustaa (2004:2ff).
266 Field note 8.
267 Fuller (1996).

area and the possible conflict that could arise in future. This concern prompted talks between the *Ukwangali* and the *Oukwanyama* Traditional Authorities in order to find an amicable solution to the problem of the uncontrolled trekking of Owambo cattle farmers from the Ohangwena and Oshikoto Regions into Kavango.[268]

The authorities do not know the exact number of Owambo farmers grazing in *Ukwangali*, but estimates are that about 60,000 head of cattle belonging to around 50 Owambo farmers are to be found in the area.[269] Many of these farmers claim to have been granted permission to enter *Ukwangali* from the headman responsible in the area. Some, like Mr G. N., claim to have gained direct permission from *Hompa*[270] Daniel Sitentu Mpasi; moreover, Mr G. N. claims to have *purchased* the land. However, other Owambo cattle farmers are deemed to have simply encroached on the area without the *Ukwangali* Traditional Authority's permission. The latter claimed that the Owambo farmers' animals had damaged the Kwangali community's crops, and that the farmers themselves had not complied with the rules and laws that prevailed and governed the *Ukwangali* area because these farmers had disrespected and disobeyed the Kwangali *Hompa*'s authority. The Owambo cattle farmers in turn claimed that people from *Ukwangali* had threatened and intimidated them with machine guns and had shot arrows at their cattle.[271]

Tensions escalated to such a degree that President Hifikepunye Pohamba became greatly concerned, and deployed the Namibian Police Force to the area to intervene and deter any physical fighting.[272] The *Ukwangali* Traditional Authority requested that the Owambo cattle farmers vacate western Kavango, but it fell on deaf ears. *Omukwaniilwa*[273] Immanuel Kauluma Elifas pleaded with the *Ukwangali* Traditional Authority to allow the cattle farmers two or three months to vacate the area, but *Hompa* Daniel Sitentu Mpasi refused and firmly held that although he consoled with the Owambo cattle farmers, they still had to leave the *Ukwangali* Traditional area with immediate effect.[274] The *Hompa* further held that those Owambo farmers that wished to return to *Ukwangali* were free to do so, as long as they followed the right procedure and applied or re-applied for re-entry into *Ukwangali*.

268 Field note 2.
269 Poolman (2005).
270 *Hompa* is the traditional title of the supreme *Ukwangali* traditional leader, and can be translated as "king".
271 Shivute (2005).
272 Shigwedha (2005).
273 *Omukwaniilwa* is the traditional title of the supreme *Ondonga* traditional leader, and can be translated as "king".
274 Field note 7.

Eviction orders signed by the chairperson of the Kavango Communal Land Board[275] were issued to the Owambo cattle farmers, which were ordered to remove their livestock from *Ukwangali* within a period of seven days. The Owambo cattle farmers were expected to evacuate western Kavango, but they refused to do so unless government met their demands. They requested instead that the *Ondonga* and *Oukwanyama* Traditional Authorities allocate alternative grazing areas to them. The farmers also demanded that the government assist them in their long trek back by providing necessities such as water along the way. A further demand was to have a clear road made available for the farmers to move their cattle safely.[276] In addition, the farmers expected quarantine camps to be made available in the *Oukwanyama* and eastern *Ondonga* traditional areas. Most importantly, government was requested to open up the areas that had been fenced off in their communal areas.

Government on its part refused to resettle any of the Owambo cattle farmers; in fact, it stated that the farmers should return to their original areas of habitation –[277]

> *... as they did not drop from heaven: they moved from some other places.*

The Owambo cattle farmers that had been issued with but had not adhered to eviction orders were then faced with legal charges, as the Kavango Communal Land Board and the *Ukwangali* Traditional Authority formally instructed the Namibian Police to take action against them. One Owambo farmer, Mr J. N., who hailed from the Elavi village, was arrested in Kavango by police officers from Kahenge. On 1 March 2006, he was charged with illegally grazing in the *Ukwangali* traditional area, and released on N$500 bail. However, despite being issued with eviction orders and despite constant pleading, some Owambo farmers remain in *Ukwangali*. They have now penetrated deeper into the bush and have shown no inclination of evacuating the area and returning to Owambo communal land.

The Traditional Authorities Act acknowledges traditional authorities as legal entities with specific duties and functions.[278] One such function is to assist the President with the administration and control of communal land.[279] The chief or traditional authority of a traditional community has the power to allocate or cancel customary land rights within the limits set by customary and statutory law. Once such a decision has been made will it be remitted to the Communal Land Board for verification.[280]

275 Field note 29.
276 Statement by Prime Minister Nahas Angula of 23 February 2006.
277 (Ibid.).
278 Section 3, Traditional Authorities Act, No. 25 of 2000.
279 Cf. Article 102 (5) of the Namibian Constitution.
280 Section 20, Communal Land Reform Act, No. 5 of 2002.

The requirement whereby the decision on an application for land rights has to revert to the Communal Land Board for verification is often not adhered to or is simply ignored. The reason for this may be that, prior to independence, the chief's permission in the form of an oral agreement was sufficient to gain access to communal land, and no consultation with any other body was required.

In the land dispute between the Owambo farmers and the *Ukwangali* Traditional Authority, the element of permission and authorisation is in dispute. The *Ukwangali* Traditional Authority claims to have granted only eight Owambo farmers permission to graze. However, a far greater number of farmers allege that they had acquired such permission from the *Hompa* and headmen. In many cases, grazing rights are said to have existed prior to the enactment of the Communal Land Reform Act. What does this now mean for the farmers that hold these rights? May they continue to hold these rights, or is a ratification of the rights required? If they are permitted to retain those rights subject to their ratification, what is the farmer's position on having to obtain such ratification?

The eviction orders issued to the Owambo farmers created controversy and uncertainty as their validity was questioned not only by the Owambo farmers, but also by government officials. Since the eviction orders were not issued via the courts, their legality has also been questioned.

To obtain the relevant information, the research for this study is comprised of data collection from fieldwork; archival research; a review of official documents; newspaper articles; and interviews with people such as the villagers from Zigizi village who were involved in the land dispute, local leaders, and government officials in Rundu.[281] A total of 12 interviews were conducted in Rundu from 26 June to 3 July 2006, and in Mpungu from 30 June to 2 July 2006. Another 17 interviews were conducted at the Zigizi village on 15 July 2006.

## 2. Background

The arrival of Owambo cattle farmers in *Ukwangali* dates back more than 20 years. This was as a result of *Oukwanyama* Traditional Councillor Elia Weyeru's request for land from the *Ukwangali* Traditional Authority, and upon which Owambo cattle farmers entered *Ukwangali*.[282]

281 Field note 6.
282 Field note 7.

The need for additional grazing and water amongst livestock farmers in communal areas, especially in northern Namibia, has resulted in many voyages to far-flung cattle posts.[283] This is coupled with the cultural significance of cattle in both *Ukwangali* and *Oukwanyama.* In the Owambo traditions, amongst others, the number of cattle is seen as a form of wealth, and serves as a deciding factor in determining a person's social status.

In the 1950s, there was an underutilised strip of land between *Ukwangali* and *Oukwanyama*, on which any form of settlement had been prohibited. The search for additional grazing and water eventually led to a request for permission from the *Ukwangali* Traditional Authority to graze animals in the area in question. In order for the request to be granted, all the chiefs in Kavango, and the relevant authorities in the colonial administration had to decide the matter together. It was eventually jointly agreed that the Owambo would receive a strip of land about 100 to 120 km wide, but with the proviso that the land was earmarked for grazing only, i.e. not for settlement or cultivation.[284]

Initially, the *Ovakwanyama* cattle farmers established cattle posts and used the area for grazing. As time elapsed, however, they began to clear fields and plant *mahangu*;[285] in the end, they had fully established homes there as well. As the number of homes increased, the number of people increased. The land soon became too small to sustain the occupants on it. Consequently, the hunger for more land arose. In 1986, Owambo herders began to occupy land that was not part of the initially agreed grazing strip.[286] This penetration occurred during the summer season when the area received good rains. It was part of the unwritten agreement between *Ukwangali* and *Oukwanyama* and, indeed, intermittent practice for the Owambo farmers to clear the area to allow the grass to regenerate. This went on until the Owambo farmers refused to return to the originally allocated strip.[287]

As the strip in question is now permanently settled, the Owambo farmers started moving into another unauthorised area in the Mpungu Constituency, where the villages of Mukekete West, Mukekete South, Ondjaba, Etale, Nandingwa, Rupeho, Zigizi, and Kwaki are located.[288] As a result, the Mpungu Constituency – which had been zoned as a common grazing area for *Ukwangali* as well as for others with due permission from the *Ukwangali* Traditional Authority – has become overgrazed. The

283 Eirola (1992:40).
284 Field note 2.
285 Pearl millet.
286 (Ibid.).
287 (Ibid.).
288 (Ibid.).

*Vakwangali* now regret the helping hand that they extended to the Owambo, because the latter refuse to leave the area.

According to the initial agreement between the two traditional authorities, the Owambo were obliged to dig wells and, in return, they were granted grazing rights in Kavango. However, the occasional use of land in Kavango evolved into a regular feature. Soon, the *Oshiwambo*-speaking land users began to fence off 'their' farms, thus physically depriving the Kavango community of their own grazing land.

As far back as anyone in the Kavango community can remember, any person wishing to reside in and/or move stock to *Ukwangali* has always required the permission of the *Hompa* and the Kwangali Traditional Authority.[289] The Owambo cattle farmers claim to have been granted permission to graze their animals on a specific strip of Kwangali communal land. Mr L. S., an Owambo cattle farmer in Zigizi, said that he first arrived in the village in 1993. He obtained permission from Headman Nambase to settle temporarily in the area. However, he never returned to his area of origin, which was Nambutu, in the Ohangwena Region. Another Owambo cattle farmer claiming to have gained permission to graze his animals on Kwangali communal land is the above-mentioned Mr G. N. He affirmed that he arrived in *Ukwangali* in 1985, and that he was granted access to the area in question by the late Headman Musonga of the Kwaki village. He also held that Headman Musonga referred him to *Hompa* Mpasi. Upon his visit to the *Hompa*, Mr G. N. was obliged to pay an ox for permission to settle at Lupeheho, where he is still a resident. The *Hompa* denied all these claims.[290]

Owambo farmer Mr V. H. expressed surprise at the allegations in the media to the effect that certain Owambo farmers had entered *Ukwangali* illegally. He said it was not possible simply to settle in another traditional authority's jurisdiction without the permission of that authority, and that he had received permission in 1999 from Headman Shiwaya to graze in *Ukwangali*, and that no time limit for this had been set. The Headman had informed him that fencing of land was prohibited unless it was to protect crops from being destroyed by animals. The agreement as regards the use of water was that it was free and available, also without limitations. He also professed to have witnesses to corroborate his story. All the people that had granted the permission to Mr V. H. are still alive, except for Headman Musonga from the Kwaki village.[291] He said he could not account for any of the other Owambo farmers in the disputed area, as many had arrived there prior to Independence.

289 Field note 7.
290 Field notes 4, 5, and 7.
291 Field note 29.

Mr N. Y., another Owambo farmer, held that he had been granted permission to graze in the area, but not to plant crops. The agreement was that the Owambo farmers would keep their cattle away form fields where crops were being grown by the *Vakwangali*. Only after such crops had been harvested were the Owambo cattle farmers allowed to move their animals into the fields.

The *Ukwangali* Traditional Authority held that, apart from the eight Owambo farmers who had been permitted to reside in *Ukwangali,*[292] other Owambo farmers had illegally entered *Ukwangali*. Notwithstanding their by now permanent dwellings, these farmers are expected to evacuate the area.[293]

Despite this, some interviewees said there were at least two other Owambo farmers who claimed to have received authorisation to farm in *Ukwangali*. One of them was allegedly brought into the Zigizi village by the *Hompa*. Therefore, his presence in *Ukwangali* is not debated as he is deemed to have followed the right procedure in obtaining permission to stay.[294] However, he does not appear on the list issued by the *Ukwangali* Traditional Authority containing the names of Owambo farmers authorised to graze on the designated Kwangali communal land. This may bring into

292 These farmers and their farm numbers are as follows:

| | |
|---|---|
| Ndali Kamati | Farm No. 1283 |
| Seeth Kaukungwa | Farm No. 1285 |
| Late Dimo Hamambo | Farm No. 1292 |
| Jeremia Nambinga | Farm No. 1303 |
| Usuko Ngamwaa | Farm No. 1320 |
| Israel Jona | Farm No. 1801 (New farm) |
| Otto Royal | Farm No. 1301 |
| Erkki Nghimtina | Farm No. 1322 |

293 The following list of farmers' names and places are known to the *Ukwangali* Traditional Authority:

| | |
|---|---|
| Nehanga Gabriel | Zigizi village. |
| Naujoma Thobias | New farm, No. 1808, Sasi village. |
| Erastus Sakkaria | New farm, Sasi village. |
| Aktofer Sakasria | New farm, Sasi village. |
| Vilho Hamunyela | New farm, Sasi village. |
| Hashikutuwa Adolf | New farm, Mukekete village. |
| Naukushu | New farm, Mukekete village. |
| Shivuhute | New farm, Mukekete village. |
| Kaimbi Matheus | New farm, Namasire village. |
| The family of the late Shinana | New farm, Namasire village. |
| John Yakalaunga | New farm, Kwaki village. |
| Kisi | New farm, Kwaki village. |

294 Field note 21.

doubt the validity of the list itself. Could it be that the *Ukwangali* granted permission to other Owambo farmers as well, but without taking down their names?

If the eight Owambo farmers are the only ones deemed to have been legally authorised to be in *Ukwangali*, why did the inhabitants of Zigizi mention the names of other persons that had been authorised by the *Ukwangali* Traditional Authority? And why do other Owambo farmers apart from those mentioned by the *Ukwangali* Traditional Authority hold that they had been granted permission?[295] Also, why did the Traditional Authority wait for some 20 years before deciding that certain Owambo farmers had illegally penetrated *Ukwangali* territory?

The majority of cattle farmers in *Ukwangali* are *Ovakwanyama*.[296] This was also maintained by the *Ondonga* Traditional Authority.[297] The Owambo farmers settling in *Ukwangali* include business people, mineworkers, civil servants, politicians, and others who have a steady and abundant cash income. This group of affluent Owambo own large herds of cattle in *Ukwangali*.[298] They do not meet the profile of the average communal farmer. Mr V. H., for example, does not reside in *Ukwangali* but on Owambo communal lands. The farmers only visit the area every few weeks, or when there is a problem. A great number of the informants said the herders are mere boys between the ages of 13 and 16, and very often relatives of the cattle owners.[299] Some of the boys come from Angola.

Since some of the Owambo farmers are government officials, those responsible for assessing the problem of Owambo farmers in *Ukwangali* find themselves in a conflict of interests. If the herders actually owned the cattle, it would have been easy to ask them to leave if they did not have permission to graze in *Ukwangali*.[300]

## 3. Socio-cultural factors behind the conflict

Although the socio-cultural factors explored in the following subsection cannot be regarded as the impetus driving the conflict between the Owambo farmers and the *Vakwangali*, it also cannot be denied that they contribute to the conflict to some degree.

295 Field note 30.
296 Field note 29.
297 Field note 4.
298 Field note 9.
299 Field note 5.
300 Field note 19.

Traditional communities have their own distinct cultural practices to which their members adhere.[301] One such difference is with regard to the right to water and wells. For example, in *Ukwangali*, a well is deemed to belong to the community as a whole, as no individual is seen as the owner of a natural resource. There is also a significant difference in how wells are built when one compares *Vakwangali* with Owambo traditions. The *Vakwangali* dig wells along lakes and rivers, where water is easily visible, while the *Aawambo* construct their wells deep in the forest.[302] The *Aawambo* hold that there is no *Ukwangali* who has ever dug a deep well, and that all deep wells that exist in the communal areas in question have been dug by the Owambo.[303] Over time, some *Vakwangali* used Owambo farmers and their knowledge to dig deep wells for them.[304] As many of the *Vakwangali* did not have the money to compensate the *Aawambo* for their work, as a form of payment the *Vakwangali* allowed Owambo cattle herders to dig wells for their own use.

Another difference is with respect to the use of land. Unlike the *Aawambo*, the *Vakwangali* do not fence off their lands. The Owambo cattle farmers are alleged to have brought along their fencing practices to *Ukwangali*. *Vakwangali* respondents stated that these farmers' fencing practices had deprived them of rights to land of which they were the rightful owners, and on which they traditionally cultivated *mahangu* and grazed their animals. The *Vakwangali* regarded themselves as the original and lawful *owners* of the land and, therefore, refused to accept that they were being deprived of their land.[305] Some of them went as far as to suggest that the government erect a fence between *Ukwangali* and *Oukwanyama* communal lands in order to prevent the latter's cattle from entering Kavango traditional areas.[306] When the Owambo herders' cattle destroyed the crops of the *Ukwangali* and the *Vakwangali* complained, the *Aawambo* responded that it was not their problem but the *Vakwangali*s', as they did not fence their land. However, this argument seems questionable as the behaviour of the Owambo farmers on *Ukwangali* communal land contravenes their own customary law.[307]

Furthermore, women from the Zigizi village are said to have encountered difficulties at times when collecting water for their households. Owambo herders allegedly refused to allow them to collect water until their own animals had finished drinking.

301 Bennett (2004:22).
302 Field note 2.
303 Field note 29.
304 Field note 2.
305 Field note 15.
306 (Ibid.).
307 (Ibid.).

In response to this rejection, the women asked: who was more important, the cattle or the people?[308]

It is obvious that events of this nature create tension and can lead to violence. Headman Salomon Nambasi of the Kwaki village recalled an incident where he had confiscated Owambo cattle while he awaited payment for damage the animals had caused to the field of a certain Mr N. N. The owner of the cattle, Owambo farmer Mr J. Y., then apparently threatened the owner of the field with a pistol.[309]

The Kahenge police confirmed an incident of attempted rape when two *Ukwangali* women from the Kwaki village were threatened that they would be forced to have sexual intercourse with Owambo cattle herders.

In response to the stated allegations of violence, Owambo farmers held that they had also experienced violence from members from the *Ukwangali* community. One report reflects an incident in October 2005, when the Kahenge police came to Mr V. H. farm to evict him from the land on which he had settled. Mr V. H. was not on his farm at the time. The police told the herders to pack their belongings and go back to where they had originally come from. When the herders refused to leave, because Mr V. H. was not present, some *Ukwangali* people allegedly set the farm on fire. Six head of cattle burned to death. However, although the police were present, they did nothing to stop this violent act. When Mr V. H. returned to his farm, the police informed him that, since the farm had already been destroyed, his best course of action was to leave.[310]

## 4. Eviction orders

The *Ukwangali* Traditional Authority eventually decided to evict the Owambo cattle farmers who, according to the *Ukwangali* Traditional Authority, occupied the land illegally. In the case of the farmer Mr G. N., the *Ukwangali* Traditional Authority evicted him because he had entered *Ukwangali* illegally, and therefore had no right to settle in *Ukwangali*. His cattle, goats and donkeys had, for the past seven years, continuously destroyed not only the crops of *Ukwangali* peasants in the vicinity, but also those of the *Hompa*. Mr Nehanga had also shown disrespect towards the *Hompa*'s wife, had denied her access to water, and had insulted her. Furthermore,

308 Field note 23.
309 Field note 19.
310 (Ibid.).

in deliberate defiance of *Ukwangali* laws and rules, Mr G. N. had refused to attend meetings to which he had been summoned by the *Hompa*.[311]

Section 43 (2) of the Communal Land Reform Act empowers a chief, traditional authority or Communal Land Board to institute legal action for the eviction of a person who occupies any communal land in contravention of section 43 (1) of the Act. Section 29 (3) of the Act permits such chief, traditional authority or Communal Land Board to withdraw the grazing right granted to a non-resident of a community if it is in the special interest of the residents. On the basis of the two quoted provisions of the Act, the *Ukwangali* Traditional Authority and the Communal Land Board of Kavango filed their respective complaints against the Owambo farmers in question with the Namibian Police and the Kavango regional authority.

In November 2004, the *Ukwangali* Traditional Authority addressed a letter to the Ministry of Lands, Resettlement and Rehabilitation requesting the aid of the Namibian Police to enforce the eviction order against Mr G. N. In a second letter, dated 27 October 2005, the *Ukwangali* Traditional Authority requested President Hifikepunye Pohamba to assist the traditional authority in the implementation of the decision to evict the unauthorised cattle herders.

In November 2005, the Kavango Communal Land Board issued 73 eviction orders to the Owambo cattle farmers on the grounds that their animals were grazing illegally in western Kavango. The eviction orders were issued in terms of section 43 (2) of the Communal Land Reform Act and signed by the chairperson of the Kavango Communal Land Board. The order read as follows:

> *Kindly take notice that you have contravened Section 43 of the Communal Land Reform Act, 5 of 2002, in that you are unlawfully occupying or using, for grazing purposes, land in the Kavango Region which is commonage in the communal area of the Ukwangali Traditional Community contrary to the provision of this Act. Take further notice that you have occupied the said portion of the commonage without the written authorization of the Chief or Board contrary to Section 29 (4) of the Act. You are notified that your occupation of the said commonage is an offence and if you are found guilty you will upon conviction be liable to a fine not exceeding N$ 4000 or imprisonment for a period not exceeding one year. Kindly take further notice that you are hereby informed to vacate or cease to occupy the said communal land within seven (7) days. Failing to do so will mean that legal action will be instituted against you.*

311 The *Ukwangali* Traditional Authority Council and community meeting held on 12 June 2004 at the *Hompa* Sitentu Mpasi Royal House.

The Owambo farmers received the eviction order, including those Owambo farmers who were not in *Ukwangali* at the time. The Police were instructed to serve the eviction orders to all farmers, regardless of where they were found. In search of absent Owambo farmers, the Kahenge police went as far as Oranjemund.[312] Of the 72 Owambo farmers in question, only 50 were served with eviction orders. Of these, only a few farmers obeyed the order. Mr V. H. was among those who refused to obey.[313]

## 5. Conclusion

One of the problems associated with these events is that it is unclear whether sections 29 and 43 of the Communal Land Reform Act empower the traditional authority, the chief or the Communal Land Board to issue eviction orders, as was attempted by the *Ukwangali* Traditional Authority and the Kavango Communal Land Board. From a customary law point of view, there are grounds to argue that the body who has the authority over communal land and, with this, the right to allocate land rights also has the right to implement decisions in cases of illegal land occupation.

The Communal Land Reform Act leaves room for interpretation. Section 43 (2) stipulates that –

> *... a chief or a traditional authority or the board concerned may institute legal action for the eviction of any person who occupies any communal land in contravention of Subsection 1 of Section 43.*

This could mean that the mentioned bodies were allowed to institute legal action within the ambits of customary law, namely to implement the eviction. The alternative view would be that legal actions had to be instituted through an order of the court.

Prior to taking the dispute to court, the *Ukwangali* Traditional Authority attempted to settle the matter amicably. Meetings were organised with the Owambo herders to find a solution that would be fair and equitable to all, but these attempts failed. Many of the Owambo farmers did not even attend. For this reason the *Ukwangali* Traditional Authority eventually took the matter to court. Many *Vakwangali* had mixed feelings about this: they feared that regardless of whom the ruling favoured, the hatred between the disputing parties would remain.[314]

312 Field note 8.
313 Field note 29.
314 Field note 20.

The High Court in Windhoek recently decided the matter, and spoke in favour of the *Ukwangali* Traditional Authority. In accordance with the judgement, nine *Oshiwambo*-speaking cattle farmers (among them Mr V. H.) who have been using land in the western Kavango Region under the control of the *Ukwangali* Traditional Authority as grazing areas for their cattle were issued with an eviction order and may not again occupy such grazing areas.[315]

It has to be seen how the court order will be executed, and what the word of the court will mean for the future relationship between the *Vakwangali* and the *Aawambo*.[316]

315 See Menges (2008); and *Allgemeine Zeitung*, 12 February 2008. The judgement of the High Court was not available when this study was completed. It was therefore decided to leave further arguments on the interpretation of section 43 to such a time as the reasoning of the court is accessible.

316 The *New Era* of 13 August 2008 reports that a meeting to be attended by *Ondonga* and *Oukwanyama* Traditional Authorities, regional councillors of the Oshikoto and Ohangwena Regions, and cattle farmers was to be held in order to set the process of removing cattle from the Kavango Region in motion.

# Part III:

# Grass

# Grass as a natural resource: A case study of *Uukwambi*

*Ntinda Mbushandje*

## 1. Introduction

Namibia's inherited traditional and cultural values require re-identification in the interest of protecting biodiversity today. Many of the perceptions about and rules affecting Namibia's fragile environment are outdated and no longer serve the interests of an independent country. They need to be revisited and adapted to comply with the new Constitution-based order in Namibia.

Not much is known about the social and legal mechanisms in place in rural communities that protect their environments, that secure the sustainable use of natural resources, or that maintain and protect the available knowledge to support this protection and sustainability. This paper will only be able to address a very limited number of issues in this otherwise under-researched socio-legal field.

The knowledge held by indigenous people and passed on over generations is also referred to as *traditional* or *local knowledge*.[317] Some of this accumulated knowledge has been found to be important in many fields today, including medicine, culture and farming. People all over the world have become aware of the economic and ecological value of this knowledge, and consider it to be increasingly important for human survival. However, such knowledge is mainly held by people in the developing world, who have a weak position in national institutions and economies. Thus, they need the means not only to maintain this knowledge as the valuable tool it is for providing their livelihoods, but also to protect it against exploitation by stronger forces or agents.[318]

Namibia signed the Convention on Biological Diversity (CBD) in 1992 and ratified it in 1997.[319] Under international law, Namibia is now accordingly obliged to ensure that its domestic legislation conforms to the CBD,[320] which principally deals with the vast array of living organisms, including those inhabiting terrestrial, marine, and

317 WIPO (2001a:36).
318 Barnard (1998:292).
319 (Ibid.).
320 Cf. Article 144, Namibian Constitution.

freshwater ecosystems. Customary law, being part of the law of the state, has to be evaluated in terms of whether and to what extent it contributes to the fulfilment of these international obligations.[321]

The conservation of biodiversity and the protection of traditional knowledge are common human concerns. We have a shared and common responsibility towards them because they are of profound importance to the global community. Any programme to conserve biodiversity has to recognise the underlying reasons for the loss of biodiversity and the manner in which these reasons are linked to cultural understanding or knowledge. Indeed, countries need to integrate the conservation of biodiversity and the sustainable use of its components into relevant sectoral and cross-sectoral plans, programmes and policies. Therefore, a national biodiversity strategy is obliged to include all sectors that relate to conserving biodiversity and the sustainable use of biotic resources.

This study, conducted amongst members of the *Uukwambi* community residing at Ogongo in the Omusati Region, focused on their traditional knowledge about grass in their environment. The leading questions were how the community protected grass in particular, and how customary law and other legal measures could be considered to improve the protection of grass.

Article 66 of the Namibian Constitution recognises customary law and puts it on equal footing with common law. Customary law is valid to the extent that it conforms with the provisions of the Constitution and statutory law. This paper attempts to enquire how grass management at the local level is supported by customary law. It will also attempt to provide information on the traditional knowledge about grass, assist in the understanding of this topic, and look at the options available to improve plant protection.

Traditional knowledge of plants is under threat. The global push for the privatisation of biodiversity continues to encourage ownership over these resources. With increasing support from governments, industry is making deeper and deeper inroads into undeveloped areas where biodiversity has been protected, while the mechanisms to protect and strengthen the rights of the communities who live in such areas and are holders of traditional knowledge about them are still weak. Conventional patent law will not work for traditional knowledge holders in this case either: it is difficult to identify an individual inventor due to the collective nature of traditional knowledge, and it often cannot be attributed to a particular geographical location.[322] Moreover, ownership of (varieties of) plants is alien to many social and cultural beliefs, and the

321 Barnard (1998:293).

322 International Chamber of Commerce (2006).

required criteria of novelty and inventive steps are not always possible to determine, particularly in cases where the traditional knowledge has been in existence over a long period.[323] The costs of applying for patents, and pursuing patent infringement cases, are also prohibitive.

## 2. Grass and *Uukwambi* customary law

The *Uukwambi* community has a rich diversity of grass used by people for generations.[324] Today, the majority of *Uukwambi* residents still rely directly on the use of grass found in pans for thatching and for animal consumption. There is an abundance of local expertise on the use of grass. However, the issue of protecting the knowledge and expertise remains critical and its exploitation by some agencies needs to be addressed urgently.

The *Uukwambi* Traditional Authority has come up with laws to protect and regulate, among other things, the use of grass.[325] Clause 14 C of the Laws of *Uukwambi* states the following in this regard:

> *(1) Grass is of high essential value as it is the main source of food to animals and indirectly provides food to human beings. Cutting of grass while not fully-grown, decreases the growth of grass in that area.*
> *(2) The Traditional Authority banned the cutting of immature grass or cutting of grass with the purpose of feeding stock. It is believed that the practice will decrease grass in the grazing area, and anyone doing it is an offence.*

It is evident from the quoted self-stated customary law of *Uukwambi*[326] that the cutting of immature grass is prohibited and regulated. However, there is no protection of the knowledge of the use of grass. There is no provision that deals with the cutting of grass by persons who do not live within the boundaries of *Uukwambi*. The law also does not regulate the sharing of any monetary benefit that can be attained from selling of grass.

The Chief of *Uukwambi*, *Elenga Enene* Iipumbu,[327] when asked about issues of this nature, emphasised that the community did not have laws that regulated the issue of research within the boundaries of *Uukwambi* either. According to Iipumbu, the

323 Ekpere (2000:2).
324 Müller (2007).
325 *Ooveta dhOshilongo shUukwambi* (Laws of *Uukwambi*).
326 Hinz (1995b); Hinz & Kwenani (2006).
327 *Elenga Enene* in *Oshiwambo* refers to the title of the supreme leader of the *Uukwambi* community and means "senior councillor".

community sometimes saw research activities as developmental factors, i.e. they hoped that researchers might intend establishing projects within the area, which would be advantageous to the community in terms of employment creation or capacity-building.[328]

Natural factors that affect the growth of grass are drought, flood and lightning. Drought affects grass if there is poor rain. Insufficient water in the pans causes grass not to grow properly. This also affects the growth of grass in the next season because there will not be enough seeds. Floods affect the growth of grass: when the pans are flooded, the grass cannot grow under water. Lightning may cause fires which burn the grass.

Most of the interviewees[329] shared the view that the fencing of land by rich people was a major problem. During the rainy season, they allowed their animals to graze outside the fenced-off areas; when grass was scarce, they moved their animals to their protected fields where the grass had not been grazed yet. Poor people's animals then had little or nothing to eat. This affected the growth of grass negatively, because as soon as the grass grew during the following rainy season, the animals – who were still struggling to survive – ate it before the grass had a chance to flower and seed.

According to *Elenga Enene* Iipumbu, a person was only allowed to fence a maximum of 10 ha of land within the communal land area.[330] Many traditional authorities[331] considered the fencing of land to be a matter of serious concern. Iipumbu was of the opinion that the illegal fences would be removed in the near future in order to reduce overgrazing.

Furthermore, most of the interviewees stated that veld fires destroyed large areas of grasslands because they spread rapidly. This resulted in the *Uukwambi* Traditional Authority enacting a provision that regulates the making of fires. Clause 14 C (3) of the Laws of *Uukwambi* states the following:

> *Veld fires are very destructive to nature as they can destroy grasses, cattle and forest. Veld fires cause hunger to animals, living creatures and human beings. Anyone found starting a veld fire commits an offence, and an investigation shall be carried out which*

328 Field note 3.

329 Field notes 2, 4 and 6.

330 This is stipulated in the Regulations to the Communal Land Reform Act issued in *Government Notice* No. 37 of 2003, as amended by *Government Notice* No. 120 of 2003. These Regulations repeal Proclamation R188 of 1969.

331 Such as the *Ondonga*, *Oukwanyama*, *Ombalantu*, and *Ongandjera* Traditional Authorities.

> *will determine the penalty for the offence. Anyone burning down someone else's house shall be responsible for the damages caused by the fire. In the case that the person who caused the fire is believed to be mentally ill, medical proof is required.*

Another problem repeatedly faced by the *Uukwambi* Traditional Authority is the cutting of immature grass by members of the community. According to *Elenga Enene* Iipumbu, the cutting of immature grass had increased over the years and had become a serious threat to the growth of grass despite clause 14 C of the Laws of *Uukwambi* that specifically prohibited it. Iipumbu further stated that one of the reasons for the increasing violation of the law was a lack of respect for it by traditional leaders at village level. Village headmen who were supposed to protect the grass were themselves found guilty of cutting it. In addition, considerable apathy prevailed within the community when it came to reporting such cases. The situation had already deteriorated to the extent that grass no longer grew in several pans in the flood plains, because immature grass had been cut there.

The traditional authority decided to regulate the cutting of immature grass because of its natural implications, which hinder the growth of new grass. In other words, if grass is cut before it is dry, the seeds are not yet ripe and have not fallen off. No seeds mean no new grass can develop during the following rainy season.

In addition to the quoted written rule on grass cutting, there is also an unwritten law according to which cattle are not allowed to graze in areas where good thatching grass is found. The intention of this rule is to protect certain varieties of grass that are used by villagers for the roofing of their houses.

Any member of the community can report anyone cutting immature grass to the traditional leader responsible. If the leader at the village level fails to solve the matter, it is referred to the district, which is governed by a senior councillor. If the matter is not solved at that level, it is referred to the *Uukwambi* High Court.[332] Before the matter is referred to this court, however, the senior councillor approaches the chairperson of the High Court, explains the matter to him or her, and requests a date on which the matter will be heard. The chairperson then determines a trial date. The chairperson of the High Court is not a traditional leader in his/her own right, but an administrator who runs the day-to-day activities at the traditional authority's office. When the High Court hears a case, all the decisions made by any previous courts are disregarded: the matter starts afresh and evidence has to be led. The High Court reaches its own decision, which is final.[333]

332 The highest court in the *Uukwambi* Traditional Authority is the court under the supreme leader of *Uukwambi* and commonly referred to as the *Uukwambi High Court*.

333 Final in the sense of customary law, i.e. notwithstanding an appeal to state courts.

The author of this study had the opportunity to observe three cases of immature grass-cutting being referred to the *Uukwambi* High Court.[334] The hearings all took place on 16 June 2004. The first case was about a headman who had failed to report a case of cutting immature grass within his village. Grass is considered to be cut immaturely if it has been cut before the traditional authority has officially declared that people may start cutting grass. The case attracted great attention and the courtroom was packed to capacity.

The court session began with the chairperson's welcome to those attending the hearing. The chairperson then proceeded with the roll call for all six senior traditional councillors of the *Uukwambi* Traditional Authority. He then asked if anyone wished to report a matter to the court, or if any announcement was to be made before the proceedings started. Such announcements would include information about cases to be heard by the High Court. After this, the chairperson officially opened the court session and introduced the number of cases on the agenda roll for that day.

The background of the above-mentioned headman's case was as follows. The cutting of immature grass had been observed, and it was alleged that the accused, the headman of Ombuga yaMunyoko, a village in the Ogongo District, was one of those involved in the transgression. However, the matter had been referred to him for investigation, since he was the headman of the village where the grass in question had been located. The court expected to receive the headman's investigation report on the day of the trial.

The headman reported that he had not found any pan in his area of jurisdiction where immature grass had been cut. He said he had also not been able to identify anybody who had been involved in the cutting of immature grass. He added that, even if immature grass had been cut in his village, he had had nothing to do with it. After submitting this report to the court, the chairperson allowed comments from those present, who were also allowed to question the accused.

The first person to speak explained that the accused could obviously not find anybody else because he himself had been the one who had violated the law. This was denied by the accused.

The next person suggested visiting the house of the accused, where evidence pertaining to the cutting of the grass in question would be found. Replying to this, the accused stated that even if anyone went to his house and found cut immature grass, he had had nothing to do with it.

334 Field note 1.

A senior traditional councillor then submitted that the accused be instructed that laws were to be enforced and that all the necessary steps had to be taken to prevent any action that would cause serious damage to the environment. The senior councillor also expressed the view that the investigation by the accused had not been satisfactory. He said that, after all, it was a fact that grass had been cut in the village where the accused was the headman, and that there were even pans in the village where immature grass had been cut the previous year. In the current year, those pans did not have grass due to the illegal cutting of grass the previous year. In this councillor's view, what the accused had done was irresponsible, and it demonstrated that he had been disloyal to the traditional authority. As a result of his actions, he had to be punished as a headman, that is, since he had refused to report the villagers who had cut the immature grass, he had to take their punishment too.

Someone else in the audience commented that the accused did not deserve to be a headman because he was not honest and had not been prepared to fulfil the responsibilities with which he had been entrusted by the *Uukwambi* Traditional Authority. The fact that he has been headman for more than 16 years should have caused him to know the rules and how to enforce them. Therefore, in this person's opinion, he had to receive severe punishment – both for his own transgression and on behalf of those whom he refused to report.

In support of the same point, a member of the traditional council asked the accused whether, after having heard all the submissions, he had made up his mind to tell the truth and to accept the punishment. The accused answered that he had been telling the truth, and whatever the punishment would be, he would not accept it.

The next person submitted that one should not reach a verdict without proper evidence. He felt that, since the accused had stated that no grass had been cut illegally in his village, the members of the Traditional Council needed to investigate the matter before deciding the case. Thereupon a senior member of the traditional council, who had given evidence in the previous hearing of the case, and some other members of the community were instructed to go with the accused to his house to look for evidence that would support the claims against him. This group found no evidence of the alleged transgression at the house of the accused. In reaction to this finding, *Elenga Enene* Iipumbu intervened and commented that the case needed more serious consideration by all, and postponed the matter to 1 July 2004, pending further investigation. The final decision would be made on that day.

On 1 July 2004, the case was again postponed and a committee was established to investigate whether there had been any immature grass cut by the accused, in pans or elsewhere in the village. This committee was then to report to the court on 6 September 2004.

When the court reconvened on the appointed date in September, the committee reported that they had not found any cut immature grass in the house of the accused, but that there had been three pans where immature grass had been cut. However, they could not determine who was responsible for this, as the members of the village said they did not know who the transgressor(s) had been. Based on the committee's report, the High Court then decided as follows:

> *Since there was no grass found in the house of the accused, the accused cannot be convicted for the cutting of immature grass. He is acquitted.*

However, the accused was convicted of failing to report the suspects who had cut the immature grass in his village. This was regarded as a serious violation of an obligation entrusted to him. He was fined N$100 and warned not to repeat the offence. The accused accepted the decision and paid the fine.

The second grass case heard at the *Uukwambi* High Court in June 2004 was that of three women from the Iipopo yaSheyanale village. The three women were accused of having cut immature grass without permission. However, they had not cut the grass themselves, but had sent their minor children to do it on their behalf during school holidays. All three women admitted to the charge, and submitted that the cut grass had already been used for thatching their houses. In their defence, the accused stated that not only had they been under the impression that it had been the right time to cut the grass, but the school holidays were also the only time that their children were available to work at home. *Elenga Enene* Iipumbu rejected this defence on the grounds that ignorance of the rules was not a valid excuse.

The matter was not disputed further and the accused were obliged to make sure that their children in future only cut grass during permitted periods. They were each sentenced to a N$100 fine. The accused all said that they would pay at the end of the month when they received their pension.[335]

The third grass case heard in June 2004 was one in which the accused had already been sentenced. The chairperson explained that the case had been reopened because the convicted person had requested the court to consider the following facts in mitigation of his sentence. The accused had been convicted of cutting immature grass and fined N$100. Furthermore, he had been ordered to hand over the grass to the traditional authority so that it could be auctioned. The money raised was to be put into the community fund. He had paid the fine, but had refrained from handing

335 The author of this study was informed afterwards that the three convicted women had paid their fines as agreed with the court.

over the grass. His request now was to be allowed to keep the grass. He alleged that, as the grass had already been cut in his yard, and as he had no other opportunity to obtain grass, he wanted to keep it. *Elenga Enene* Iipumbu responded to this matter as follows:

> *Our government recognizes the Traditional Authorities. The laws administered by Traditional Authorities are recognized by the Constitution of this country, for them to be followed and respected. If you have breached the law, you must accept your punishment as it was handed to you. ... As the law is well established, there is nothing that we can take from our head to make decisions. The law has been there and your actions illustrate bad behaviour to all people present here. ... We have to protect our grass and we have laws in place to do just that. Therefore you must bring the grass as it was ordered, and you must know that anger does not solve anything ... .*

Thereafter, *Elenga Enene* Iipumbu officially declared that people had the right to cut grass as from 15 June 2004. He then elaborated on the procedure of how the date for cutting grass was determined. If the rain was good that year, then the only time that grass could be cut was from 1 July. If the rain was poor, grass could be cut as from 1 June. However, these dates had to be officially announced by the traditional authority each year.

In light of the above, it can be concluded that customary law appears to implement the sui generis option to protect biodiversity and traditional knowledge in terms of TRIPS.[336]

Apart from that, it is recommended that Parliament enacts legislation that recognises, protects and rewards knowledge and innovation derived from traditional knowledge systems. In developing such policies and legislation, an effort should be made to integrate the customary laws, values and views of the various communities in Namibia.

To cater for all the different communities in Namibia, state law needs to be flexible, and should allow for the development of customary law. It is a common cause that varieties of plants worth protecting are found within the rural areas where customary law is mostly practised. Indeed, enacting legislation without serious consideration of customary law can render such legislation inadequate.

336 Rosenberg (2004:6). This appears to be one of the purposes of the Access to Biological Resources and Associated Traditional Knowledge Bill.

## 3. Conclusion

The report on the hearings of these three cases illustrates that, apart from the provisions in the self-stated Law of *Uukwambi*, there are customary laws that are not written down. One example is the determination of the exact date on which grass may be cut for the first time in any given year. A further example relevant to the cases dealt with by the *Uukwambi* High Court is that, if anyone is caught with illegally cut grass, the grass will be confiscated and taken to the seat of the traditional authority. The traditional authority sets a date on which the grass will be auctioned, and whoever wants to bid for it (including the culprit) is invited to the auction. According to Iipumbu, the reserve price for the grass is N$5 per portion, which weighs between 15 and 25 kg.

# Overgrazing and grazing rights: A case study of Ovitoto

*Ray-wood Mavetja Rukoro*

> *Every country has three forms of wealth: material, cultural, and biological. The first we understand well because it is the substance of our everyday lives. The essence of the biodiversity problem is that biological wealth is taken much less seriously. This is a major strategic error, one that will be increasingly regretted as time passes.*[337]

## 1. Introduction

Namibia has a highly skewed distribution of land and access to natural resources because of its colonial past and the application of the South African apartheid policy prior to the country's independence in 1990.[338] In Namibia, communal land makes up 43% of the total land surface area. An estimated 120,000 rural households, consisting of predominantly indigenous Namibians, sustains a great number of people. This is so even for Namibians who are urban residents, as they return to communal homelands on a frequent basis for their daily diet, such as *mahangu*[339], *omaere*[340], butter and meat. This demonstrates the importance that communal land plays in the lives of many Namibians. This prompted the government of Namibia to bring communal land into the mainstream by formalising the manner in which communal areas are administered and how resources in such areas are allocated. This was achieved through the enactment of laws that give formal recognition to traditional communities and to those entities granted authority to perform certain actions on their behalf. Thus, *traditional authorities* are entities vested with the authority to administer the affairs of the communities they serve, with the power to make laws[341] pertaining to the various issues within the bounds of such communities.

The Traditional Authorities Act[342] provides for a system whereby such an authority applies to the government for recognition. Once recognised, the traditional authority is formally vested with the power to administer the community's affairs. This means that a traditional authority legitimately deals with the affairs of the members of a

337 Barnard et al. (2000:16).
338 Jones (2002:2).
339 Pearl millet; this is in the form of a dough or porridge and is the traditional staple.
340 Unfermented beer, normally drunk as a refresher.
341 Section 3 (3) (c), Traditional Authorities Act, No. 25 of 2000.
342 No. 25 of 2000.

specific community, which is in furtherance of the democratic principles and in compliance with the policies of the government of the day.

There are, however, communities such as the *Otjiherero*-speaking community of Ovitoto that exist on the margins, outside the mainstream of recognised communities. These unrecognised communities continue to exist in a state of *unregulated dualism*.[343] In other words, they run their affairs as per the prescription of the previous political dispensation, or try to copy the prescriptions of the current government in an attempt to persuade the latter to bring them into the mainstream of administration.

The land issue was one of the pillars of the Namibian people's struggle for independence. The apartheid regime advocated a policy that deprived the majority of the Namibian population of access to land and land tenure. Since this policy was racially motivated, the dominant white population owned the vast part of the most fertile land. As observed by former Prime Minister Hage Geingob:[344]

> *Inequality of access to and ownership of land in Namibia is widely regarded as having contributed to widespread poverty in the country. In 1990, approximately 36,2 million representing 44% of the total land area or 52% of agriculturally utilisable land was held under freehold title by just over 4000 land owners. Under the previous apartheid regime policies, access to this land was reserved for white farmers, so that the freehold farming sector is still dominated by white landowners. By contrast, former reserves referred to today as communal areas […] comprise about 33,4 million hectares, representing 48% of agricultural land. This area supports more than 70% of the Namibian population. This aggregate figure overstates the agriculturally usable land in communal areas, as large tracts of communal land are situated in semi-desert areas, with minimal rainfall that renders the land unusable for agricultural purposes due to absence of exploitable ground water.*

In Ovitoto, which is the geographical focus of this study, the situation is comparable. Ovitoto is governed by a traditional authority, as already stated, does not enjoy recognition. The Ovitoto Traditional Authority grants grazing and land rights in terms of its customary law.

The granting of grazing rights, land occupation rights and land use rights in general has a direct impact on the environment, which increasingly needs protection in order to ensure that future generations benefit from it as well. Community leaders are duty-bound to ensure that resources are used sustainably. The ancillary question to this task is whether they know about this duty, and if so, whether they carry it out.

343 Hinz (2008:61ff).

344 Unpublished speech of former Prime Minister Hage Geingob, Office of the Prime Minister, Windhoek, 2000.

This study operates from the assumption that traditional communities are understood as socially defined societal entities with a distinct sub-statal structure of governance known as *traditional governance*, which follows legitimising strategies that are guided by the respective traditions. Traditional communities have a repertoire of norms – be they legal or merely social – which are applicable to the protection of biodiversity.[345] An examination of the customary laws in place to protect the environment will reveal whether such laws adequately deal with Namibia's obligations in terms of protecting Namibia's biodiversity and resources for generations to come.

Traditional communities have knowledge that can be regarded as a comprehensive code of traditional information maintained and administered by the community in accordance with accepted rules about the societal value of biodiversity and, thus, the need to protect such biodiversity against non-sustainable external and internal exploitation. Traditional knowledge further entails the potential to be transformed into societally efficient norms and normative mechanisms administered by the traditional communities in question in order to have a more sustainable impact on the protection of biodiversity than concurrent norms of the state, administered by agents of the state.[346] Empirical data collected from the field will be analysed to validate or contradict this assumption.

Ovitoto is a traditional community. In this area, the laws on communal land administration and the protection and granting of land use rights, such as the Communal Land Reform Act,[347] are not applied. This paper seeks to answer the following questions:

- What is the impact of this in respect of natural resource management from a customary law point of view, as practised by the community *since time immemorial*?
- What are the demands and requirements of modern legislation aimed at protecting biological diversity?

## 2. Grazing: A common right?

Ovitoto is one of the oldest settlements in Namibia. It has been in existence for more than 80 years, as it was founded in 1924.[348] It is a small settlement surrounded by commercial farms. Its size makes it an interesting place to study for the purposes of the preservation of biological diversity. This is because the number of animals and

345 Hinz (2005).
346 (Ibid.).
347 No. 5 of 2002.
348 Field notes 9, 14, and 19.

human beings has been on the increase since its establishment, but the size of the land has remained the same. The question one is tempted to ask is this: How does the community ensure that the various land uses in the settlement do not lead to land degradation and the consequent loss of biological diversity? Do the communities know how to ensure that the different land uses do not have adverse effects on the land in question? As one of the interviewees observed, –[349]

> *... livestock in the area has increased at least tenfold and the human population is growing steadily. What has not grown is the land – and this poses a threat to our existence as land is not available to cater for all the animals in the area.*

Through a combination of fieldwork and a desk study, this research attempts to provide answers to the problem of land use rights granted by the traditional authority, and the impact of these rights on biological diversity. The methodology used to obtain information was through qualitative interviews; fieldwork in Ovitoto; group discussions; and consultations with community leaders and relevant stakeholders such as Agricultural Extension Officers in the area; and officials of the Ministry of Lands, Resettlement and Rehabilitation, and the Ministry of Agriculture, Water and Forestry. Seventeen interviews were conducted by using a standard questionnaire on a range of issues pertaining to the allocation of grazing rights, including the administration of these allocations, the type of grazing systems (farming) used, and the community's knowledge of biological diversity.

The interviews mentioned above do not include discussions the author held with people that were merely observing or did not want to be interviewed, but nonetheless commented on the topic. However, their contributions provided a wealth of knowledge for the research, and are included in the analyses below. All interviews were conducted in *Otjiherero*, recorded, and then transcribed into English by the author of this study.

The transcribing process proved to be a strenuous task, as it was at times difficult to find corresponding terminology in English to translate the community's views without the risk of distorting them. Nonetheless, an honest and meticulous attempt has been made to let the voices of the community speak throughout the pages of this work. The target group of the research was mainly farmers as they are the ones to whom land use and grazing rights are allocated by their traditional authority. It was noticed that most women and young people shied away from the interviews, as they did not consider themselves as farmers. In most of these instances, women referred to their husbands as the head of the household. Unmarried women refused to speak

349 Field note 2.

at all, some saying that traditionally it was not up to them to speak on the allocation of land use rights and farming methods.

As part of the research on the recognition or non-recognition of the Ovitoto Traditional Authority, the author travelled to Okakarara to speak to the people under the Kambazembi Royal House, which is the recognised authority in the area and under which the people of Ovitoto are expected to fall. However, no link between the Kambazembi Royal House and the Ovitoto community could be established, and none of the meetings in Okakarara was fruitful as the Councillors opted not to respond. They instead and referred the author to *Ombara* Kambazembi,[350] with whom an audience could not be arranged.

As part of the desk study, various pieces of legislation relevant to the protection of biological diversity were examined to ascertain Namibia's obligations in terms of the Convention on Biological Diversity. It has been acknowledged globally that urgent measures need to be taken to conserve species and ecosystems in order to curb the increasing rate of loss of biodiversity.[351] Article 95 (i) of the Namibian Constitution explicitly refers to biological diversity, providing that, in the interests of the welfare of the people, the state is obliged to adopt policies aimed at maintaining ecosystems, ecological processes and biodiversity for the benefit of present and future generations.

Jones[352] analyses the Namibian Government's process of devolution of limited and conditional rights over natural resources to communal area farmers. He states that this exercise was aimed partly at providing communal area residents with rights similar to those held by white freehold farmers, and partly to promote the sustainable use and management of these resources. His paper analyses these reforms from the perspective of their impact on natural resource management, and it considers the implementation problems of these approaches. However, the study by Jones falls short of adequately dealing with the extent to which the residents of communal land have embraced government reforms, and the extent to which this has made them aware of the need for all concerned to protect natural resources.

Through numerous in-depth interviews with traditional leaders, community leaders and government officials, as well as an extensive desk study, Hinz[353] assesses the role that traditional authorities play in administering and managing natural resources.

350 *Ombara* or O*mbara Onene* are the titles for the supreme leader of *Otjiherero*-speaking communities and can be translated as "king".

351 Glazewski et al. (1998).

352 Jones (2002).

353 Hinz (2003b:33ff).

However, the work by Hinz primarily investigates how traditional communities deal with game and the conservation of wildlife as an aspect of biodiversity. Since it does not examine the question of land use in detail, some of these issues still need to be discussed.

Maithufi[354] examines the notion of *land regulation* in South Africa, where rural communities suffer a fate similar to that of their Namibian counterparts due to colonial injustices. He examines the Black Administrations Act,[355] which contains provisions about land administration and two types of land tenure, namely permission to occupy. Maithufi's study further illuminates how traditional authorities control land under customary law. Traditional leaders, in consultation with their councillors, control the use of land and distribute it among the members of their respective communities. Since the situation is similar to the Namibian set-up. It will be useful, for the purposes of this study, to compare the two.

An attempt to evaluate the impact of land use on biodiversity will fail dismally if it does not consider the land tenure systems in the community and their impact, if any, on the environment. Different land tenure systems are found in Namibia. Ovitoto comprises communal land that is held collectively by the inhabitants of the entire community. This community, which derives its livelihood from the communal area, has diverse rules on how land is allocated, managed and used. These rules are implemented by the Ovitoto Traditional Authority.

In order to determine what the different land uses in the area were, the interviewees were asked about the importance and nature of the livestock they farmed. Some of the responses were as follows:[356]

> ***[Respondent 1]*** *Livestock is important to us. It is our means of subsistence. You can earn an income from it to take your children to school and just about pay for anything that you need at home. As it is there, you get meat, milk, and butter from it. You need to eat and you need to rest, and that is what the cattle provide. I am not employed elsewhere, so that is my income. I have never worked for anyone else and I am not planning to so. I am a livestock farmer and it will perhaps bring me good fortune or not, but one thing is for sure: it will provide for my burial. Apart from cattle, I farm goats and sheep. Goats provide your daily meal and you can slaughter them for your visitors, which you would not do with your cattle.*

> ***[Respondent 2]*** *In our community, our livestock is the supreme means of subsistence. We survive on our sheep, goats and cattle.*

354 Maithufi (2002:58).
355 No. 38 of 1927.
356 Field notes 16, 5 and 17, respectively.

> ***[Respondent 3]*** *I have not been as fortunate as other people, who have had the opportunity to go to school. I was born here and grew up here, and now I am getting old here. My means of subsistence is cattle breeding. With it I am able to pay for my children's school fees and it provides for all my needs.*

From the above, it is clear that the main economic activity in the Ovitoto settlement is livestock production. Most people in the area are poor, and animal husbandry provides the only means of income generation.[357] Senior Traditional Leader Amon Muharukua echoes the sentiments of many in the area when he was asked about the importance of keeping livestock:[358]

> *The importance of cattle traditionally is a means of subsistence in the area, and without it you are not able to make a living. It is the principal means of income for most of us. We cater for all our needs through livestock farming, either financially or otherwise. Traditionally, it was a means of transport and of providing food. Apart from cattle, they also keep small livestock such as goats and sheep.*

Cattle give *Ovaherero* status in their community. The more cattle one owns, the more respect one enjoys within the community. From this it also becomes clear why grazing is the most important land use in the area. Grazing means that the land has to provide food for one's animals. Land available for grazing is very limited, the demand for it is high, and the forest or grazing land is under extreme pressure. Moreover, there has been an increase in the number of people and livestock in the area. It was noted that exceeding the carrying capacity of the land by overstocking leads to overgrazing. The degrading effects of overstocking include accelerated soil erosion and a net reduction in the land's carrying capacity. Is the present system of grazing laissez-faire? Are grazing control mechanisms enforced?

Another research question asked was whether the community realised the importance of grazing and its consequences if no protective mechanisms were in place to prevent damage to the environment and its biological diversity. Most respondents believed that protective mechanisms were important because the land had begun showing signs of exhaustion as a result of overgrazing. Some areas used for grazing had turned into semi-deserts as they were no longer useful for grazing purposes.[359] These were, as the respondents stated, the results of uncontrolled farming methods and farmers' careless attitudes. It was also believed that new mechanisms should be set in motion to curb the rate at which the animals were depleting the vegetation.[360]

---

357 SWAA (1979); further confirmed by interviews with the local people.
358 Field note 9.
359 Field note 15.
360 (Ibid.).

Interviewees were also asked whether fencing off areas in the community had become a problem, and how fencing would affect grazing. The response was that fencing was, indeed, a problem, as many people had fenced off large areas for their own exclusive use. This posed a challenge for those that could not afford to fence off land, either due to the cost of such an exercise, a lack of manpower, or the unavailability of suitable land available to embark on such an activity.[361]

When respondents were asked whether customary law guarded against fencing off land, i.e. depriving others of enjoying the benefits of the vegetation, especially in view of the size of the land, they simply said that the authority of the traditional councillors had been compromised because even some of the leaders had been fencing off areas for themselves. Unfortunately, fencing was commonly accepted by those who could afford it, since they argued that they were only protecting their interests.[362]

It is certainly the task of even unrecognised traditional authorities to regulate fencing, because it would cause strife in the community. As it is, the authority tries to settle any disputes about fencing amicably. Such disputes usually entail farmers having fenced off large tracts of land, depriving others of their right to grazing. Although this issue had been discussed extensively, no solution had yet been found. Indeed, most farmers regarded themselves as entitled to the benefit of grazing their stock on communal land.[363] Nonetheless, the Ovitoto Traditional Authority, because it had not been officially recognised, was unable to prohibit people from fencing off land. The following two-pronged approach was offered to solve the problem of ensuring equal access to grazing:[364]

> ***[Respondent 1]*** *[T]he authority came up with a solution of allowing the fencing[,] provided that it does not exceed a given size. ... [T]he initial motivation was not to have a secure grazing for exclusive use, but to use it for purposes such as keeping animals that are suffering from disease while they are being nursed; to keep the bull [enclosed] during the mating season, and to protect heavily expectant cows until delivery to minimise the possible risk of still birth and calves being killed by wild animals.*

> ***[Respondent 2]*** *[T]he traditional authority calls upon farmers to share the fenced-off area with those who are not able to fence due to the unavailability of land necessitated by a lack of resources. This can be done free of charge or at a nominal fee. It is left to the farmer who has fenced off the area to decide. The above discussion contributes to the conservation of biological diversity as people benefit from animals, and grazing*

361 Field note 6.
362 Field note 6.
363 (Ibid.).
364 Field notes 15 and 8, respectively.

> *has a direct impact on the recovery of plant species in the area that is suitable for feeding animals.*

The above creates a food chain in that the behaviour of farmers and the manner in which they deal with fencing directly affects biological diversity – and their own food production. As commented by a farmer from Zimbabwe, conservation to a farmer means –[365]

> *... wise management of natural resources for economic use. It does not mean an absence of use at all costs. Neither does it mean a complete depletion of the natural resource ... [I]t would not be economically beneficial as most in the southern hemisphere carve their living from these natural resources.*

As a means of persuading people to practise some system of rotational grazing, the government offered to cover half the cost of renting grazing from commercial farms.[366] This practice has been successful because a number of people took advantage of the offer. Others moved their cattle to other communal areas where they set up cattle posts. They only moved back once the grazing in their areas of origin had recovered.[367] Another government initiative encouraged farmers to sell their cattle, in that government offered a top-up fee of N$200 per head of cattle sold. The farmers responded overwhelmingly, but government soon realised it could not keep its side of the bargain because the claims began to run into millions of Namibia Dollars. This was beyond government's projection so it put a halt to the exercise.[368] Some who had sold their cattle did not receive the promised top-up fee, while others stopped selling once they realised the government was unable to make good on its promise. The problem remained unsolved, therefore. In this regard, Chief Kapuuo of Ovitoto[369] argued as follows:

> *This is everyone's land. Thus, it makes it difficult to seriously regulate grazing. You will agree with the community today to use one side of the land for grazing so as to give the other sides time to recover. But after a few, weeks people start complaining that the allocated site does not have enough food for grazing. Thus, they revert to the old ways of grazing.*[370]

Ovitoto is a rocky, mountainous area and, as a result, is not suitable for crop production. None of the farmers in the area venture into crop production as a means

365 Glazewski et al. (1998:291).
366 Field notes 1 and 15.
367 Field note 15.
368 Field note 8.
369 Chief Kapuuo is the unrecognised traditional leader of Ovitoto.
370 Field note 1.

of generating income or as a source of sustenance.[371] Indeed, crop production would be a costly exercise. The lack of water is another deterrent to potential crop farmers. The only gardens found in the area are small pieces of land next to people's houses where they plant tomatoes and onions. Therefore, people continue to depend heavily on livestock and grazing.

Communal land vests in the state for the benefit of the traditional communities inhabiting a communal land area. This is affirmed in section 17 of the Communal Land Reform Act, which provides as follows:

> *Subject to the provisions of this Act, all communal land areas vest in the state in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, especially the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.*

The primary power to allocate land lies with the Chief and the traditional authority. This is ancillary to their powers as the main administrators of all community affairs. The Ovitoto community is no exception. The right to move into Ovitoto as well as all farming rights have to be obtained from the traditional authority. Anyone who intends to acquire land use rights on communal land is expected to request permission from the traditional councillor of the area. In turn, the councillor is expected to table the request at a traditional authority meeting, where such request will either be refused or granted. If the latter, the applicant would be allocated a piece of land.[372]

In this respect the traditional authority considers different types of settlements or land use rights. These include –[373]

- permanent settlement;
- temporary settlement; or
- the fencing of a portion of land for exclusive use.

For permanent settlement, a person has to apply in writing to the traditional authority through the traditional councillor of the respective area. The applicant is expected to state his/her intentions to the traditional councillor, namely why he/she intends to

371 Field note 15.
372 Field note 21.
373 Field notes 7 and 16.

reside in the area concerned. The following factors will then be considered by the traditional authority:[374]

- Where the applicant comes from, and why he/she wishes to reside in the area;
- The number of the applicant's livestock;
- The purpose for which the land applied for will be used; and
- The applicant's preferred area of residence.

The first requirement is motivated by the fact that Ovitoto is small and the traditional authority cannot simply allocate land use rights to anyone who has the desire to reside in the area.[375] Each year, the traditional authority receives about ten applications for grazing rights. Not all of these applicants are successful, in particular those who had to leave commercial farms for various reasons. Applicants coming from more spacious settlements are generally not considered.[376]

Temporary settlement is given to people not wanting to reside in the area permanently. The right to settle temporarily is granted to people who reside in a nearby town, such as Okahandja, and who would like to keep some livestock.

The third type of right granted by the Ovitoto Traditional Authority is the applicant's right to fence off an area for his/her exclusive use. Areas that are allowed to be fenced off are usually small, and the fencing needs to be done in consultation with the rest of the community members in the area.[377] The traditional authority will not allocate land use or grazing rights to anyone who owns too many cattle, because such a person obviously has sufficient wealth to buy a farm or look elsewhere for grazing.

As regards the forums or adjudication procedures that exists in Ovitoto, and the way they operate to settle disputes, one of the respondents had the following to say:[378]

> *Once a conflict arises between you and your neighbour, the aggrieved person can approach the traditional councillor in the area and launch his complaint against the accused person. The councillor will then try to talk to the accused person to stop the alleged action. If we don't come to an agreement, we call a meeting in the community, called an* ombiri. *The people residing in the village attend the* ombiri *and are free to ask the two people questions with a view to providing advice that may lead to an*

374 (Ibid.).
375 Field note 5.
376 Field note 1.
377 Field note 1.
378 Field note 16.

> *amicable solution. If the* ombiri *does not succeed in solving the grievance, then it is forwarded to the authority, where all the traditional councillors in the area meet and discuss the issue.*

The *ombiri* is an adjudication process at community level. The traditional councillor is the presiding officer whose role it is to facilitate the *ombiri*. The elders from the village assist in the adjudication process, and look into the matter to suggest possible solutions. If a solution is not found the matter is forwarded to the traditional authority.[379]

With respect to whether any disputes existed concerning grazing and land use rights in the area, the respondents stated the following:[380]

> *We have such disputes, but [they occur] rarely, especially as regards grazing.*[381]

If the *ombiri* is not able to resolve the dispute, it is transferred to the *otjombanguriro tjo tjirata tjo mbazu*, that is, the Chief's court. At this level, the Chief and the traditional councillors assemble to hear the case. The parties are expected to present their case to the traditional authority themselves. Sometimes an elderly person who is not necessarily part of the traditional council is given an opportunity to ask questions on points that need to be clarified. The *otjombanguriro* has to solve the dispute amicably by pronouncing itself on the matter and giving a solution acceptable to the community.[382] Whenever a traditional councillor considers a matter to be of a serious nature, it can be taken directly to the *otjombanguriro*.[383]

The following case illustrates how the *otjombanguriro* operates. A young man approached the traditional authority to be allowed to settle in an area with an uncle who was also a resident of the settlement. Permission was required because the young man came from another village. He expressed his intention to help take care of the family homestead, as his elderly uncle was no longer able to do so. After a while, the young man and his uncle disagreed on matters concerning grazing and the young man moved to another area. He complained that the area given to him by his uncle was unsuitable for grazing, and that his animals were unable to find sufficient grazing. He moved to another area where a borehole had been erected by the community for times of drought or when there had been insufficient rain to support their livestock. This angered the community, and they took their case to the *ombiri*. When the young

379 Field note 17.
380 (Ibid.).
381 Field note 1.
382 Field note 3.
383 Field note 5.

man was requested to move back to his uncle's land, he refused. Thus, the case was transferred to the *otjombanguriro tjo tjirata tjo mbazu*. The latter found that the young man had violated the rules of the community. The issue that had actually prompted the community to approach the *otjombanguriro* was that the young man wanted to settle in the specific area permanently. Accordingly, the *otjombanguriro* ruled that the man had to move back to the main village. He refused and proceeded to the Communal Land Board in Otjiwarongo, where he launched a complaint against the traditional authority. The Board investigated the matter and he was ordered to comply with the findings of the *otjombanguriro* – which he finally did.[384]

## 3. Conclusion

The aim of this research was to investigate, in particular, the mechanisms that guarantee the sustainability of local indigenous knowledge, including concepts of customary law that have specific bearing on land use and natural resources management. The findings showed that customary law adequately provides for the protection of natural resources. If one compares conventional legal instruments (national legislation or international legal instruments), it also seems that customary law is more closely aligned to the peculiarities of the traditional community it serves. Costmary law has the capacity to accommodate what is special to such communities: it is grounded in tradition, bound in a societal collective network, and thus differs from the individualised and market-oriented legislation that is not necessarily in touch with the needs of traditional communities. The communities are not affected by such legislation as they live in accordance with their own traditional prescriptions. Nevertheless, the living law of the people assists in protecting nature's resources for the benefit of all concerned.

Namibia's biodiversity is extraordinarily distinct and endangered. It is urgent, therefore, that steps are taken to document, describe, interpret, and protect this exceptional biota. This is the task not only of the natural scientist, but also of the social scientist. Biologists and lawyers, for example, should employ a suite of methodological and analytical tools to investigate the loss of biological diversity from different angles. While the Namibian Government's sterling efforts to ensure compliance with the Convention on Biological Diversity are acknowledged, it is nonetheless important to add that rural communities need to become part of this mammoth and noble task. This can only be achieved when communities are made aware of the importance of the environment and its resources. Even though survival is the paramount goal, people need to realise that resources serve this purpose exactly, for present and future generations. Therefore, Namibia still needs to strengthen its approach to biological diversity in rural communities in particular. Such communities

384 Field note 1.

need to be made aware that they have a role to play in protecting biodiversity. The installation of a sense of collective ownership could be one appropriate mechanism by means of which this objective can be achieved. Furthermore, the government needs to come up with a policy on land degradation. The problem in Ovitoto is that the community is oblivious of the needs of the environment, especially for livestock. The allocation of rights in respect of land use and grazing should be monitored by knowledgeable persons in order to ensure that traditional authorities do not ignore the needs of the environment or allocate rights to such an extent that they lead to environmental degradation. Communities need clear guidelines on the allocation of land use and grazing rights. In the absence of adequate control of by the Communal Land Board, there is a need for communities to keep a record of such allocations as a reference as to who was granted what kind of right. In this way, a balance can be struck between the carrying capacity of the land and the way it is used.

Traditional communities should develop customary law, as per the prescriptions of the Traditional Authorities Act. This is a community's most useful tool when it comes to protecting biodiversity. Customary law should take full cognisance of the need to preserve our environment for current and future generations. Traditional knowledge, as embodied in the usages, rules and practices of communities, can guide this reform process as well as the fight for the preservation of biodiversity. A balance needs to be struck between economic interests and those pertaining to the sustainable use of resources. Thus, there is a need to deal with the issue of fencing off communal land. In this respect, the traditional authorities need to devise measures to avoid conflicts of interest between their laws and the interests of individuals under their jurisdiction.

*Jeura ndjima iri jeura* is a saying in the author's home language, *Otjiherero*. Translated, it means one needs to help those who try to help themselves. Assistance like this from all stakeholders can only be expected if the community members first make a concerted effort to help themselves, before they look to others.

# Farming in a politically divided community: A case study of Berseba

*Philanda Blockstein*

## 1. Introduction

This study deals with farming and grazing rights in the Berseba communal area, one of the largest in Namibia's Karas Region. In many rural areas like Berseba, people are concerned about the administrative structures with respect to the allocation and management of land. What people want is certainty about access to land and the ways in which land is administered. In some areas, traditional authorities administer land with varying degrees of efficiency and legitimacy, and many believe that communal areas receive second-class treatment in this regard.

Two groups of people exist side-by-side in Berseba, each executing and claiming traditional power over their subjects: one group is led by Chief Isaaks, and the other by Chief Goliath. Both groups belong to same ethnic community: the Nama of Beersheba or the *Hai-/khauan*.[385] Traditionally, the Nama were nomadic. Today, they primarily live in their identified areas, although many still move within these areas with their herds in search of good grazing. These people are referred to as *rondtrekkers*.[386]

To date, the Bersebaners have not enjoyed recognition under the Traditional Authorities Act.[387] The issue of non-recognition is of serious concern to the people since they are accustomed to electing their traditional leaders.[388] Only recognised traditional communities are entitled to be represented on Communal Land Boards in terms of the Communal Land Reform Act.[389]

385 The Nama name for the original inhabitants of Berseba.

386 From Afrikaans, literally meaning people who constantly move from one place to another.

387 No. 25 of 2000. Originally, the Bersebaners were recognised under Chief Johannes Isaak (cf. *Government Notice* No. 65 of 1998. This recognition was later cancelled (cf. *Government Notice* No. 98 of 1998) because two groups claimed leadership of the Bersebaners. Cf. here also Patemann (2002:49).

388 Field note 11.

389 No. 5 of 2002.

Many attempts have been made to solve the leadership problem in Berseba. A very promising resolution was the result of a meeting between the conflicting parties in 2001, assisted by stakeholders from outside.[390] This meeting had resolved that the Berseba leaders would present themselves to the community as one solid leadership; that the destiny of the entire community would henceforth be jointly vested in them; and that all the leaders would work towards a consolidated traditional structure.[391] However, the Berseba clan strife remains unresolved.[392]

Article 66 (1) of the Namibian Constitution stipulates that both the common law and customary law are to remain valid to the extent that they do not conflict with the Constitution or statutes. Therefore, customary law plays an important role when it comes to the successful conservation of biodiversity: rural communities are obliged to use the natural resources at their disposal in a sustainable way. However, what role does customary law play in the administration and management of natural resources in the Berseba community?

In addition to seeking answers to this question, this case study will address how the division of leadership affects the sustainable use of land in Berseba. One of the major problems faced in this context by the Communal Land Board is that the unrecognised traditional leaders discourage members of the community to register their land rights as required by the Communal Land Reform Act.[393]

The research paper focused around the following principal assumptions:[394]

- Traditional communities possess a repertoire of norms that are geared towards the protection of biodiversity;
- Traditional communities possess knowledge about the societal value of biodiversity and the need to protect biodiversity against unsustainable external and internal exploitation;
- Traditional knowledge entails the potential to be transformed into norms; and

390 (Ibid.).

391 Resolution of the |*Hai* |*Khaua* Traditional Leaders at Keetmanshoop, 12 September 2001.

392 *The Namibian*, 20 July 2005: *An initiative launched by Karas Governor Dawid Boois to resolve the Traditional Leadership tussle at Berseba has sparked frustration among some community members ... During a community meeting convened by Boois last week, a three-year rotation system of Traditional Leaders from the two clans was proposed ... Another meeting is scheduled for August 8 to discuss the proposal further. However, a source within the Isaak clan charged that Boois was not the right person to mediate, as he was part of the Goliath clan. He alleged Boois could not be impartial*.

393 Cf. Republic of Namibia (2003).

394 Hinz (2004b).

- Normative mechanisms administered by traditional communities have a greater impact in respect of sustainability and the protection of biodiversity than the concurrent norms of the state, administered by agents of the state.

The study, which is based on field research, will examine the right to allocate land for farming and grazing, the position relating to conflict resolution, and the impact conflict resolution has on the preservation of the environment and the protection of biodiversity. The field work was conducted in the Berseba communal area during May and July 2005. Qualitative interviews, group discussions, and consultations with local stakeholders were used to obtain information. The research mainly targeted communal and commercial farmers, members of the Communal Land Board and Water Point Committee, and traditional authorities. Interviews were held in Nama, Afrikaans or English, depending on the respondent's preference. The questionnaires consisted of a set of questions anticipating the obstacles, solutions, precedents and expectations relating to farming and grazing rights. All interviews were recorded.

The interviewees were persons who accepted the invitation by traditional leaders to participate in the study. The number of participants varied from one individual to ten. Young people and women were rather reluctant to cooperate with the author.

The interviews with the two Chiefs were loaded with tension, since both had much to say about the other. People were also reluctant to answer questions about the split of the traditional leadership in Berseba.

The discussion with mostly male communal and commercial farmers took the form of a meeting, which was organised by members of the Berseba Village Council. Most of the farmers were particularly concerned about the lack of recognition of a traditional authority in Berseba, which had led to remedies under the Communal Land Reform Act and the Traditional Authorities Act not being available to them.

## 2. Remedies against overgrazing

In accordance with Article 95 (1) of the Constitution, Namibia's land policy is obliged, at all times, to promote the environmentally sustainable use of land. In Berseba, two types of land use rights were identified: permanent and temporary settlement. In this respect, the interviewees were asked about how land use rights could be acquired in the Berseba area. They responded that applicants were expected to approach the traditional councillor in whose area they intended to reside, and to request permission to settle in a specified area either temporarily or permanently. The respective councillor would, in turn, table the application to the traditional authority, which then decided on whether or not to allocate land to the applicant.

In deciding an application the following factors are considered:

- The origin of the applicant and his/her reason for wanting to reside in the area;
- The number of livestock to be brought into the area; and
- The applicant's preferred area of residence.

Most of the people currently living in Berseba have the right to permanent settlement because their ancestors have always lived there.[395] The right to temporary settlement is granted to people who do not intend to reside in the area permanently, e.g. people who work in Keetmanshoop who have a temporary need for farmland for their stock. This type of arrangement is made with an applicant for a period of up to five years.[396]

The traditional authority receives a number of applications for grazing rights each year. Not all applications are successful. Most applications are submitted by people that have been retrenched from commercial farms in the surrounding area. A few are received from people who want to start farming after retirement.

Section 17 of the Communal Land Reform Act states the following in this regard:

> *Subject to the provisions of this Act, all communal land areas vest in the state in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, especially the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.*

The primary power to allocate land lies with the Chief and the traditional authority. This is ancillary to their powers as the main administrators of all community affairs. According to Chief Isaaks,[397] all the residents of the Berseba area have grazing and farming rights. Disputes among them only arise where some have much larger numbers of stock than others.[398]

In order to assess the mechanisms for the allocation of grazing rights, questions were asked about the authority to allocate rights; what factors were considered for such allocations; and what procedures related to the allocation of such rights.

395 Field note 11.
396 (Ibid.).
397 Field notes 6 and 7.
398 Field note 3.

If a person has a large number of livestock, he/she may more readily qualify for a resettlement farm than for communal land use rights under customary law. Therefore, the deciding traditional authority would consider the number of livestock an applicant had and would determine the allocation of land rights accordingly.[399] However, where an applicant's ancestors had lived in an area and he/she wanted to farm on communal land despite having a large number of livestock, the traditional authority might consider the application positively, provided the risk of overgrazing was limited and sufficient water was available.

As to whether there are any measures in place for the protection of grazing land, the interviewees responded that the number of livestock any one person was permitted to keep could be limited to 200 head of large and 800 head of small stock. Another rule reported on was that grazing had to rotate to different areas from time to time. Community members were also not allowed to hire out land for grazing to somebody else. Failure to comply with these rules could result in the termination of grazing rights at any time.[400]

The size of land allocated to a farmer depended on where the land was situated and what it would be used for.

In Berseba, both traditional authorities, namely the traditional authority of Chief Isaaks and of Chief Goliath, assist in settling disputes. Where a case involved members of the two groups, the leaders dealt with the case together. However, the split between the two groups in this area makes it extremely difficult for the community as a whole to cooperate with one overarching traditional authority. Cooperation has been possible up to mid-level, which consists of the traditional hierarchy, as this level is not really concerned with the political rivalry at the uppermost level, namely between the two Chiefs.

In order to assess the mechanisms available to settle disputes over the allocation of grazing rights, a number of questions were addressed to various groups of persons. The intention was to investigate the types of disputes; the forum to settle them; the role of traditional leaders in the process of dispute settlement; and the involvement of commercial farmers in the process of dispute settlement.

The types of discord that arises mainly involves disputes over grazing and farming rights, the supply of water, and stock theft. The adjudicating authorities are the

399 Field note 4.

400 This is also in accordance with the provisions of section 29 (2) of the Communal Land Reform Act.

traditional councillors and the Chiefs. The traditional authority is responsible for administering hearings, which community members are allowed to attend.[401] When asked to illustrate the dispute settlement procedure, Chief Isaaks[402] presented the following explanation:

> *A meeting is called between the traditional leaders and members of the community involved in the dispute. An investigation is carried out to find out who the guilty party is. If the traditional authorities' council cannot reach a settlement, the Chief and the other authorities are present to deal with the conflict.*

In illustrating the role that traditional authorities play in dispute settlement, reference was made to a case that occurred towards the end of 2004:[403]

> *The dispute was that some people thought they were the sole and authentic people in a certain area, and they didn't want other people; these they regarded as intruders. This problem arose because of grazing. The grazing area of the other people was completely depleted. Therefore, they moved away into an area where, firstly, the Water Point Committee complained that newcomers had ignored its authority. Secondly, the people who lived on the land that was of interest to the newcomers did not accept them. However, the newcomers believed that, because the land was communal, they had the right to make use of the available grazing capacity. This was a very difficult case to resolve. We, as the traditional leaders, had to explain the law about the land and the rights people have on it ... The conclusion reached by the traditional authority was that a temporary arrangement could be made as long as grazing and water resources were available. It was clear that we could not accommodate everybody: we had to consider the grazing capacity and the availability of water. This resulted in the decision that some people were allowed to settle, while others had to move to another area. Communal land belongs to all of us, but some farmers have been living here for a very long time and regard the area as theirs. It is, therefore, not possible for all of us to graze wherever we want to, since there is scarcity in the supply of water and land for grazing.*

If the traditional leaders find that the case is beyond their jurisdiction, the matter is referred to the police.[404] Cases of dispute between communal and commercial farmers are subject to the same rules.

401 Field note 4.
402 Field note 1.
403 Field notes 1 and 4.
404 (Ibid.).

## 3. Conclusion

The non-recognition of the traditional authority of Berseba is the most prominent source of difficulties in the administration of community affairs, including the administration and management of land. Apart from the problems caused for the members of the Berseba community itself, the unavailability of a consolidated traditional structure prevents government agencies from instituting proper consultations with traditional authorities and the community when it comes to the implementation of government policies.

While governments take the lead in protecting biodiversity as a national objective, other sectors of society also need to be involved. Local communities can play a major role, since they are the custodians of the ecosystems in which they live.

**Oshiwambo-speaking Traditional Authorities (Oshakati, October 2007)**

**Standing** (from left to right): Prof. M.O. Hinz (editor); Mr J. Halweendo (Advisor, *Oukwanyama* Traditional Authority); Mr A. Amunyela (Senior Traditional Councillor, *Uukolonkadhi* Traditional Authority); *Elenga Enene* H. Iipumbu (*Uukwambi* Traditional Authority); Chief O. Mukulu (*Ombalantu* Traditional Authority); *Omukwaniilwa* J.S. Taapopi (*Uukwaluudhi* Traditional Authority); Mr V. Kamanya (Senior Traditional Councillor, *Ondonga* Traditional Authority); Ms E. Namwoonde (BIOTA Project Assistant); Ms S. Hinayele (Secretary, *Ombadya* Traditional Authority); Ms A. Shilimela (Secretary, *Ombalantu* Traditional Authority); Ms M. Angungu (Secretary, *Uukwambi* Traditional Authority); Ms M. Iileka (*Ongandjera* Traditional Authority); Mr E. Nakale (Senior Traditional Councillor, *Oukwanyama* Traditional Authority); Mr A. Ndakulamo (Senior Traditional Councillor, *Ongandjera* Traditional Authority); Dr O.C. Ruppel (editor)**Seated** (from left to right): Mr G.P.S. Hikumwah (Traditional Councillor, *Oukwanyama* Traditional Authority); Chief K.M. Walaula (*Ombadya* Traditional Authority)

**Kavango Traditional Authorities (Rundu, February 2008)**

**Front** (from left to right): *Hompa* A.M. Ribebe (Sambyu Traditional Authority); Mr N.A. Mutuku (Secretary, *Ukwangali* Traditional Authority)

**Back** (from left to right): Mr E. Sikerete (Foreman, Sambyu Traditional Authority); Mr F. Shikerete (Senior Traditional Councillor, Gciriku Traditional Authority); Mr R. Ngondo (Senior Traditional Councillor, *Ukwangali* Traditional Authority); Mr H. Kalipa (Senior Traditional Councillor, *Mbunza* Traditional Authority); Ms E. Namwoonde (BIOTA Project Assistant); Mr C. Mapaure (Customary Law Project Assistant and contributor); Prof. M.O. Hinz and Dr O.C. Ruppel (editors)

*Hompa* A Kaundu (*Mbunza* Traditional Authority), who is not on this picture, was also present at the above meeting.

**Caprivi Traditional Authorities (Katima Mulilo, February 2008)**

**Front** (from left to right): Prof. M.O. Hinz (editor); Chief B.L. Shufu (*Mayeyi* Traditional Authority); Chief M.K. Liswani III (*Masubiya* Traditional Authority); Chief J.T.K. Mayuni (*Mashi* Traditional Authority); Dr OC Ruppel (editor)

**Back** (from left to right): The respective Senior Traditional Councillors

A homestead on communal land in Berseba, southern Namibia

**BIOTA/UNAM Workshop (Windhoek, March 2007)**

From left to right: *Elenga Enene* H. Iipumbu (*Uukwambi* Traditional Authority); Ms A. Kaundu (contributor); Chief B. Sekonyela (Lecturer, National University of Lesotho); Dr O.C. Ruppel (editor); B. Kohrs (BIOTA Africa, Namibia Country Coordinator); the late Ms Nanzala Siyambango†; Prof. M.O. Hinz (editor)

# Part IV:

# Medicinal plants

# Medicinal plants: A case study of *Uukwambi*

*Victory H. Gabriel*

## 1. Introduction

The protection of biological diversity has gained considerable attention at national and international level. This case study researches the protection of herbs as a biological resource around Ogongo in the *Uukwambi* Traditional Authority.

The devil's claw[405] is one of the examples of plants to be examined in this study. Local people used it for various human and animal ailments. Although this plant once grew in large quantities in the *Uukwambi* area, today its occurrence has reduced drastically due to unsustainable harvesting methods. The study investigates whether this came about because of a lack of control, i.e. lack of legal measures at traditional authority or state level that could be employed to prevent the overexploitation of the plant.

The objective of the interviews conducted in the field was to reflect what the *Uukwambi* Traditional Authority has done to protect and conserve plants in general and herbs in particular as essential biological resources within its area of jurisdiction. A number of individual and group interviews were conducted. The interviews were gender-balanced, and different age groups were represented. Despite the fact that the interviewer introduced himself and explained the purpose of the interview, it became clear during many interviews that people were cautious about responding to certain questions. The Headman of Ogongo told the author that one female participant of a group interview was a traditional healer. However, when the author enquired about her profession, she herself said that she was not a traditional healer, although she had knowledge about the properties of some herbs.[406] In the same group as this woman were two males with a formal educational background. They were open-minded and even explained to the others what the importance of research at local community level was. But they questioned why this particular research had come so late: they felt it should have been done immediately after independence in order to provide input to the early attempts at law reform.[407]

405 *Harpagophytum procumbens* (*ekakata* in *Oshiwambo*).

406 Apart from devil's claw, the herbs mentioned were *Stapelia kwebensis* (*ekato* in *Oshiwambo*) and *Aloe zebrina* (*endombo* in *Oshiwambo*).

407 Field note 2.

The expectation of the author of this study was to interview five or six traditional healers. Unfortunately, some people were reluctant to reveal their status as healers. Nonetheless, it became clear that elders within the *Uukwambi* Traditional Authority had knowledge of herbs that they used to treat human and animal diseases, including health problems that were grounded in certain traditional beliefs.

## 2. Healing with herbs: Relic of the past?

The questions about plants with medical properties principally concerned the following: the poison pod albizia[408], the devil's claw, the sjambok bush[409], the carpet flower or Karoo violet,[410] and the carrion flower – also known as the starfish flower[411]. These plants were selected on the basis of their use and scarcity, as well as for the unique traditional knowledge associated with them. Some of them, like the carpet flower, have almost disappeared, while others are in the process of depletion.

Some of the questions posed in this study related to the causes of the depletion of these plants:

- Is the depletion being caused by unsustainable harvesting methods?
- Is it a lack of administration and control?

In order to sketch a background to the study, a brief indication of their medical properties will be given, as follows:

*Sjambok bush* is found in the bushy environments of northern Namibia.[412] According to some of the interviewees, it is even today still being used to treat heartburn.[413] However, for it to work effectively, it has to be prepared traditionally by a person who knows how to use it. This type of preparation means that a piece of the plant is rolled on cattle hide. After this, the particles produced are scratched into a cup of water and applied to the patient. The patient has to vomit and release whatever has been given to him/her through evil spirits which are believed to roam around at night or witchcraft in general. Even though the plant is becoming scarce in Namibia, it is

408 *Albizia versicolor* (*omusheshe* in *Oshiwambo*).
409 *Kleinia longiflora* (*etanguthi* in *Oshiwambo*).
410 *Aptosimum procumbens* (*omulimbalimba* in *Oshiwambo*).
411 *Stapelia kwebensis* (*eekato* in *Oshiwambo*).
412 Rodin (1985:156).
413 Field notes 7 and 4. Heartburn or pyrosis (*oshindja* in *Oshiwambo*). This is a painful or burning sensation in the oesophagus, just below the breastbone, caused by the regurgitation of gastric acid.

still available in the *Ovambadja* area in neighbouring Angola. The plant is sold at open markets, e.g. the one at Oshakati.

*Poison pod albizia*, also known as *broad-leaved albizia*, can grow into a big tree. In the past it was abundantly available around Ongwediva. There is even a village in the area named after it, namely the Omusheshe village.[414] The plant bears fruits that look like beans. The beans and the leaves are unsuitable as cattle fodder.[415] For medical purposes, the bark is pounded with a little water to produce a strong, dark liquid. This liquid is used to treat gonorrhoea. According to one of the interviewees, the medicine cures the disease quickly; however, it should be used with caution because a slight overdose can kill the patient within seconds. A drop is given to the patient and thereafter he/she is expected to vomit and experience serious diarrhoea.[416] Another respondent stated that not many people knew about this plant because those in the know were most probably afraid to pass on the knowledge due to the high risk involved. Several other interviews confirmed that the plant was not widely known.[417] When one of the interviewees was asked how he had come to know of the plant's existence, he replied as follows:[418]

> *At one time, I cannot remember the exact year, there was somebody close to me seriously ill with gonorrhoea. I heard of a healer in Ongwediva who could treat the disease. I then took this patient to the healer for treatment. That's the source of my knowledge about this herb.*

The *carpet flower* is believed to be able to treat epilepsy.[419] It is indigenous to Southern Africa and has been used as a traditional medicine in several areas in the Cape and Karoo regions. Although it is scarce by nature, it has almost totally disappeared because even those who knew it can no longer locate it. The Latin name, *Aptosimum*, originally comes from the Greek *a-*, meaning "not", and *ptosimos*, meaning "deciduous". The latter, which in turn comes from *ptosis*, meaning "to fall", refers to the fruit, which is a capsule that is retained on the plant even after the seeds have been released. The plants are also used to treat krimpsiekte[420] in sheep. South African studies showed extracts that had a moderate anti-cancer activity against three cell lines, and a subsequent phytochemical investigation of the plant has been

414 Rodin (1985:127).
415 Field note 9.
416 (Ibid.).
417 Field notes 3, 6, 7, and 9.
418 Field note 9.
419 (Ibid.).
420 Literally, Afrikaans for "shrinking disease". This is an acute and serious sickness that affects the joints, muscles and stomach of domestic animals, especially goats, and often results in starvation and death.

performed. This is the first report of a phytochemical study on procumbents where they were shown to have given positive results for anti-tumour activity.[421]

The *carrion flower*, a cactus-like plant, forms large colonies and is characterised by its erect four-angled stems. A row of upright blunt spines dots the stems' edge. If it bears flowers, they are star-shaped and brown.[422] The plant does not smell pleasant: as its name reflects, it smells like carrion. The plant is mainly used to treat dogs and cattle. For dogs, a piece of the plant is mashed in a bowl and mixed with the animal's food. For cattle, the plant is mashed and squeezed against the wound to allow the liquid from the plant to flow into it.[423] There was no information from the respondents as to whether this plant was suitable for human consumption, although information recorded by the *Uukwambi* is that it is in fact not suitable. The plant is common everywhere in the villages. According to Leffers,[424] the plant is edible although it is not clear which part is eaten. Some people claim that the whole plant (stems and roots) is eaten after being scorched in hot ash, while others maintain that is only the roots can be baked and eaten. When eaten this way, the plant is usually pounded together with manketti nuts, the leaves of *Talinum* species and the corms of *Eulophia* species.[425]

*Zebra leaf aloe* (or *tiger aloe*)[426] is found in the shadow of shrubs and trees. The green and grey leaves are shaped in a rosette-like manner. The scientific and vernacular names both refer to the rows of the pale spots on the dark leaves with a zebra-like pattern.[427] This plant bears flowers that normally show a swelling at their base. The flowers are edible half-cooked and made into round cake, which is then dried and stored for cooking at a later stage. In some parts of Namibia, the flowers are collected and prepared as an ingredient for other dishes.[428] Indigenous people normally cook the flowers lightly, after which the moisture is squeezed out of them. This forms a stiff paste, which is dried in the sun and can be stored for quite some time. The preparation and consumption of the flowers is widely practised, whereas its utilisation for various medicinal purposes was found to be variable, with treatments often differing from village to village. In some villages the leaf gel that exudes when a leaf is broken is referred to as a valued remedy for eye ailments in humans and certain animals, such as chickens.[429] For the application to chickens, the

421 See Van Wyk & Wink (2003).
422 Leffers (2003:179).
423 Field note 4.
424 Leffers (2003:179).
425 (Ibid.:179–180).
426 *Aloe zebrina* (*endombo* in *Oshiwambo*).
427 See Van Wyk & Smith (2003:236).
428 (Ibid.).
429 Field note 3.

broken leaves are spread on an open area. The chicken will start pecking them and as the leaves are punctured, some of the fluid in them will eventually splash directly into the animal's eyes or be ingested into their system.[430]

In another village, the leaf gel was recommended for burns, skin problems, a runny nose, fever, and stomach ache. The Senior Headman stressed that the plant was capable of treating anything.[431] He also confirmed that people were aware that the plant would not cure HIV/AIDS, but it was nonetheless applied to someone living with HIV/AIDS as it helped to prolong their life. The medicine is reportedly prepared by pounding the leaves in order to extract the liquid from them. Apart from being used as medicine, the plant is also used to protect one from evil. When two neighbours are fighting for a piece of land, for example, the plant is spread over the area concerned. This is believed to stop the dispute.

According to *Elenga Enene* Iipumbu,[432] in the *Uukwambi* area, devil's claw mainly grows near the Etosha Pan.[433] The properties of the plant are manifold, and it is said to be able to treat almost every ailment in human beings and cattle.[434] According to the Senior Councillor[435] responsible for the Engombo Oponona District in *Uukwambi*, devil's claw has been documented as being harvested since the early colonial period. He says that people have difficulty accepting that the processed form of their plant is being sold as a medicine by pharmacies.

Devil's claw has been protected under Schedule 9 of the Nature Conservation Ordinance 4 of 1975. Since then, a special harvesting permit is required from all who collect, transport, possess or sell the plant. This system was changed in 1987, when the permit requirement was restricted to commercial trade in the plant.[436] In order to export or deal in devil's claw, a phytosanitary certificate is required in addition to the above documents.[437]

*Elenga Enene* Iipumbu complained that people come from all over and started digging up the plant. Huge trucks were seen transporting devil's claw.[438] Despite the

430 Van Wyk & Smith (2003:236).
431 (Ibid.).
432 *Elenga Enene* in *Oshiwambo* refers to the title of the supreme leader of the *Uukwambi* community and means "senior councillor".
433 (Ibid.). For further information on devil's claw, see http://www.criaasadc.org/devilsclaw.htm; last accessed 13 July 2007.
434 Field note 3.
435 (Ibid.).
436 CRIAA SA–DC (1998).
437 (Ibid.).
438 Field note 7.

fact that the exact volume of world trade in devil's claw is not known, Namibia is probably the biggest exporter of the plant, with an estimated volume of between 300 and 500 metric tons a year.[439]

It was only during the 1990s that people became aware of the need to conserve and protect devil's claw.[440] For this reason, the *Uukwambi* Traditional Authority issued strict instructions to its representatives in areas where the plant grew to do their best to apprehend unauthorised diggers. Whether the current permit system for devil's claw proves successful remains to be seen. If it proves not to be, the traditional authority will need to employ more effective methods to control and protect this resource.[441] According to Iipumbu and most of his senior counsellors, they were appealing to the government, NGOs and private individuals to come up with a national initiative, like the Devil's Claw Resource Management Project, that could control and manage all traditional plants within traditional communities. In this regard, they likened devil's claw to the zebra leaf aloe or tiger aloe: the latter was harvested, processed, and marketed at a very high price. They believed that, if there were one consolidated, well-managed and controlled national project, traditional communities could generate an income from the use of their natural resources, and in this way, share the benefits amongst the entire community.[442]

The interviewees were confronted with various questions concerning the law and its effectiveness in protecting plants with medicinal properties. In this respect, the rules of customary law were reportedly not very developed.[443] This unfortunate situation resulted in knowledgeable people becoming secretive and not divulging what they knew about medicinal plants – not even to their families. They preferred to die with their knowledge.[444] Knowledgeable people also often employed tactics to make sure that their knowledge was protected. One opinion expressed[445] was that, if there some

439 CRIAA SA–DC (1998).
440 Field note 3.
441 Field note 2.
442 In the Devil's Claw Resource Management Project, rural communities are assisted in ascertaining the volume of their resource, establishing quotas, and determining sustainable harvesting techniques for the production of high-quality products. Direct and economically feasible access to the market is aimed at the harvesters in the rural and poverty-stricken communities. The Project also intends to generate proposals for the effective management of the resource, and these can form the basis of the recommendation for improved policy formulation. Apart from its objective to control and manage devil's claw, the Project has also produced a guide on the management and conservation of the plant, which is written in English and *Oshiwambo*. Field notes 1 and 8.
443 Field note 7.
444 (Ibid.).
445 (Ibid.).

sort of protection existed for the holders of traditional knowledge, such knowledge would be shared among traditional healers. This respondent argued strongly for laws to protect traditional knowledge, but said she feared that laws would be drafted in a manner that would advance the interests of pharmacies rather than the local communities whose knowledge was being exploited.[446]

A teacher and former headmaster of the Ogongo Primary School argued that, from an educational point of view, it would be difficult to embark on a system of protection of traditional knowledge. This, he felt, was because many people felt that cultural and traditional practices were outdated.[447] Even the children in school would not listen if one talked to them about traditional knowledge and traditional ways of healing. He said most people were oriented towards modern technology and preferred pharmaceutical products off the shelf. Nonetheless, he expressed his appreciation for the government's initiatives to investigate how traditional healers could be officially recognised by way of certificates.[448]

Another respondent pointed to the causes of the current ignorance of traditional practices.[449] Referring to the missionaries whose interest was to bring the message of Christianity to Namibia, he submitted that they had actually suppressed the use of traditional knowledge and practice by declaring them to be products of the devil and, thus, evil. For reasons such as these, people were not made aware of the need to protect medicinal plants as important components of their environment. Furthermore, the lack of adequate statutory legislation protecting these plants today should prompt traditional authorities to educate the members of their communities about the importance of medicinal plants for human and animal use. He concluded with the following:[450]

> *I am a headman, a priest of the Lutheran Church, and a teacher by profession. When I taught people about conservation of the environment and protection of specific plants, some people in my community got angry with me. They did not accept it when I warned them not to cut down plants. I always emphasised this in meetings with my people or during court cases of this nature. An understanding of conserving and preserving the environment is lacking in our local communities.*

446 (Ibid.).

447 (Ibid.).

448 In 1997, the Ministry of Health and Social Services and the World Health Organisation jointly undertook a study entitled *Scientific evaluation, standardisation, and regulation of traditional medical practices in Namibia*. The findings of this study guided the development of the Traditional Healers Bill of 1998. They were also used to prioritise activities and to inform the planning process for the 2000–2002 programme on the regulation and integration of traditional medicine. See also WHO (2001:27).

449 Field note 9.

450 (Ibid.).

This respondent also felt that customary law provisions that prohibit the destruction of plants in general and herbal resources in particular were not efficiently enforced by the traditional courts of the *Uukwambi*, including its High Court. He further referred to cases where a perpetrator had been arrested, tried and sentenced at all levels of the *Uukwambi* traditional judiciary, but eventually ignored the order of the court. According to the interviewee, the degree of punishment should be increased so that potential offenders would really be deterred.[451]

The author of this research was also informed that the traditional authority had not yet been confronted with any dispute amongst herbalists, but it was not clear why. One assumption is that conflicts of this nature are resolved before they reach a level that requires the involvement of the traditional authority. This may be because traditional knowledge holders do not know that traditional knowledge can be interpreted as being part of intellectual property law. The reluctance of traditional knowledge holders to appreciate the value of their knowledge is also linked to the widespread negativity towards traditional practices, which are characterised as un-Christian.

## 3. Conclusion

Namibia has a number of valuable medicinal plants found within its communal land areas that are subject to all sorts of exploitation and abuse. This is because no adequate legal instruments regulate or control the harvesting and use of such plants in these areas.

One obvious obstacle to successfully protecting medicinal plants is that traditional knowledge and traditional knowledge holders themselves do not enjoy protection. The concept of patent – or, rather, sui generis – protection is not known in traditional communities. When this type of protection was explained to them, many traditional knowledge holders appreciated what it offered.

Traditional authorities will need substantial guidance if they are to assist the members of their communities in changing their attitudes towards traditional knowledge. The latter is often understood to be a relic, the devil's work, or backward in comparison with modern pharmaceutical products.

On a more general note, traditional authorities also need assistance in enforcing customary law protecting medicinal plants through their courts. Effective enforcement mechanisms will also contribute to a broader acceptance of the need to manage and conserve all sorts of valuable natural resources.

451 (Ibid.).

# Part V:

# Fish

# The catching of fish under *Uukwambi* customary law

*Tomas M. Nekongo*

## 1. Introduction

The *Uukwambi* area is known for its floods known as *efundja*: they come with heavy rains almost on a yearly basis. The floods flow from neighbouring Angola, and bring along a range of water-based organisms, including fish. *Uukwambi* is an area where lakes, popularly known in *Oshiwambo* as *iishana* (sing. *oshana*), are very common. Members of the community engage in fishing for home consumption or sale. Two species of freshwater fish are found in the *Uukwambi* area, namely catfish[452] and tilapia[453].

Fishery is one of the main contributors to the country's gross domestic product – a fact that calls for the protection of this important natural resource. Equally important is that fish are an element of biological diversity protected by the Convention of Biological Diversity to which Namibia is a party,[454] Article 95 (i) of the Namibian Constitution, and section 3 (2) (c) of the Traditional Authorities Act.[455] Article 66 (1) of the Constitution also confirms common law and customary law in force on the day of Namibia's independence to be part of the country's law.

The focus of this study was to conduct research on the customary law in *Uukwambi* as regards the practice of catching fish, and on the effectiveness of such law.[456] It was discovered that the *Ooveta dhOshilongo shUukwambi*[457] contain a section regulating

452 *Clarias gariepinus*.

453 *Oreochromis andersonii* (*eshale* [sing.], *omashale* [pl.] in *Oshiwambo*).

454 Namibia signed the CBD on 12 June 1992 and ratified it on 16 May 1997.

455 No. 25 of 2000.

456 A consultative meeting was held to give feedback, inter alia, on research concerning the *Uukwambi* customary law on fishing. Representatives from all the *Oshiwambo*-speaking communities were invited to the meeting, which was held in Tsandi at the palace of *Omukwaniilwa* Taapopi, King of *Uukwaluudhi*, in February 2008. Interestingly, representatives from communities other than *Uukwambi* expressed that what had been explained as being the customary law of *Uukwambi* was in fact also the law applied in their communities.

457 *Oshiwambo*, meaning "the Laws of *Uukwambi*".

the catching of fish in the area. However, this does not answer the question regarding whether fish is adequately protected under customary law.

In addition, the fact that one finds provisions protecting fish resources in customary law leads one to enquire about the nature of the relationship between such law and the Inland Fisheries Resources Act.[458]

Moreover, it was also the task of this study to enquire how aware people were of the need to protect fish as a component of biological diversity. Finally, by way of conclusion, the study asks what steps could be taken to achieve better legal protection in respect of fish in Namibia.

Field research was the main method of collecting data for the study. Interviews were conducted with traditional leaders of *Uukwambi* and members of the *Uukwambi* community as well as some fishermen and government officials. The field research was conducted in two phases, the first being from 1 to 5 May 2005, and the second from 27 June to 1 July 2005. In both phases of the field research, difficulties were experienced with respect to community members' availability and willingness to be interviewed. It was also not easy to find interviewees engaged in fishing as the research was conducted in winter, i.e. out of season.

## 2. Fish swim in water: Water is life

The Inland Fisheries Resources Act is one of the legislative tools aimed at conserving and protecting aquatic ecosystems and the sustainable development of inland fisheries resources, of which fish comprise a major element. The Act provides for the control and regulation of inland fishing, as well as the conservation and protection of Namibia's biodiversity. The control mechanisms include the prohibition of certain fishing methods, most of which are injurious to the ecosystem in one way or another.[459] For example, the use of any chemical substance, poison, poisonous plant, explosive, firearm, or electrical device is prohibited. Most importantly, the Act sets out the procedure for applying for fishing licences and for registering fishing nets.[460] It also states that a person is not permitted to engage in fishing in inland waters unless he/she holds –[461]

458 No. 1 of 2003.
459 Section 17.
460 Part IV of the Act.
461 Section 11 (1) (a).

> *... a fishing licence issued by the Minister or a designated officer authorising fishing by means of the particular type of regulated fishing gear which the person is using or intends using.*

The common definition of *traditional gear* is that it is gear manufactured by the local population in an artisanal manner making use of natural materials available from the local environment.[462]

However, the Inland Fisheries Resources Act does not refer specifically to the traditional fishing gear of *Oshiwambo*-speaking communities, namely the *oshongo*.[463] The gear is in the form of a trap made of twigs or grass, and is referred to as a *basket trap*. Most people in the northern and north-eastern Regions of Namibia still use this traditional gear. Many reasons are given for this, the most convincing being that such gear is easy and cheap to manufacture, and easy to use. Because the materials needed to make the *oshongo* are scarce, the residents of *Uukwambi* have now also come up with a modern type of *oshongo*, which is referred to as *the bucket system* for catching fish. The bottom is removed from old buckets and other containers of similar size, and these are now widely used to catch fish instead of the *oshongo*. Traditional leaders in the area see the use of buckets as equally acceptable if compared with the *oshongo*, namely that, in terms of water and the natural resources found in it, the two have the same impact. However, the 'bucket *oshongo*' can actually be more destructive than the traditional basket trap because both the water and mud get trapped and mixed inside the bucket.

Fishing by means of *iishongo* is still the most commonly used method in *Uukwambi*. The fact that the Act omits to mention traditional fishing makes it unclear whether or not fishing with *iishongo* is allowed: if one concludes that the legislator intended to exclude the *oshongo* from the definition of *regulated* fishing gear in section 1 of the Act, clarification is required as to whether this applies only to the traditional *oshongo* or also to its modern 'bucket' counterpart.

There are other conditions stipulated in the Act with which fishermen have to comply. One of these is the requirement for fishing licences, which some traditional leaders have problems with. One interviewee held that the issue of licences would create conflict between community members.[464]

The Act also mandates the responsible minister to declare, by notice in the *Government Gazette*, any species of fish as endangered if such species is to be protected or its

462 Republic of Namibia (1995c:19).
463 *Oshongo* (pl. *iishongo*) in *Oshiwambo* is a noun denoting a basket used for fishing.
464 Field note 4.

stocks replenished. When a species is declared endangered, no person is permitted to catch, retain, kill, or injure any fish belonging to that species.[465] Persons contravening this are guilty of an offence.[466] The fine for such an offence can go up to N$10,000, or one is liable for imprisonment for a period not exceeding 12 months.

Furthermore, the Act provides for the appointment of a specific person to oversee all fishing activities in a given area, and ensure adherence to the fishing laws applicable there. The Act also requires every traditional authority in the territory in which fishing activities take place to have a fishing inspector.[467] The functions of the fishing inspector are to monitor and regulate all fishing activities in the area for which he/she has been appointed. This institution can certainly be interpreted as a political move to ensure that biodiversity is protected, and that resources are utilised in a sustainable manner.

Upon enquiry as to how the institution of fishing inspector was working in *Uukwambi*, the author was informed that although an inspector existed, his office was not yet functional. When the author approached the Omusati Regional Council on this issue, the Acting Fishing Inspector said the following:[468]

> *In terms of the Act, the fishing inspector is tasked with overseeing all fishing activities in the area for which he is designated. However, I, as the acting fishing inspector, cannot carry out these functions. This is because the Ministry of Fisheries and Marine Resources still has to finalise certain logistics before the fishing inspector's office can become fully functional.*

Prior to Independence, customary law determined the way of life in traditional communities. This also applied to rules on the catching of fish in *Uukwambi*. According to *Elenga Enene* Iipumbu[469], those responsible for administering customary law had to be present at lakes and *iishana* when people were fishing.[470] Iipumbu pointed out that certain members of the community had had the responsibility of looking after lakes or pans:[471]

465 Section 21.
466 Section 27.
467 Section 23.
468 Field note 6.
469 *Elenga Enene* in *Oshiwambo* refers to the title of the supreme leader of the *Uukwambi* community and means "senior councillor".
470 Field note 8.
471 (Ibid.).

> *Previously, there were specific times when fish were caught.* Iishana *were entrusted into the care of specific people. Those who were given responsibility over the lakes had to see to it that the people were informed about the beginning of catching season which started when the water dried up.*

Those who oversaw the fishing activities at lakes were referred to as the *owners* of such lakes. Together with traditional leaders, they made frequent visits to places where people fished. On a fishing day, people would gather around the lake after they had fished and nobody would leave until a certain practice called *okukunguna* had taken place.[472] This practice referred to the rule that anyone who had caught a considerable number of fish had to give some to the 'owner' of the lake as well as to the traditional leaders, so that those who had failed to catch anything would also receive some fish, be it the disabled or young children. Iipumbu brought up the issue of 'owning' lakes and the *okukunguna* practice when he was asked whether a limit had been placed on the number of fish that one was permitted to catch at any given time.

Around Independence, the practice of assigning lakes and *iishana* to members of the community started dying out, and eventually became a thing of the past.[473] However, doing away with such a practice also meant doing away with an important tool to preserve fish as a natural resource and part of inherited biological diversity.

It could not be fully established why the practice of assigning ownership of lakes to community members had passed away. While some people related it to the lack of rain around the time when the practice started to disappear, others emphasised that perceptions had changed with respect to the competence to administer customary law land rights in communal areas. The achievement of rights under the Namibian Constitution after the oppressive years of colonialism and apartheid were very often wrongfully interpreted as giving rights on communal land to anybody in Namibia – without any respect for the customary law rules in place and being observed by various traditional authorities.[474]

An enquiry as to whether the *Uukwambi* Traditional Authority offered any protection to fish led to the identification of the already mentioned *Ooveta dhOshilongo shUukwambi*, the laws of *Uukwambi*. The laws of *Uukwambi*, compiled by the *Uukwambi* Traditional Authority, contain rules on different matters of importance to the community. The laws also prescribe punishment to be imposed where these laws

472 *Okukunguna* is an *Oshiwambo* cultural practice whereby the owner of the lake where people fished would receive part of the catch from the fishermen.

473 (Ibid.).

474 In other words, this problem remains open for further research.

are violated. Unlike other examples of the self-stated laws of Namibian communities, the laws of *Uukwambi* deal with a wide range of environmental issues such as water, grazing and – very importantly for the purpose of this study – fishing.

Clause 13.2 of the Laws of *Uukwambi* reads as follows:

> *The Traditional Authority does not permit fishing with nets during rainy seasons, or other ways that will pollute the water.*

Clause 13.5 says the following:

> *The traditional laws strengthen the protection of lakes, which prevent drinking water from being fished with nets unless the headmen or senior headmen announces it. Anyone found fishing before such announcement will be guilty of an offence.*

Clause 13.9 adds this:

> *Anyone found polluting or vandalising water resources for the first time will face a penalty from N$10.00 to N$100.00, or from chicken to goat.*

The above clauses leave a number of questions open. The author tried to get answers to them from his interviewees, for example, by asking whether a legal limitation existed in terms of the number of fish that one was permitted to catch in any given period. One of the interviewees informed the author that there was no such limitation.[475]

With regard to the size of the fish, this is not directly regulated. It is primarily up to the individual to decide if the fish is too small.[476] An indirect way of regulating the permissible size for caught fish is achieved by the rule that fishing is only allowed to start when announced, i.e. after sufficient time had passed since the *efundja* to allow the fish a chance to grow.

*Elenga Enene* Iipumbu confirmed this by stating that there were no fixed fishing seasons as such, but that there were certain times when people were discouraged from fishing. This was normally when the flood waters were still flowing, because that was when the local fish species bred. Furthermore, he saw it as inevitable for the traditional authority to prohibit the use of *oshongo* and nets in flowing flood waters,

475 Field note 1.
476 (Ibid.).

as these also caught baby fish.[477] However, there was no objection to the use of the line-and-hook method during that time: baby fish would normally not eat from the hook, so they would not get caught, Iipumbu said.

The Laws of *Uukwambi* specifically restrict fishing under certain circumstances. However, the reason why the quoted paragraphs were incorporated into these laws is also of great importance. What is the purpose of a clause that emphasises the non-pollution of water? Is it to protect the fish, preserve clean water, or both?

When the findings of this research were communicated to local stakeholders,[478] the latter questions were discussed at length by participants at the meeting. Most referred to the eminent importance of water as the basis of all life, saying, "Water is everything". They went on to say that whatever one found in the water also needed protection.

The *Uukwambi* Traditional Authority seems to be strict on fishing methods. Their laws clearly allow for the line-and-hook, fishing net and *oshongo* methods. Indeed, all three methods are currently used in *Uukwambi*. The most accepted gear is the line and hook, mainly because it does not have a harsh impact on the water. Concerning the *oshongo* method, however, the Governor of the Omusati Region had this to say:[479]

> *We are still very sensitive about the traditional fishing gear, in the light of preserving water and grass. These may only be used when the water is drying up and is no longer safe for human and animal consumption, and the grass has reached a point where it would not be negatively affected by the use of such gear.*

When asked what methods of fishing the customary law of *Uukwambi* allowed, another interviewee gave the following answer:[480]

> *During the times when there is clean water which is safe for human consumption, one may only use the line-and-hook method. When the water is drying up, people can use the traditional gear and buckets.*

When the author asked whether there was a rule in customary law with respect to 'bucket *iishongo*', there seemed to be no clear answers. There also appeared to have

477 Field note 8.
478 The Tsandi meeting, referred to earlier.
479 Field note 2.
480 Field note 4.

been no case to date which challenged the application of the law as regards traditional *iishongo*.

For a traditional authority to successfully ensure that the natural resources in the communal land area were used sustainably by the members of the community concerned, effective enforcement mechanisms need to be in place. In the case of *Uukwambi*, the traditional authority punishes any person violating the fishing laws. The procedure followed in dealing with such cases is very clear and, according to Iipumbu, very effective as well. If a person was found fishing with an *oshongo* or a net in clean, drinkable water, the first thing the authority did was to confiscate the person's fishing gear. The arrested person's details were then taken down, after which the headman of the area concerned would take the accused to the traditional authority's office to be tried.

A special concern of this research was whether the customary law on fishing was being implemented effectively. The answers to this question varied: some of the fishermen interviewed were rather reluctant to accept the law, saying that one should be able to fish whenever one wanted to, without prior permission being obtained from the authority.[481] On the other hand, the traditional leaders interviewed were satisfied with the way cases were being handled by the *Uukwambi* Traditional Authority. According to a Senior Councillor for Ogongo, –[482]

> *... anybody who is found using* oshongo *before the fishing season has been officially opened is punished.*

The Councillor referred to about 50 people that had been arrested between July and September 2004 and taken to Uukwangula, the headquarters of the *Uukwambi* Traditional Authority. In the interview with *Elenga Enene* Iipumbu, the latter underscored what the Senior Councillor had alluded to, and added that 50 *iishongo* had been confiscated from persons found fishing illegally.[483]

This quoted case demonstrates how customary law works in *Uukwambi*: it gives an idea of how those that violate the law are tried, what penalties are imposed, and how enforcement occurs.

The headman of a village where 300 *iishongo* had been confiscated was also interviewed. Because such a large number of people had been involved, the case

481 Field note 5.
482 Field note 4.
483 Field note 7.

was referred to the *Uukwambi* High Court. In this regard, Iipumbu made mention of earlier cases of a similar nature:[484]

> *Last year, for example, we had about 300* iishongo *that were confiscated from the people that were fishing illegally. We arrested these people, brought them to the office, took their fishing gear, and made them pay N$25 each.*

Therefore, the *Uukwambi* High Court applied the same rules of customary law to the accused. The confiscated *iishongo* were auctioned, and the proceeds were paid into the community fund.

The laws of *Uukwambi* provide for a N$10 fine in cases where someone is found guilty of fishing illegally. The fine has meanwhile increased to N$25 as a result of deliberations at one of the customary law revision meetings that take place in *Uukwambi* every five years. According to Iipumbu, the fine is doubled with every subsequent offence of which the person is found guilty.[485]

As to whether culprits actually paid their fines, *Elenga Enene* Iipumbu confirmed that most did. Very few defaulted on the judgments and ignored their punishment. He also pointed out the following:

> *If such a person later comes to the traditional authority with a problem and we see in our books that he/she ignored a fine that was imposed upon them by the traditional authority, then this person will not get the help they need from us unless the fine is paid.*[486]

With respect to increasing awareness about the value of fishery resources and preparing for a more solid foundation of the effective implementation of relevant customary law, Iipumbu said that at least parts of the community had developed a better understanding about fish as a natural resource that needed human protection. He said the youth in the community realised the good that fish-farming projects such as those implemented under Namibia's Aquaculture Strategic Plan of 2004[487] could do for the community, and to the economy of the country as a whole.[488] *Elenega Enene* Iipumbu emphasised that the *Uukwambi* Traditional Authority was prepared to allocate communal land for such projects in particular.[489]

484 Field note 8.
485 (Ibid.).
486 (Ibid.).
487 For more detail on the Strategic Plan, see above.
488 Field note 7.
489 (Ibid.).

The Namibian Government has a policy on aquaculture projects in which assistance is granted to people to establish their own fish-farming sites. This is the focus of the Ministry of Fisheries and Marine Resources' Aquaculture Strategic Plan. The aim of the Strategic Plan is to set up the framework for the required rules as regards the business climate, public acceptability, and strategies to ensure training, research, marketing and infrastructure development.[490]

However, Namibia's commitment to strengthening the aquaculture industry does not only serve economic factors, but also demonstrates the country's respect for the obligations imposed by the Convention on Biological Diversity and other international instruments. While the economy will surely grow as a result of aquaculture projects, biodiversity will also be conserved and protected in a sustainable manner – as required by the Convention.

## 3. Conclusion

This research was conducted with the intention of establishing whether fish, being a natural resource and a component of biodiversity, is being protected in Namibia as required by the CBD. Traditional governance in the *Uukwambi* community was the focus of the empirical research. The main enquiry was on the role that the *Uukwambi* customary law played in the protection of fish. The investigation also pursued whether the *Uukwambi* community understood the need to protect biodiversity, and that they needed to use biological resources in a sustainable manner for the benefit of both the present and future generations.

Although the laws of the *Uukwambi* Traditional Authority are in force, they are not always adequate when it comes to Namibia's obligation to protect fish as a biological resource. For example, although those found using inappropriate fishing gear were fined when they transgressed the law, the imposition of fines provided (even after their increase) does not seem sufficient to deter potential or repeat offenders. This is particularly important since the convicted person is able to get more from the sale of his/her catch than the fine payable.

Apart from the general problem that exists with respect to the legal framework for the enforcement of traditional judgements, *Uukwambi* customary law could certainly be improved by reintroducing the now defunct concept of assigning responsibility for lakes to community members, as this was said to have been very effective in protecting those resources in the past.

490 Republic of Namibia (2004b:2).

Although the principles of customary law on fishing are very similar in all *Oshiwambo*-speaking communities,[491] the differences that do exist – for example, with respect to the amount of rules that have been made subject to self-stating and those that have remained unrecorded – could be considered by the communities for standardisation when rewriting their customary laws. The fact that implementation is obviously a problem is another reason to recommend standardisation, since this would contribute to a better awareness of the rules and the socio-biological reasons for their existence.

As in many other cases where statutory and customary law apply concurrently, or where statutory law cannot adequately replace customary law rules, the interface between the two types of law as regards fishing in Namibia needs clarification. Such clarification would ease the work not only for traditional authorities, but also for the envisioned fishing inspectors.

The effectiveness of the existing legal instruments could also be improved by establishing dialogue between traditional leaders and the administration of the fishery resources, i.e. the Ministries of Fisheries and Marine Resources. Guidelines from the Ministry could help traditional authorities incorporate modern fish protection mechanisms into customary law. This could also guide traditional authorities in implementing more effective rules on fishing activities. This would apply particularly to the number and size of fish that one was allowed to catch at any particular periods or occasions, as well as to the fishing methods involved.

491 Cf. supra, the Tsandi meeting.

# Fishing among the Topnaar: An expropriated tradition

*Clever Mapaure*

## 1. Introduction

This study of the Topnaar community who live on the Namibian coast stimulates debate and the desire to grasp how local regulations have created an environmental regulatory system resting on a community's traditions. The following discussion will show that, as the length of time that a community remains in an environment increases, the residents develop a deeper understanding of their surroundings and the resources found there.[492] The Topnaar confirm the accuracy of this theory if one considers their understanding of their environment and its resources as they made their way along the coast and made the decision to settle.

In a traditional society, supreme rulers are entrusted with wide-ranging powers that, in Western democratic eyes, would be regarded as despotic. Such authorities, however, also hold the core values of the community: they pronounce themselves on what is good for the community's welfare currently and in the future. This powerful leadership is one of the impetuses behind traditional fishing as practised among the Topnaar. The success or failure of the practice rests largely on the directives of the supreme leader of the community and his/her resting in the Creator. His directives were believed to be given effect by a 'spiritual police force' (*hupa!kamku*).

Colonialism came to Africa as an uninvited guest onto land which the Topnaar regarded as God-given.[493] As colonialism proceeded to establish itself, the social and political status of indigenous communities weakened, and with this, their socio-cultural practices. In the case of the Topnaar, one of these was fishing. This study investigates the expropriated tradition of fishing in the Topnaar community and its customary law framework, with a special focus on the rules and practices surrounding the use of fish, an important natural resource, in a sustainable manner.

Because very little literature on the history of the Topnaar as a community exists, let alone the practice of traditional fishing and the analysis of its sustainability, a qualitative field research was conducted among the Topnaar in September 2007.

492 Graham-Kordich (2003:12).

493 Field note 1. Since the Topnaar regarded their land as God-given, the presence of the colonisers and the land dispossession that followed was illegitimate.

Group and individual interviews were conducted. These were mainly with community members in the older age groups, as custodians of Topnaar history, in order to carefully extract historical aspects and anecdotes of their lives. The interview with *Gaob*[494] Seth Kooitjie, Chief of the Topnaar, was particularly productive. His objective and balanced view of Topnaar history and the practice of traditional fishing was a highlight in the field research.

The community speak Nama/Damara (*Khoekhoegowab*) as their mother tongue, with Afrikaans as the dominant lingua franca with outsiders. One of the principal obstacles in the field research was language because, at first, no interpreter was available. Finally, the Secretary of the Topnaar Traditional Authority assisted the author with interpreting what the interviewees were saying.

The concept of *sustainability* is broad, and requires a multidisciplinary approach to research. Various libraries were consulted, including the UNAM library, the National Library, the Polytechnic of Namibia library, the Human Rights and Documentation Centre library, the Multidisciplinary Research and Consultancy Centre library, and the library of the Centre for Applied Social Sciences.

The following questions concerning the analysis of the sustainability of fishing among the Topnaar had to be answered:

- Who among the Topnaar practised traditional fishing?
- What fishing gear did they use?
- What fish did they catch, and where did they fish?
- When and why did they stop fishing?
- How sustainable was the practice of fishing, if ever?
- What, if anything, facilitated sustainability?
- What substitute did they find after they stopped fishing, and why did they follow that alternative?
- What is the role of customary law and practice in securing conservation and the sustainable use of resources?
- What is the link between traditional knowledge, customary law and practice, traditional land rights, and marine tenure and fishing rights?
- In the current discourse, are there cases where allowing the free exercise of traditional authority and/or customary law and practice may have negative social, cultural, environmental and economic impacts?

494 *Gaob* is the traditional Nama title of the supreme traditional leader of the Topnaar and is literally translated as “king”.

- Is it legitimate for statutory law to intervene in traditional decision-making processes in order to ensure social, economic, cultural or environmental rights?
- Is there a link between the acknowledging and respecting traditional power and the conservation and sustainable use of resources?

Nichols reports that, although no indigenous fishery communities exist in Namibia, and there is no artisanal fishing in the country, there are some remnants of such communities here.[495] These communities endure the harsh environmental conditions prevalent in the Namib Desert, which is part of the Namibian coastline. They are no longer actively involved in fishing because the entire shoreline has been turned into national parks.

As far as the history of Namibian communities is concerned, only the Topnaar are known to have practised fishing in a traditional fashion regulated by customary law. The origins of the Topnaar remain a riddle wrapped in mystery; even the Topnaar themselves doubt and differ about their exact roots. Kinahan et al. speculate that a hunter-gatherer community inhabited the lower *!Kuiseb* River valley and adjacent coastline for well over 2,000 years.[496] Others hold that migrants entered the area, especially the upper *!Kuiseb* catchment, some time after that; over the past 1,000 years, the economies of these early communities diversified to include domestic stock farming. This settlement of a Nama-speaking community in the *!Kuiseb* River valley of the Namib Desert obtained the name *!Aonin*, by which they are known today.[497]

Some say that the Topnaar came from present-day Botswana. These authors derive the history from linguistic studies, and claim that the Nama languages spoken in Namibia belong to the northern and central branches of the Khoisan language families. It is, however, not known when the first Nama-speaking people arrived in what is Namibia today.[498] The historian Elphick suggests, and anthropological linguists support this proposition, that they originated somewhere in present-day Botswana and gradually moved south and west. The Nama were hunter-gatherers; some of them also became pastoralists around the beginning of the Common Era.[499]

The Topnaar are sure about one thing, however: they were once settled in what was formerly the Cape area, and migrated from there to the *!Kuiseb* River valley; but how

495 Nichols (2004:326).
496 Kinahan et al. (1991:3).
497 Dentlinger (1983:7).
498 Budack (1983:5).
499 Elphick (1977:12).

they got to the Cape is not known. The footsteps of this group, although faint, are a remarkable piece of history. Some authors such as Vigne speculate that the Topnaar came from north-eastern Africa:[500]

> *The Nama came at some ancient time perhaps from North-Eastern Africa, perhaps from an even further place of origin.*

Berat writes that the word *Topnaar*, which early visitors applied to the people of the Walvis Bay area, seems to be a Dutch translation of the Nama name the people use for themselves, *!Aonin*, which means "people of the point". The *point*, here, was presumably the northern- or westernmost point of Namibia, meaning Walvis Bay, inhabited by Nama-speaking peoples.[501] The term *Topnaar* is generally accepted by the people, and *Gaob* Kooitjie calls himself a *Topnaar*.

## 2. Sea and land: Sacred gifts

As highlighted above, before settlement at the Cape, it appears that the Topnaar used to hunt and gather as their major socio-economic activity. They also used to keep small herds of livestock. With the discovery of fishing, this seemed to have changed. It was easier to live off fish because it could be obtained easily; livestock, on the other hand, took years before they were ready for slaughter.

It is not known how much time the Topnaar spent at the Cape. The Nama in general hold that they were moved out of the Cape by Dutch settlers. According to *Gaob* Kooitjie, the Topnaar are known as *the people of the edge*, meaning that they lived at the edge of the earth, i.e. along the coast. Their 'huts' were built facing the sea. The Topnaar were also called *beachcombers*, reflecting the fact that they survived on the things they could gather along the beach.

On their way out of the Cape, the Topnaar crossed the Orange River and continued northwards into the southern part of what is Namibia today. At Sandwich Harbour they established a semi-permanent settlement. They found a place of refreshment and, according to one informant, chose to settle there for a longer period for a number of reasons, including the navigable terrain and abundance of fish.[502]

Thus, the place where they settled did not seem to have been a territory already claimed by any other group, according to *Gaob* Kooitjie. One of the requirements

500 Vigne (2000:7).
501 Budack (1983:6); see also Berat (1990:6).
502 Field note 3.

when it came to the continuing practice of fishing was that the consent of the Chief was required. Kooitjie also related that the people who wanted to go fishing first received directives as to how much fish they were supposed to catch. This amount was dependent on the size of the fish the men could catch. For example, the *Gaob* said, if the men caught three dolphins, they were to return home. They would not be permitted to catch dolphin again when they next went out fishing. This directive existed in order to allow the dolphin to grow and multiply while other species were being fished. This is a case of the sustainable harvesting of natural resources, and it was a customary rule that the community respected. In the old days, when the *Gaob* spoke he was believed to have spoken with the voice of the Creator; hence, to disobey his directives would bring misfortune not only on the miscreant's family for generations to come, but also the nation as a whole.

While they were settled at Sandwich Harbour, some community members decided to migrate further north. One of the Topnaar respondents believed that this was perhaps due to a leadership dispute or from having been influenced by the hunter-gatherer lifestyle of the San.[503] *Gaob* Kooitjie believed that the split was caused by a lack of consensus as to where exactly to migrate. The larger group followed their leader northwards, migrating along the coastline until they arrived at Walvis Bay in the 1740s or thereabouts. Walvis Bay became their place of permanent residence, as nobody had yet settled there when they arrived.

They regarded the territory as a God-given place and, thus, became attached to it. The resources on the land adjacent to the sea and the marine resources in the sea were believed to be part of their natural property. This concept emanated from the doctrine of sovereignty, which, from a customary law perspective, means that the Topnaar identified themselves with Walvis Bay before it was even called by this name. Hence, the development of their laws cannot be divorced from the land, the sea, and its resources. The Topnaar adapted themselves to the environment and the practice of fishing continued.[504]

The Topnaar regarded their new territory as a sacred gift given to them after their long journey. Capitalism arrived at Walvis Bay pre-packaged, unbound by either feudal remnants or the legacy of particularly harsh labour relations. The history, as recited by Prinsloo, is that the Commander of the British Ship Industry took possession of the bay on 12 March 1878 in the name of the British Crown.[505] On 14 December 1878,

503 Field note 2.

504 Field note 1.

505 Prinsloo (1976: 187). History as recited by Arbitrator Don Joaquin Fernandez Prida. See: Award of Don Joaquin Fernandez Prida, Arbitrator in the matter of the Southern Boundary of the Territory of Walvis Bay. Madrid, 23 May, 1911: *The Walvis Bay Boundary*

the British annexed the bay to the Colony of the Cape of Good Hope.[506] During this time, Walvis Bay was inhabited by the Topnaar. Six years later, after trying in vain to persuade the British Government to claim all of what is today Namibia, the Cape Colony, acting under letters patent issued by Queen Victoria, annexed the port and settlement of Walvis Bay as well as the surrounding area.[507]

By the South Africa Constitution Act, 1909, which created the Union of South Africa, the Colony of the Cape of Good Hope – along with the bay – became part of the Union. When the Union of South Africa turned into the Republic of South Africa, Walvis Bay was still considered to be part of the then Cape Province.[508]

As early as 1876, the Colony of the Cape of Good Hope was interested in possessing all of the Namibian bay and its hinterland in order to monopolise trade in the Southern African interior. Great Britain formally annexed Walvis Bay at the Cape's instigation. Had Germany not annexed the hinterland, Britain would have maintained informal control over the rest of Namibia as well.[509] After the loss of the hinterland, the Cape Colonists expended little energy in developing or integrating Walvis Bay into the Colony: they believed that Germany could not make a viable colony of Namibia

---

*Case* (Germany, Great Britain) 23 May 1911. *Reports of International Arbitral Awards*, XI:263–308. Arbitrator Fernandez Prida got the date of 12 March 1878 from *British and Foreign State Papers*, LXIX:1177. The said annexation and proclamation were preceded by various preparatory documents emanating from the Cape Government, the Colonial Office at London, and other British authorities. Amongst these documents a special series was constituted by those intending to fix the extent and boundaries of the territory to be annexed, together with the harbour of Walvis Bay.

506 British Proclamation, taking possession of the Port and Settlement of Walvis Bay, March 12, 1878, *British and Foreign State Papers*, Vol. 69:1178.

507 Berat (1990:4f).

508 See Department of Foreign Affairs, Republic of South Africa, "The legal status of Walvis Bay", at E3.E4 (Sept. 1977) (unpublished memorandum); quoted in Goechnev & Gunning (1980).

509 It is reported that, in 1883, Adolf Lüderitz requested protection from the German Government for a factory he planned to open at the Bay of Angra Pequena (ibid.). Although Britain indicated that it would consider the intrusion of another foreign power in the country as an infringement of Her Majesty's legitimate right, Germany, in April 1884, extended protection to Angra Pequena, later Lüderitz Bay. The Cape attempted to annex the entire coast in July that year, but they were too late to stop the German advance (*House of Assembly Debates, Cape of Good Hope*, 1884:353–356). Germany laid claim to the entire territory of South West Africa but the Bay. The division of the Bay from the rest of the territory was confirmed by the Berlin Conference of November 1884 to February 1885, where the major colonial powers gathered to resolve their differences on the partitioning of the African continent.

without Walvis Bay, and preferred to wait until they could acquire control over the entire territory of what constituted Namibia.

The destruction of the customary social fabric of the Topnaar was a great blow to the success of fishing. The settler regime showed no concern about the welfare of the people in respect of retaining their customary tenure system or their rights to marine resources. The coloniser also did not understand that fishing was an essential part of the Topnaars' relationship with their land and environment. The Topnaar had to give in to European domination at the expense of their rights over Walvis Bay and the sustainable utilisation of the God-given resources of the sea.[510]

In African traditional communities, land has a religious importance. The Topnaar viewed the ocean as a God-given reservoir of resources that they had to use wisely. This notion developed into a moral philosophy to deal with the ethics of environmental conservation, which sought to provide a basis for the relationship between human beings and their environment. The *Gaob* thus, was a respected person whose subjects believed was endowed with supernatural insight. The Topnaar saw themselves as a people to whom the sea had been given in trust, and they had to manage of it. This mandate of management also entailed the responsibility of not depleting the sea's resources.[511]

The Topnaar at Walvis Bay are also known as the *Hurinin* – a name that is related to *hurib*, "the sea" – because they relied on the sea for their survival. They stayed in typical traditional huts, which some refer to as *whale-rib houses*. Alexander describes them as follows:

> *The huts were of singular construction. Crooked stakes were arranged in a circular form and met at the top[,] where a stout[,] straight post supported the roof. Some of the crooked stakes projected beyond the entrance, so as to form a porch, to prevent the west wind from blowing into the hut, which was well thatched with grass and reeds and was roomy and comfortable inside.*[512]

These huts were constructed along the coast. From there, the Topnaar practised fishing and other related practices like gathering shells and hunting sea mammals and turtles. Sometimes the Topnaar also used resources like fish and whales that had washed up on the beach. At certain times the women were allowed to pick up these and other edible things on the coast.[513]

510 Field note 1.
511 (Ibid.).
512 Alexander (1838:II,76), as quoted by Köhler (1969:111).
513 (Ibid.).

If one talks about traditional fishing among the Topnaar, one needs to 'unpack' the tradition. Some customary law practices have to be investigated. Here, too, the role of one's ancestors needs to be considered, as religious beliefs also affected the practice – both negatively and positively.

Today, the Topnaar can only confirm that fishing was practised in their history. However, it is difficult for them to recollect the species that were fished. One thing they do remember, however, is that they caught both big and small fish. Through oral history passed on down the generations, they also know that the fishermen normally targeted big fish. According to *Gaob* Kootjie, the species that community members refer to as *big fish* were normally dolphins. These were targeted because dolphins used to expose themselves by jumping out of the water – thus making themselves easy prey for the fishermen. Spearing these animals required great skill, intellect and vigilance, since the dolphin's emergence from the water was unpredictable.[514]

The spears used by the Topnaar were specially designed for fishing. The fishing spear also had unique features. Unfortunately, no member of today's Topnaar community has such a spear in their possession, but they could describe it:[515]

> *There was a long spear used for bigger fish, and a short spear … The long spear had a head and a tail end. The head was mainly made of strong wood or iron. The ones made of iron were most valued, as they were more durable and could not easily be broken. The Topnaar knew how to smelt iron and hammer it into spears.*
>
> *The short spear was designed with metal or wooden ends in such a way that it had hooks. The tip was sharp, for piercing the flesh of the fish, while the other two ends had hooks which could not be dislodged once they were embedded … On the other end of the spearhead was a rope or thread. This was used as a handle. When they speared the target, they would keep the rope in their hand to make sure that the fish would not disappear with the spear, and also to ensure that, once speared, the target formed part of the catch. No poison was used on the spear, as was the hunting practice in other communities.*

The Topnaar used no poisons in the water because they believed that could cause problems for the fish, and they would not be able to catch the following day. This measure was put in place to ensure that future generations would benefit from the same resource with equal enjoyment, and is an indication of the equities of sustainability

514 Field notes 1 and 4.
515 Field note 3.

inherent in environmental law today.[516] The spear is a safeguard against the depletion of small fish, and a natural tool to ensure that fish continued to multiply. The Topnaar never made use of canoes or nets. Today, the only fishing method they know of is the spear. According to an elderly Topnaar, hooks – if used at all – were only employed after the arrival of the white man.[517]

The Topnaar were dependent on fish as their major source of nutrition; there was, therefore, no specified fishing season for them. One could fish at any time of the year, but the community still had what they termed *the appropriate time*. The Topnaar knew very well that one needed to know when to fish: they could not simply be caught at any time of the day. Their knowledge and experience with fishing dictated that it would only be permitted at certain times. One such time was towards dawn, *just after the sun had tilted towards the horizon*, which was also when the water was translucent enough for spearing.

The Topnaar believed that their ancestors, although dead in the physical sense, remained active among them in the family and community. This was true irrespective of where their ancestors had been buried. The principle of 'living' ancestors, inherent in African customary law as underlined by African traditional religion, was carried over into the practice of fishing.[518] Ancestors were believed to play a significant role in this activity, because they enabled the fisherman to catch the fish, *Gaob* Kootjie maintained. Their ancestors were said to 'chase' the fish into the hands of the fishermen. They also guided the *Gaob* to decide where the fishermen should fish, because they knew where the fish could be caught without danger. This also explains why the advice of the *Gaob* was held in high regard, and why the belief in ancestral spirits was a very significant part of traditional fishing among the Topnaar. Without the blessing of the *Gaob*, one would not catch fish; even worse, the person might drown in the sea, face misfortune, or be cursed.[519]

Whenever men intended to go fishing, they first gathered together and underwent certain rituals. They met with the *Gaob* under a sycamore tree, at a place now known as *Gobabeb*. This place was believed to be the dwelling place of some of the ancestral spirits who oversaw community affairs. It was a sacred place outside the Topnaar settlements, located about 100 km from Walvis Bay. The *Gaob* or his representative would kneel down and start communicating with the ancestral spirits under the sacred tree. They would then inform the spirits that the men present intended to go

516 See Principle 21 of the Rio Declaration, 1992, in the light of the history thereof as derived from Principle 2 of the Stockholm Declaration, 1972.
517 Field note 3.
518 Field note 1.
519 (Ibid.).

fishing along the coast. Their first names, family names, and ancestral lineage would be called out. In this way, their ancestors would know exactly who the *Gaob* was referring to. Once this had been communicated, the *Gaob* would give the men his blessing to go fishing. This blessing was coupled with some instructions to the men on fishing, namely how to fish, how many to catch, and how to conduct themselves whilst fishing.[520]

According to *Gaob* Kooitjie, it was common practice among the Topnaar that while the men were fishing, the community members were to remain silent. No noise was allowed, including shouting, noises caused by dropping items, crafting objects, or cutting down trees.[521] A crying child had to be stilled by its mother. This custom of maintaining silence aimed to ensure not only that their ancestors' attention remained focused on the fishermen, but also that the fish would not swim away.

The availability, amount, and size of fish went hand in hand with the morals of the people. These morals were intertwined with the customary values and norms of the Topnaar, and were well respected. Budack reports that the fishermen even had to abstain from sex when they went fishing, lest they caught only small fish:[522]

> *Before the men started fishing, they recited a poem on the beach … The night before fishing is done, no man may sleep with his wife, otherwise he would catch only small fishes. This is what Oupa Moses Kasper told me: When a few men fish together and they catch only small ones, they will soon find out who ignored the prohibition and get angry. A man may not fish while his wife is menstruating … Normally the family may accompany the father to the beach, but must comply with certain rules … Even when the family stay sat home, certain rules must be kept: the wife may not pay visits and walk about much, because "otherwise the fish will swim around too". She must not stay in the house and the doors must not be closed. While the husband is fishing cold water may never be thrown on the fire.*

Beliefs, values and traditions of this nature were binding, and the whole Topnaar community was expected to observe them.[523] One of the interviewees believed that the rules were always obeyed because the consequences were known and were evident. They illustrated how natural wisdom worked among the Topnaar in the practice of traditional fishing.[524] They also ensured the sustainable extraction and utilisation of natural resources. These practices eventually lead to the acquisition

520 (Ibid.).
521 (Ibid.).
522 Budack (1977:21), as quoted by Hinz (2003b:18).
523 Field notes 1 and 2.
524 Field note 2.

of a natural acumen among the Topnaar, and explain how customary law remained significant in respect of protecting humans and their environment.

## 3. Sustainability through tradition

Without traditional leaders taking an active role in the management of natural resources, they would not be used in a sustainable way. When wildlife, marine resources, fruit trees and other natural resources were abundant, not many rules were needed to control their use. The conservation of these resources was, however, dependent on the role and power of the traditional leader. The Topnaar community supported their traditional leaders in their work because they believed that these traditional structures were able to influence people's behaviour. The Topnaar had no land or marine 'police' authority to patrol the sea in order to control whether someone was fishing without proper permission. The *Gaob* only had his assumed spiritual powers over the community, but these were sufficient and highly effective. How people were punished for breaking the rules is not known. This shows that the rules were followed and understood as genuine community control mechanisms.[525]

The *Gaob* was accepted as the supreme authority, against whom appeal was not possible. He created a close tie between a community and its environment. This is a manifestation of the concept of *sustainability* in Topnaar customary law, and explains why local communities are regarded as fully committed to the protection of biodiversity, nature conservation, and land care. Evidence of this concept of *sustainability* is also the reason why, in recent years, more concerted efforts have been made to understand, respect and utilise indigenous environmental practices and systems in an effort to promote sustainable development.[526]

The concept of *sustainability* in the Topnaar community is linked with their indigenous ecological knowledge. Such knowledge differs from modern scientific knowledge in that it is intuitive, holistic, spiritual, and based on empirical experience through trial and error.[527] Indigenous knowledge affirms that it is not simply a product of ancient

525 The deterrent measures inherent in the rules coupled with the spiritual element of retribution in cases of disobedience encouraged a common understanding and respect amongst the community in respect of their laws. In this light, customary law was seen as a system without a physically present or commissioned police force, but rather its spiritual equivalent. See Algotsson (2006).

526 Richardson (2004:2ff), as well as Warren (1991:6ff).

527 Richardson (2004). In South America, some indigenous ethnic groups continue to practise certain traditional uses of forest resources that are sustainable, including the use of forest products for medicine and crafts. For this, see Posey (1985:189); see also Berkes (1993).

hunter-gatherer societies, but is applied to many aspects of contemporary resource management.[528] This includes herbal medicine, building construction techniques, communal land use arrangements, craft technologies, and knowledge of faunal and floral ecology. Knowledge can be transferred through one's elders, rituals, initiation, and storytelling.[529]

Sustainability at customary-law level among the Topnaar at that time was measured according to resource utilisation in observance of the directions of the *Gaob*. The latter always made sure that the community would have enough fish and could always benefit from the bounty of the natural resources around them. The ultimate was achieved by extracting and consuming only what one needed, while simultaneously making sure that the community would not suffer down the line because the resources had been depleted. Children were valued and their future was supposed to be secured. The practice therefore aimed to ensure that, by the time the children were old enough to start their own families, they would have the same level of enjoyment from the resources as their ancestors had had.

The Topnaar also believed that their ancestors had dwelling places that included trees and mountains. In the sea, where they fished, there were ancestral spirits who supervised the fishing process and took care of the fish so that the community would always have food. This gave rise to an obligation on the part of the community to take care of the environment. It was believed that failure to use the environment in a way that would benefit every person in the community was an insult to their ancestors and their ultimate Creator, who had provided them with the fish for their livelihoods. This again points to the way in which the obligation to look after natural resources in their environment was binding upon a community, since this became a customary law observed by all community members. This is akin to what Richardson submits:[530]

> *Indigenous people's direct reliance on their environment can spur the formation of indispensable customary rules to govern resource harvesting to avoid environmental depletion and sharing of nature's bounty. For example, the Barotseland people of Zambia continue to apply rules governing forest cutting, fishing and hunting on their traditional lands.*

A critical analysis of the Topnaar's coastal environmental management at the time, and of how they regulated fishing practices, reflects numerous modern theories and models on sustainability. Ironically, the models appear to look back on what happened

528 Richardson (2004).
529 (Ibid.).
530 (Ibid.).

in traditional communities before and compare the current situation with that, where modern governments have taken over the management of most societal sectors. Costanza's is one such model that reflects the meaning of *sustainability* according to Topnaar customary law.[531] This model views the world as a *full-world era*, where natural capital is the limiting factor. In this era, the maximisation of productivity of natural capital is paramount. In concert with this, there needs to be an adequate valuation of the natural capital involved, and its associated ecosystem services. This alternative paradigm may be envisioned through the three types of values outlined by Costanza:[532]

- *Homo economicus* refers to human behaviour where humans act in their own self-interest, the level of discussion required is low, and an efficiency-based value is assigned. This may be seen as a market-driven paradigm which, under customary law, represents community demand, since the market is not viewed as the modern market of commerce.
- *Homo communicus* is involved in discussions with the community regarding future choices by the community, and strives to come to a consensus that is inclusive of everyone, including future generations. The fairness value relates to what is fair to all members of the community. (This will become clearer later as we investigate the equities required under customary law.)
- *Homo naturalis* operates as if decisions being made are in the context of the whole ecosystem, where individual items are assessed by their contribution to ecological sustainability. In customary law, this involves respect for traditional authorities and the Creator, as the provider of the resources.

Among the Topnaar, it is evident that decisions are made at community level, i.e. in the *homo economicus* mode. In the same vein, sustainable fishing practices were achieved through the incorporation of the *homo communicus* and the *homo naturalis* modes. The use of natural resources is not objected to by conservationists: what is objected to is the *unsustainable* use of such resources. Duxbury and Dickinson put it this way:[533]

> *The term* sustainability *that environmentalists use all the time, all it means is that God wants us to use the things that we have been given, the bounties of the earth, to enrich ourselves, to improve our quality of life, to serve others. But we cannot use them up. We cannot sell the farm piece by piece to pay for the groceries. We cannot drain the ponds to catch the fish. We cannot cut down the mountains to get the coal. We can live off the interest, but we cannot go into the capital. That belongs to our children.*

531 Costanza (2001:459ff).
532 As summarised by Duxbury & Dickinson (2007:702).
533 (Ibid.).

The importance of customary law in sustainable development is a concept which has, however, not been ignored.[534]

## 4. Customary inter- and intragenerational equity

The general concept of *intergenerational equity* is the issue of sustainability referring, within the environmental context, to fairness in the inter-temporal distribution of the endowment with natural assets or of the rights to their exploitation. This concept is known to be a more recent development although it must be accepted that the oldest examples of sustainable livelihoods are to be found among traditional communities and indigenous peoples. This is because considerable ecological knowledge and wisdom is held by traditional and other rural people, emphasising food self-sufficiency and local resource conservation.[535] The Topnaar, like other traditional communities around the world who survived on nature's bounty, traditionally saw themselves as part of the community of nature, realising that persistent violation of its ecological rules would inevitably reverberate and destroy their own culture.[536]

The Topnaar understood that the fishing resources were there not only for the present, but also for future generations. They were conscious of the young generation and valued children as future members of the Topnaar who would continue to bear the community's good name. Food sources were supposed to be exploited carefully so that future generations would benefit equally from them. Thus, a moral obligation was created between generations. This is a reflection of the precautionary principle, which was universally agreed on as a principle of international environmental law.[537]

The principles of inter- and intragenerational equity, as reflected in the customary rules of the Topnaar, appear to be a philosophical concept embedded in the customary laws observed and evolving over time. The main virtue of these principles lies in their ability to shape policy processes that promote legal and economic responses, irrespective of scientific uncertainty. When the *Gaob* of the Topnaar decided which fish should be caught and how much was allowed to be caught, this decision reflected the recognition of the welfare of generations to come.

534 Hinz (2003b:28–29).

535 See Altieri & Merrick (1987:98), Morin-Labatut & Akhtar (1992:24) and Richardson (2004).

536 Klee (1980:34ff).

537 Rio Declaration, 1992, as derived from Principles in the Stockholm Declaration, 1972.

The customary law of the Topnaar, even today, is inherently laden with principles of intergenerational equity, intertemporal effectiveness and the collective rationality of social decision-making. This shows that it is a generic truism that communities who have done their utmost to live in harmony with nature have evolved rules and practices based on knowledge accumulated over several hundreds of years.[538]

Contemporary legal systems at times disregard these customary practices. Madhav writes that, while healthy scepticism is warranted, the present-day approach of most legal systems is unduly critical, ensuing in widespread loss of community control over natural resources.[539] Given the accelerated changes in the global environment, all alternatives that help revive and restore sustainable management practices need to be given serious consideration where –[540]

> *(c)ustomary law is a legal instrument, while sustainability is a political norm that is increasingly being transformed into legal rules.*

The Topnaar were regarded as a people that were difficult to colonise. They tried at all costs to resist colonisation and to retaliate where they could.[541] When the settlers eventually took away the land, it meant that the Topnaar were no longer able to fish as they used to. They tried to continue fishing, but were soon overpowered by the settlers' superiority when it came to weaponry: as amply portrayed in successive battles over fishing rights. These rights were closely connected to the rights to the land that had already been taken away. It is a common feature of former African colonies that the imposition of the European land-tenure system was frequently met with resistance. This led, for example, to the evolution of 'family estates', which offered a compromise between individual and collective approaches to tenure.[542]

Most writers and researchers understand that the Topnaar were dispossessed of their land by colonial elements. Nevertheless, there is evidence that the genesis of this dispossession was the weakness of their Chief.[543] The records show that, in 1878, Chief Piet //Haibeb agreed to the British annexation of Walvis Bay. This surrender was not prompted by material greed, but by the insecurity that had arisen out of ethnic divisions that were rife in the territory. Botelle and Kowalski record that the Topnaar community experienced great political and social insecurity. They suffered not only from ill-treatment by whalers and other sailors, but also from attacks

538 Ørebech et al. (2005:82), as quoted by Madhav (2005).
539 Madhav (2005).
540 Ørebech et al. (2005:20), as quoted by Madhav (2005).
541 Vigne (2000).
542 Okoth-Ogendo (1976:174ff).
543 Botelle & Kowalski (1995:11).

by Nama, Herero and German forces. It is also recorded that intertribal conflict prevailed, and that other Namibian communities – the Bushmen/San, the Nama, the Damara and the Herero, as well as mixtures of these with Europeans – settled and mixed with the Topnaar.[544] Botelle and Kowalski refer to many writers during this period that observed poverty, alcoholism, prostitution, disease and famine as common occurrences within the Topnaar community:

> *It is not surprising that in 1878 the Topnaar's chief, Piet //Haibeb, in hopes of accruing greater protection and benefits, agreed to the British annexation of Walvis Bay, and by 1883 petitioned for the annexation of proclaimed Topnaar Land outside the Walvis Bay enclave.*

This is in stark contrast to what the Topnaar claim today, namely white colonists forcefully took their land away. Perhaps they did so deceptively. This surrender in return for security is what proves to be the initial cause of the problem involving the Topnaar quest for their lost indigenous lands. In fact, the agreement between Piet //Haibeb and the British was in writing; and in the agreement, as Botelle and Kowalski point out, //Haibeb described the demarcated boundaries of Topnaar land as follows:[545]

> *... the whole* !Kuiseb *area as far as the Gamsberg and from there to Onanis and Horobis on the Swakop and from there to Karibib and in a straight line from there to the sea.*

In fact, Piet //Haibeb sold other Topnaar land for 20 Pounds Sterling, conceding the coastline and 100–200 km of its adjoining land from 26° to 22° S, excluding Walvis Bay, which had already been ceded to the British.[546] This British annexation of Walvis Bay, which effectively was the annexation of Topnaar land, according to Botelle and Kowalski, did not buffer the Topnaar from the vagaries of modern politics and the onslaught of the modern economy during the course of the 1900s. Furthermore, in 1884, Germany proclaimed the area from south of Lüderitz to north of Cape Frio as a Protectorate. This enabled the Imperial Commissioners to purchase land and mineral rights from chiefs.[547]

Like the British had done in Walvis Bay, the Germans built the foundations of the current plight of the Topnaar (and the rest of Namibia in general) in their quest for the restitution of 'stolen' land. The first onslaught on the economic self-sufficiency of the people living in the German colony was to take away their land and stock,

544 Budack (1983:1).
545 National Archives of Namibia, 1885–1907; quoted by Botelle & Kowalski (1995:11).
546 Vigne (2000:1).
547 Botelle & Kowalski (1995:11); Henschel et al. (2004).

which were their principal means of livelihood. Between 1893 and the end of the Herero–German War in 1908, people lost their land and cattle to colonial settlers. This system of land theft was clearly spelt out by Paul Rohrbach, the German Commissioner for Settlement:[548]

> *The decision to colonise in Southern Africa means nothing else than the native tribes must withdraw from the lands on which they have pastured their cattle and so let the white man pasture his cattle on these selfsame lands.*

The colonisers used legal mechanisms to divide the land on the basis of the settler/native dichotomy. Since Walvis Bay was being administered from the Cape, some of the laws passed in South Africa applied to the enclave as well. This was done by the initial declaration of all annexed territory as Crown land. In order to declare areas inhabited by native groups in South West Africa, the Cape government passed a plethora of laws. In 1903, for example, the South African Administration enacted the Transvaal Crown Land Disposal Ordinance to achieve this goal in South Africa. After 1920, once South West Africa became a mandated territory under the League of Nations, the latter Ordinance applied to South West Africa as well by virtue of Crown Land Disposal Proclamation 13 of 1920. This extension was made possible in terms of section 4 (1) of the Treaty of Peace and South West Africa Mandate Act.[549] Section 12 of the said Proclamation declared that certain areas of Crown land could be reserved for the use and benefit of aboriginal natives.

Thus, the Topnaar customary law on traditional fishing was slowly but surely waning into the pages of history. However, Amoo submits, all was not lost:[550]

> *The declaration of the territory as crown land meant by necessary implication that the received law was to be used to determine property relations[,] but did not rule out completely the application of the relevant customary law in areas where the land was substantially occupied by tribal groups.*

Amoo adds say that one should also acknowledge section 4 (3) of the Treaty of Peace and South West Africa Mandate Act, which, in respect of land contained in any such reserve, authorised the Governor General to grant individual title to any person lawfully occupying and entitled to such land.[551] Hinz reflects on how colonialists played the game of annexing land and continuously eroding native ties to their land.[552]

548 As quoted by First (1963:106).
549 No. 49 of 1919.
550 Amoo (2000; 2001:88).
551 (Ibid.).
552 Hinz (2004a:51ff).

The annexation of Topnaar land, then, was the start of commercial or modern industrial fishing at Walvis Bay. It can also be submitted that this was the start of unsustainable fishing there. The Topnaar had to find another dwelling place which they could settle and use resources sustainably. Indeed, the Topnaar still know how to use the environment sustainably. As Richardson explains, whilst cultural, demographic and technological changes have considerably altered the relationship and impacts traditional communities have on their localities, many communities continue to use the environment in a relatively benign way that can provide lessons on approaches to sustainability.[553]

The annexation of Walvis Bay triggered a drastic change in the life of the Topnaar. It compromised the traditional fabric of the community and disrupted the very foundation of their existence. Traditional culture encompasses all human activities, including religion, philosophy, moral standards, laws, politics, the economy, society, history, literature, and art, such as have been preserved, learned and transmitted in a given community or group over a long period of time. As is found in other cultural traditions, the Topnaars had placed great value upon the harmonious coexistence of man and nature, and these values are still felt today.

The expropriation of the Topnaars' rights to fishing can be regarded as one of the hardest blows to their livelihood. Moreover, it was a direct insult to their ancestral spirits because the white settlers had taken away what the Topnaar had inherited from their ancestors. A few decades after the arrival of the settlers and the expropriation of the said fishing rights, the sycamore tree where the fishermen could meet and communicate with their ancestral spirits (in the ritual they call *≠harugu*[554]) and their Creator, who had guided them in the fishing practice, dried up. After that, it fell down. The tree symbolically died with the death of the practice of traditional fishing. The Topnaar interpret this to mean that their ancestors were unhappy with the way the fishing rights had been taken form the community. The drying up of the tree was seen as an expression of anger by their ancestors.[555]

By the end of the 19th century, observers reported that the Topnaar had been impoverished under the yoke of colonialism, and that they formed the base of the labour force used to load and unload boats that put into the bay.[556] The annexation

553 Richardson (2004).

554 This is the process whereby the elders of the community or family come together and communicate with their ancestors. Through a form of poetic recitation, they ask the ancestral spirits to do certain things for the community, or they inform and update the spirits about community developments.

555 Field notes 1, 4 and 5, respectively.

556 Dentlinger (1983:21).

of their land and the sea as their fishing grounds had eventually sapped the strength of their society and relegated them to the social and political margins. These were the effects of colonialism: on the one hand, productive relations between the native and colonialist were created, while on the other, colonialism led to violence and the destruction of indigenous cultures and populations. This was because wage-based, capitalist-driven settlements did not interact peacefully with pre-contact political economies.

The Germans declared the Namib Game Reserve in 1907. It was extended to become the Namib-Naukluft Game Park in 1975, under the South African Mandate.[557] The Department of Nature Conservation of the then South West Africa put in place park regulations – some of which were in direct conflict with the traditional land use practices of the Topnaar. An example of this was game hunting and the trapping of predators, which were prohibited by the South West African Administration. The park rule effectively prevented the Topnaar from practising their custom of seasonal hunting. The new regulations also prohibited well-established practices of environmental management, such as burning the dry parts of bushes. Furthermore, the regulations did not recognise the right of the Topnaar to live in the area of the park. In 1992, a socio-ecological report pointed out that –[558]

> *the most important issue for the Topnaar people is the need for government recognition of their rights on the land they occupy.*

The Namib-Naukluft Park is the largest nature reserve created in Africa to preserve the very special species found in it. However, the ecological philosophy behind the proclamation of the area as a national park did not find favour with the Topnaar. This is because philosophies of this nature have been viewed to be part of what can be termed 'environmental racism'. For the Topnaar, governments have often been too much of a threat when they have implemented policies affecting the Topnaar's sources of survival and their cultural orientation. Studies among the Topnaar all reach the same general conclusion: the Topnaar increasingly adopted a sedentary lifestyle because of park regulations restricting their movement and development.[559] In the words of Henschel et al., –[560]

> *[t]he continuous cyclical wanderings of the Khoi herders were reduced to an annual migration between semi-permanent settlements, and the crop. In the late 1970s, the government began sinking boreholes along the river, which contributed to the*

557 Botelle & Kowalski (1995:12).
558 Henschel et al. (2004).
559 (Ibid.).
560 (Ibid.).

> *establishment of permanent settlements in proximity to the water points. This was a response to the lowering of the water table caused by overuse of the aquifer, which is said to have also contributed to the decrease of* !nara *productivity.*

The Topnaar have now settled in the *!Kuiseb* catchment area, and specifically along the *!Kuiseb* River itself.

Keulder submits that, during the apartheid era, the Topnaar were perhaps the most isolated and marginalised of all the Nama-speaking communities.[561] The author notes that the Topnaar are not only few in number: their economic well-being is also extremely precarious. Much of this delicate situation stems from the natural environment within which they have lived and resided – a problem that is compounded by the fact that their ancestral land now forms part of a national park. Botelle and Kowalski summarise the position of the Topnaar as follows: [562]

> *In terms of environmental changes, therefore, the Topnaar have been subjected to more than a century of colonial exploitation and environmental degradation. Many of the Park regulations still in place today are in direct conflict with their traditional land use practices, and many of the natural resources which they were dependent on for centuries have been set aside for a Namibian settler population, most of whom live outside the lower* !Kuiseb *River valley. As a result, the Topnaar are a people increasingly alienated from their environment and from a system of land tenure which, in the past, met their basic, day-to-day needs.*

Although it is laudable in principle, the park conservation policy and park legislation – coupled with colonialism, which took away their fishing rights – punish the Topnaar for using protected areas. In this light, local people suffered economic hardships as a result of the country's conservation policies, mainly through denying them access to natural resources and wildlife. Most conservation policies and laws in developing countries pursued a similar preservationist conservation policy until the 1970s.[563] Such centralised regulatory control, which led to the disenfranchisement of rural people whose livelihood strategies were largely nature-based, caused traditional communities to resent state conservation officials.[564]

According to *Gaob* Kooitjie, the Nama are known for *!nara*[565] harvesting. However, he also maintains that the Topnaar or *hurinin*, the "people of the sea", were originally

561 (Ibid.).
562 Botelle & Kowalski (1995:39).
563 Büscher & Dietz (2005:3ff).
564 Colchester (1993:158ff).
565 This plant has many traditional uses for the Topnaar in the *!Kuiseb*.

not *!nara* harvesters. *!Nara* harvesting was never a major social economic activity until the fishing rights were taken away from the Topnaar by the settlers.[566]

Budack states that, although dependency on the *!nara* has decreased under the influence of modernity, some individuals and even whole families spend from November to April in the *!Kuiseb* Delta harvesting the plant for their own supply and for the sale of the pips.[567] Budack also found that –[568]

> *... virtually all Topnaar families have abandoned the seasonal practice of moving to the delta to harvest the* !nara.

A new pattern has emerged more recently, according to which individuals, mostly men, travel to the delta for some weeks during each season to harvest *!nara*. Today, it is estimated that at least 19% of the *!Kuiseb* Topnaar are professional harvesters, to whom *!nara* harvesting is of great economic significance, bringing in over a quarter of their household income. Nearly all members of the rural population continue to harvest *!nara* occasionally, either for food or additional cash. Most of these people still consider *!nara* to be important. The *!nara* is an alternative for the survival of the Topnaar, which they chose after they lost their fishing rights. This was out of necessity, but today the fruit is being commercialised, and various scientific experiments have been done which include the extraction of oil from *!nara* seeds.[569]

Under the Odendaal Plan on land use and allocation imposed on South West Africa by the South African Government, the administrators wanted to remove the Topnaar from the park where they lived and send them to Gibeon. They vowed not to go because it lacked *!nara*.[570] They also vowed that, unless the *!nara* could grow in Gibeon or the government succeeded in planting it there, they would not leave the park. Needless to say, the plant was unable to grow in Gibeon and the Topnaar remain in the park to this day. This shows how culturally attached to the Topnaar the *!nara* plant is.

*Gaob* Kooitjie lives in Homeb, at the last settlement along the *!Kuiseb* River at the foot of the mountain. Although the *!nara* does not grow naturally there, he planted some at his homestead. When asked why he had done so, he responded that –

> *[i]f there is no* !nara *plant at my homestead, I am not a Topnaar.*

566 Field note 1.
567 Botelle & Kowalski (1995:39); Budack (1983).
568 Budack (1983).
569 Field notes 2 and 4.
570 Botelle & Kowalski (1995:12).

This showed the author of the study that the *!nara* has more than just economic significance. Keulder submits that, against a trend of decreasing access to various natural resources by the Topnaar community, access to *!nara* has been continuous – showing its superiority to all the drastic changes that have occurred during the history of the Topnaar.[571] The *!nara* is not only economically important: it also has cultural value, contributing to the self-identification of the Topnaar community. The *!nara* is still central to the daily lives of the *!Kuiseb* Topnaar, as it has been for at least two centuries.[572]

How can dilemmas of this nature be solved in a democratic country which, on the one hand, accepts its international and national obligations to protect natural resources and biodiversity as confirmed in Article 95 of the Constitution, and, on the other, to protect the right to culture, as set out in Article 19 of the Constitution?

## 5. Conclusion

During the course of the field research, *Gaob* Kooitjie repeatedly stated the following:[573]

> *Let them pass all the laws on communal land: they will not apply to me. The Communal Land Reform Act does not touch me and my people; we are different – we live in a Park.*

This is a clear rejection of the one-sided policy of conservation which government officials in Namibia are following. The dominant conservation policy aims at managing natural resources, and seeks to preserve natural resources such as forests and wildlife through the coercive exclusion of rural communities that traditionally depend on these resources for their livelihoods.[574] Faasen and Watts submit that this conservation policy was dominant throughout the 20th century, and that it entailed the exclusion of humans from protected areas.[575] Such exclusion included denying rural communities access rights that they had previously enjoyed in the areas now designated as conservation reserves.[576] Under such a policy framework, laws are enforced to keep local people out of, or prevent their effects on, protected areas. Such conservation policies are largely biocentric, seeking to conserve nature for

571 Keulder (1997:16).
572 Field notes 1 and 4.
573 (Ibid.).
574 Brockington (2002).
575 Faasen & Watts (2007).
576 Hutton et al. (2005:341–370).

nature's sake. It differs from the community conservation ethos, which emphasises biodiversity conservation for utilitarian and anthropocentric purposes.[577]

Recently, the Namibian Government started recognising the right of the Topnaar Traditional Authority to allocate land to the Topnaar in the Namib-Naukluft Park. This, however, could only happen after many meetings with government officials where the Chief of the Topnaar was forced to explain the legally difficult situation in the Park, and where he submitted that any act which attempted to void his powers under customary law was illegal. He also said this did not mean that the Topnaar would not be prepared to respect regulations regarding the conservation of certain species of trees.

For the Topnaar, there is no need to go to a university and obtain a degree in order to know how to use the environment sustainably; they believe all one needs is natural acumen – as they have had for centuries. This argument is valid as far as life in the past was concerned, but nowadays it will no longer hold water. The force of commerce and technological development increasingly drives all industry in a more profit-oriented direction. Modern economies will not function on natural acumen alone: what once worked in a small, localised environment will not work in the global village that we live in today.

Customary law has to come to our aid in this context. On the one side, customary law is closely linked to traditional knowledge and traditional natural resource management, and facilitates the latter. It is undeniable that the Topnaar possess their own local system of jurisprudence regarding the management of natural resources since the days where they fished for their livelihoods. Conversely, the law of traditional communities is built on the experience of that community, and is accordingly altered to meet new circumstances as they arise. Changes in customary law occur mainly for two reasons: either though impositions from outside the community, or through the challenges of developmental needs from within it.[578] This research has shown the remarkable manner in which the customary law of the Topnaar responded: in both cases of stress, the law showed flexibility and adaptability.

This takes us back to the issue of the Topnaar still seeing themselves as the owners of the land that they occupy today. This view of the land is delicate when set against the background of national governance. The emphasis of the Topnaar community on self-governing strategies results from the lack of success of the public control

577 Cf. Brockington (2002) supra; Neumann (1998); and Jones & Murphree (2004:63–104). Similar approaches were attempted in a bid to establish as many conservancies as possible under the Nature Conservation Amendment Act; cf. Hinz (2003b:91–93).

578 (Ibid.).

and command systems.[579] Under self-government strategies and customary regimes, even the poorest of the poor have a voice. Juxtaposed with the popular economic theory promoting private property regimes, the concerns of equity and democracy become weightier in a developing world context. The Topnaar are sceptical about the attitude of the Namibian Government towards their welfare.[580] So their battle continues.

579 Madhav (2005:1).
580 Field note 1.

# Part VI:

# Trees

# The protection of trees: A case study of Otjombinde

*Vetu Uanivi*

## 1. Introduction

While the number of animals and people in the Otjombinde settlement has increased dramatically over the past few years, the size of the land, of course, has not. The increase in the population and livestock has a direct impact on the environment: more trees will be cut down for building traditional houses, fuel wood, fencing, etc. The manner in which rural communities deal with this resource poses a threat to its sustainability.

This study explores the customary laws in place to protect the environment, and enquires whether such laws are adequate in respect of dealing with Namibia's obligations to protect biodiversity. The study also examines what statutory law is in place to manage natural resources effectively.

Namibia is a semi-arid country, where the vast majority of people live in an estimated number of 120,000 rural households in communal areas, which cover 43% of the country's total land surface area.[581] Namibia has a highly skewed distribution of land due to its colonial past.[582]

When Namibia gained its independence in 1990, the new government realised that it had to enact laws that would give formal recognition to traditional communities and their administrations.[583] This was an attempt to bring the administration of communal land into the national mainstream.

This study focuses on the Otjombinde communal area, which is a small settlement in the Omaheke Region. The community that lives in Otjombinde falls under the *Ovambanderu* Traditional Authority.[584]

581 Humutenga, in Hinz & Malan (1996:6).
582 Jones (2002:2).
583 Section 3 (3) (c), Traditional Authorities Act, No. 25 of 2000.
584 Government Gazette No. 65 of 1998.

Omaheke lies to the east of Namibia, bordering Botswana, approximately 200 km from Gobabis. The word *omaheke* means "sandy veld" in *Otjiherero*. Gobabis is the main business hub in the Region, and is linked to the capital, Windhoek, by rail and tarred roads.

About 900 commercial and 3,500 communal farmers exist in the Omaheke Region. Most of them farm cattle. There are four resettlement areas or communal areas around Gobabis, namely Aminuis, Epukiro, Otjinene, and Otjombinde.

Before Otjombinde became communal land, it constituted a number of farms that belonged to whites. In 1968, the area was declared a resettlement area for *Otjiherero*-speaking people. The farms were demarcated into plots for the purpose of resettlement. The name *Otjombinde* comes from a plant that grows in the area. Otjombinde consists of some 100 villages, of which Talismanus is the largest. Talismanus has a junior secondary school, a clinic, and a number of shops.

For the purpose of this study, interviews, group discussions and consultations were conducted in Otjombinde in July 2007. The interviewees included farmers, community leaders, and stakeholders from various government Ministries. It was unfortunately not possible to interview the now late *Ombara Onene*[585] Munjuku II Nguvauva of the *Ovambanderu* Traditional Authority because *Ombara* was very ill at the time.[586] Nevertheless, an interview was conducted with a traditional councillor. Overall 22 interviews were held. They were all conducted in *Otjiherero*, and then transcribed into English.

In terms of age, the farmers interviewed ranged from their twenties and early thirties, i.e. young farmers, to those in their late thirties and older, i.e. the older farmers. This differentiation was essential as it showed the level of knowledge of customary law associated with the use of natural resources in the area. Younger farmers did not know much about these laws, while most older farmers demonstrated a sound knowledge of them.

## 2. Trees under threat

The Forest Act[587] is the main statutory enactment relevant to this study. The objectives of the Act are to ensure forest products are used and managed in a sustainable

585 *Ombara Onene* is the title for the supreme leader of *Otjiherero*-speaking communities and can be translated as "king".

586 *Ombara Onene* Nguvauva passed away on Wednesday, 16 January 2008.

587 No. 12 of 2001.

manner, that the forest environment is protected, and that forest fires are controlled. Most of the provisions of the Act are aimed at what are called *classified forests*. The Act establishes four types of classified forests: state forest reserves[588], regional forest reserves[589], community forests,[590] and forest management areas.[591] The Act requires management plans for all the classified forest types, which need to detail the management objectives and management measures relating to them.

Although many of the interviewees had no knowledge of the Forest Act, there are also problems associated with the application of the Act with respect to communal areas that are not under the regime of communal forests. The gap in the Act when it comes to forest-related customary law is another issue that needs further research. This study, however, addresses only those aspects of customary law that appear to close the gap left by the statutory law and its incomplete implementation.[592]

As stated earlier, Otjombinde is communal land administered in accordance with customary law. The latter regulates the allocation, management and use of the land. Livestock farming is the most common economic activity on the land in question, as supported by some of the interviewees: [593]

> ***[Interviewee 1]*** *There is no other type of farming found in this area. People here only farm livestock, nothing else but livestock.*
>
> ***[Interviewee 2]*** *Livestock is all we know. It has always been part of our lives. Livestock is our means of survival, and it has dressed me, schooled me, and fed me. Livestock is all I trust.*
>
> ***[Interviewee 3]*** *Cattle are our tradition. Without them there is no life; they also rate your standing in society. Cattle have made us able to pay for our children's education and food. Anyway, the area as you can see is not good for other types of farming such as planting cabbage or mahangu or maize meal as there is no water. We also keep donkeys, horses, goats and sheep.*
>
> ***[Interviewee 4]*** *There are approximately 16 households in this community. The village has grown fast. I remember there were only 5 households ..., but now more people*

588 Section 13, Forest Act.
589 Section 14, Forest Act.
590 Section 15, Forest Act.
591 Section 16, Forest Act.
592 Cf. the papers herein by Kaundu and Muhongo, which touch on the same unclear interface between the Forest Act and customary law.
593 Field notes 14, 15 and 9, respectively.

> *have moved in. ... [P]eople moving out of their parents' houses are starting their own households with their own cattle. The land is just not enough. The space is too small to accommodate all of us, but what can we do?*

The interviewees in Otjombinde were also asked what source of energy they used. In the De Hoek community of Otjombinde area, a group of seven women responded as follows: [594]

> ***[Interviewee 1]*** *Electricity only came to our area and neighbouring areas two years ago. Before that, we used to go and fetch wood in the bush. We used the wood for making fire to cook.*

> ***[Interviewee 2]*** *We used wood for many years before getting electricity, and we still use it now, but less often. We have to make fire at our homes. We are* Ovaherero *and there must always be fire at our homes. It is a part of our tradition. A fire has to be lit daily. As we have electricity we only use wood to light the fire outside the home; we use electricity for cooking and other things.*

> ***[Interviewee 3]*** *We use trees to fence our camps and yards to keep in our cattle since we are cattle breeders. It is important to have a camp, as this prevents the cattle from wandering off too far ...*

> ***[Interviewee 4]*** *We also use wood to make weapons to sell in Talismanus to earn some money from visitors. We also need wood for cooking at social events such as weddings and funerals.*

In Talismanus, which people considered as the capital of Otjombinde, the interviewees were asked what they used trees for. One respondent had the following to say:[595]

> *Here, in Talismanus, we don't really need wood as we have electricity. Nevertheless, some houses do not have electricity and they need wood for cooking and to make hot water.*

In view of these statements, a number of interviewees were asked about the existence of rules for the protection of trees. People in different areas of Otjombinde were observed to respond differently. One respondent from the village of St Peter held the following opinion: [596]

---

594 Field notes 8, 10, 17 and 18, respectively.
595 Field note 1.
596 Field note 20.

> *We do not protect our trees as such. We cut and take what we need to cook for the month or the week. We cut trees for fixing buildings. We have not really looked at whether the trees are depleted; what we worry about is grass because it is important for our cattle. Grass is the one we try and preserve. Trees are there to provide shade; we don't really care about trees. When goats eat leaves from the trees, they will not deplete all the trees in the area.*

This was contradicted by another elderly interviewee in the village: [597]

> *Trees are very important in our community as they provide us with firewood, food and other useful things. The trees we normally use for firewood are dead. The problem we have is that we have to walk far distances to look for these dead trees.*

The trend of different views being held on the preservation of trees continued from village to village, especially since some villages had electricity, while others did not; also, some villages had more inhabitants than others. A villager in Olistera, for example, said the following in regard to protecting trees: [598]

> *Trees are very important in this village and we do apply traditional rules to preserve them because trees provide us with food and shelter. One of the rules is that a person may only take what is necessary for his or her essential needs. This is to ensure that there will be enough wood for all of us in the village.*

As to what customary laws existed to protect trees, the same respondent replied: [599]

> *As far as I know, there are many rules on the cutting of trees, but I only know a few of them. Certain trees are not allowed to be cut at all because cutting would bring bad luck to our families.*

An elderly village leader added the following:

> *There are indeed rules that prevent us from cutting down certain trees. Young people, however, don't know these things because they don't know our culture – being more interested in city life. The trees you are not supposed to cut are the* omunguindi[600] *and the* omutjete.[601] *If you cut those trees, this would, for example, affect the growth of your cattle. Therefore, the cutting of these trees is forbidden. It is also forbidden to cut down*

597 Field note 19.
598 Field note 5.
599 Field note 5.
600 *Boscia albitrunca*.
601 *Dichrostachys cinerea*.

> *trees in the field in such a way that it will leave the forest naked. The forest is not for one person, but for all of us. Damage to the forest has always been forbidden as the forest provides food for our livestock. Another reason for preventing the cutting of certain trees is that they hold medicinal properties. These trees may not be burnt because they release a terrible smell, which also brings bad luck and negatively affects your cattle. The only trees that you may cut down are the* omusaone[602] *and the* omumbonde.[603] *The rule, however, is that you cut these trees only when they are dead and dry. You are not permitted to cut living trees unless it is for fencing. Building a fence is allowed in order to protect the cattle.*[604]

A man who was with the latter respondent had this to say: [605]

> *We should not forget that our ancestors have always told us that we should guard and not waste our natural resources. [This is] in order to preserve them for the use of our children. This is what the white people are doing, but it is also part of our culture. I have been in this area for many years and I have seen how the area has changed. When I grew up here, most of this area consisted of open fields with few trees. As far as you could see then, there was just grass. Now this place has changed: there are trees, lots of sand, and very little grass. If you now were to cut the trees, no grass would remain at all. This is why we need to protect the environment and not waste its resources. We cannot tolerate behaviour that depletes the forest, because we need trees for shelter, fencing, cooking and lighting of the Holy Fire*[606].

In Talismanus, a teacher confirmed the existence and application of customary laws with respect to the protection of trees:[607]

> *In Talismanus, customary law is applied. We see customary law practised every day. One of the rules is about the quantity of wood you are allowed to cut. There are villagers coming in every day with donkey carts to sell wood and most of them are fined and their wood confiscated as they cut more than is allowed. I don't know the exact quantity of wood you can cut, but it is certainly not acceptable under law if one person comes with two donkey carts full of wood on one day.*

As to how effective customary law was in Otjombinde, these were some of the responses:[608]

602 *Acacia mellifera*.
603 *Acacia erioloba*.
604 Field note 6.
605 Field note 7.
606 *Okuruuo* is the place where the *Holy Fire* burns and which is visited for contacting the ancestors and to worship.
607 Field note 2.
608 Field notes 11, 12 and 13.

> ***[Interviewee 1]*** *Our laws are enforced and we make sure that they are obeyed and practised. This is what we do when someone cuts too many trees in the village: we tell the culprit not to repeat what he/she has done. Should they repeat [the offence], they will be reported to Talismanus and punished so that others can learn from them and understand that such rules exist.*
>
> ***[Interviewee 2]*** *I think our laws are good because they give the person who has done something wrong a chance not to repeat the mistake. The perpetrator also gets a chance to explain him-/herself and apologise to the community for what he/she has done. In the end, most disputes are solved peacefully.*
>
> ***[Interviewee 3]*** *By means of* ombiri*, we try to resolve the problem peacefully, in a respectful manner. When the wrongdoer feels that he/she had not been treated fairly and has been wrongly accused by fellow villagers, we call on a traditional councillor. In such a case a special meeting is arranged to which the traditional councillor is invited to try to help resolve the differences. Should the traditional councillor be unable to resolve the problem, the matter is send to Talismanus, to the traditional authority headquarters.*[609]

The interview with the traditional councillor confirmed this:[610]

> *Before we hear any matter, the community tries to resolve the matter on its own. Only if the community fails does it call upon the traditional councillor. If the traditional councillor cannot come up with a solution, the matter is transferred to the chief for a further hearing.*

The author of this study was informed that cases of illegal cutting of trees, although rare, do arise from time to time. The majority of disputes, however, are about stolen cattle. The cases involving the illegal cutting down of trees mostly involve people who violate the rule on the quantity of trees that are allowed to be cut. Cases of this nature are referred to the traditional authority, which fines the wrongdoer. The traditional authority applies customary law and not statutory law on nature conservation. The *Ovambanderu* traditional councillor agreed:[611]

> *We only apply our own laws. If the people are unhappy with this, they can go to the white man's courts, where the laws of the state apply. In our hearings, we apply the rules of tradition and what our ancestors used to apply. We look at the circumstances and make use of our knowledge, experience and reason.*

609 That is, as an appeal to the *otjombanhuriro tjo mbazu*, which is the Chief's court. Cf. field note 23.

610 Field note 23.

611 (Ibid.).

## 3. Conclusion

It is evident through the findings of this study that the use of trees in Otjombinde is of great importance to the people. Although electricity has arrived in many places, trees are still cut down in Otjombinde for various reasons. Not all individuals in Otjombinde are aware of the laws for the protection of natural resources and the environment. Traditional authorities play an important role not only in adjudicating cases of violations of customary law that protects natural resources and the environment, but also in making such laws.

Unfortunately, the customary law in Otjombinde differs from village to village. Most of the young people do not know or understand their customary laws, although these laws have existed for many years and have been passed down from generation to generation. Awareness campaigns could help to create a better understanding of customary law and its purpose to protect the environment.

It is further recommended that government provide all communities with sources of energy, as this would reduce the need to cut down trees for firewood, and contribute to their protection.

# Kiaat trees for wood-carving: A Kavango case study

*Ainna Vilengi Kaundu*

## 1. Introduction

Wood is used industrially and in households for carving beams and columns; making doors and musical instruments; fashioning tools such as hoes, axe handles, pestles and mortars, cooking sticks, plates, bowls, bows and arrows, drums, knobkerries, walking sticks, ox harnesses, and ox-carts.[612] Notably, wooden carvings are an important income-earner.

Southern Africa has a variety of species that are exploited in the wood industry. These include zebra wood,[613] tamboti,[614] pod mahogany,[615] snake-bean,[616] and kiaat.[617] Kiaat is the most important tree species used for carving.[618] Apart from Namibia, it is found and processed in Botswana, Zambia and Zimbabwe. Although kiaat is fairly light in weight, it is one of the most favoured woods for making furniture and sculptures. It also ranks highly as one of the finest furniture woods in the world. Kiaat is also suitable for boat-building.

Making wood carvings is an important local industry, generating income and promoting tourism. It is a male profession. Rural men from the Kavango Region engage in wood-carving for economic purposes. For this reason, the popularity of kiaat has increased immensely, and the wood-carving industry has rapidly developed as a source of income for many rural people.[619] In the Kavango Region, wood-carvers earn a substantial income with their profession.[620] Indeed, many people depend on wood-carving for a living, as one wood-carver testified:[621]

612 Matose et al. (2006:2).
613 *Dalbergia melanoxylon*.
614 *Spirostachys africana*.
615 *Afzelia quanzensis*.
616 *Swartzia madagascariensis*.
617 *Pterocarpus angolensis.*
618 The *Rukwangali* name for kiaat is *muguva*.
619 Terry et al. (1994:4).
620 (Ibid.) and field note 10.
621 Field note 2.

> *Some of us do not even have Grade 10 and we depend only on wood-carving ... Wood-carving is the only source of income that allows me to send my children to school and to take care of the family.*

The popularity of kiaat has led to its overexploitation: a situation that requires special attention to avoid the extinction of this valuable tree.[622] As a component of Namibian biodiversity, the kiaat is entitled to protection against increasing over-utilisation.

Kiaat trees, being forest resources and elements of biodiversity, enjoy protection under both the customary law and the Forest Act.[623] The need and effort to conserve this tree is manifested in the Forest Act by the introduction of licences and the payment of a royalty where these trees are harvested.[624] This arrangement regulates and controls the harvesting of kiaat, and offers better protection and conservation of these trees.

The Development Forestry Policy[625] aims to reconcile rural development with biodiversity conservation by empowering farmers and local communities to manage forest resources on a sustainable basis. The Policy notes under this aim that the problem with biodiversity conservation is particularly acute in poverty-stricken rural areas. Fragile ecosystems are being degraded due to the absence of woodland protection and management strategies. The situation is exacerbated by a lack of coordination as regards policies intending to promote rural development, as well as poor appreciation of the economic value of forest resources and biodiversity conservation. Maintenance of biological diversity, therefore, requires economic incentives to increase the net local benefits from conservation and sustainable forest resource use.

Section 10 of the Forest Act provides that the forest resources of Namibia are to be managed and developed in order not only to conserve soil and water resources, but also to maintain biological diversity; and provide further that forest produce should be used in a way that is compatible with the forest's primary role as protector and enhancer of the natural environment. On this note, in 2001, the Department of Forestry drafted the Development Forestry Policy. Its objective was to practise and promote the sustainable and participatory management of forest resources and other woody vegetation, in order to enhance socio-economic development as well as environmental stability.

622 The Traditional Authorities and the Directorate of Forestry have more recently attempted to suspend the harvesting of kiaat in the Kavango Region.

623 No. 12 of 2001.

624 Sections 33 (3) and (4).

625 Republic of Namibia (2001d).

In addition to the national policy and statute that aim to protect natural resources and the environment, traditional authorities also serve as custodians of the environment as recognised holders of traditional knowledge. They play an important role in supervising and ensuring the observance of customary law by their members, and in promoting, protecting, and preserving traditional community culture and customs.[626]

The interface between the laws of the state and customary law has to be borne in mind when analysing a special area of the environment and related natural resources.[627] The task of this study is to explore customary law regulating the harvesting of trees, and examine how this is implemented. The self-stated Laws of *Ukwangali* – the area in which the research was conducted – are silent on environmental issues. The laws of other traditional communities in the Kavango Region, however, contain provisions on matters relevant to this study. They are referred to here, as the laws of the five Kavango communities[628] are very similar (if not identical).[629] The fact that some of the self-stated laws in Kavango explicitly deal with nature conservation and the need to protect natural resources does not mean that those communities that have no written law on those matters have no respective law at all. It can be rather assumed that law relevant in this respect is unwritten. It will therefore be helpful to quote also from self-stated laws of other Kavango communities. The Laws of the *Mbunza* contain two articles which deal with matters relevant to this study. Article 3 of the *Mbunza* laws reads as follows:

> *The Mbunza Traditional Authority encourages its residents to use its natural resources in a good and sustainable manner.*

Article 4 states the following:

> *The Mbunza Traditional Authority has the responsibility to conserve all natural resources in the river and on the land.*

Section 5 of the Laws of *Mbukushu* stipulates the following:

> *Anyone who is found guilty causing veld fires, he/she shall pay five (5) head of cattle to the Tribal Authority.*

626 Section 3 (1) (c).

627 Glazewski et al. (1998:281ff).

628 The five communities are (from west to east): *Ukwangali*, *Mbunza*, *Sambyu*, *Gciriku* and *Mbukushu*.

629 Proof of this is that all five communities of the Kavango Region are currently involved in compiling their laws into one document.

Section 9 makes the following provision:

> *Anyone who cuts or destroys protected and prohibited trees, by law, shall pay five (5) head of cattle to the Tribal Authority.*

The questions to be addressed by the study will be whether and, if so, to what extent the customary law of *Ukwangali* protects trees and in particular the kiaat tree. The research also investigates what effect existing statutory law has, and how this is perceived by community members.

Interviews were conducted in Katji-na-katji, a village in the *Ukwangali* area and in Rundu. The area around Katji-na-katji is an unclassified forest area in terms of the Forest Act. The fieldwork was done in two phases, namely from 2 to 6 May and from 27 to 30 June 2005. Senior traditional leaders at village level, other community stakeholders, and some young men were interviewed. Most of the interviewees were wood-carvers.

## 2. When the last tree has fallen

The first written regulation for woodland management goes back to the late 19th century. During the German colonial period (1884–1915), forest advisors such as the government botanist Kurt Dinter developed management policies to support the increasing demand for timber and other wood products.[630] A research station was started near Windhoek in 1900. The early German foresters attempted to establish alien plantations to meet the demand for timber. However, even then, unsustainable timber exploitation in natural forests occurred in what are today known as the Caprivi, Kavango and Otjozondjupa Regions.[631]

When South Africa took over the administration of Namibia in 1915, forest legislations enacted by the Germans were widely replaced.[632] Trees were controlled under two separate laws, the Forest Act[633] and the Preservation of Trees and Forest Ordinance.[634]

630 Erkkila & Siiskonen (1992:8ff).
631 (Ibid.).
632 Mubita (1995:40ff).
633 No. 72 of 1968.
634 No. 37 of 1952. Before the promulgation of the Forest Act, the Preservation of Trees and Forest Ordinance was applied. The 2001 Act repealed the Ordinance.

After Namibia's Independence in 1990, despite the clear obligation to protect the environment and natural resources as stipulated in the Constitution as well as international obligations, it took 12 years to produce the 2001 Forest Act. This new piece of legislation was enacted in order to provide for the establishment of a Forestry Council and the appointment of certain officials, as well as environmental protection. The Act also provides that the purpose for which forest resources are managed and developed – including the planting of trees, where necessary – is to conserve soil and water resources, maintain biological diversity, and use forest produce in a way which is compatible with the forest's primary role as protector and enhancer of the natural environment.[635]

Section 23 (1) of the Forest Act stipulates that, unless the Director of Forestry so approves, no person is permitted to clear the vegetation on more than 15 ha on any piece of land or several pieces of land situated in the same locality that has predominantly woody vegetation. Neither is any person permitted to cut or remove more than 500 $m^3$ of forest produce from any piece of land in a period of one year. Furthermore, section 33 (1) provides for the following:

> *... subject to the Customary Law applicable in a relevant communal land, the inhabitant of communal land may, on communal land which is not legally occupied by any person and which is not a classified forest, cut, take and remove forest produce for use as a household fuel, or for the construction of structures used to protect his or her agricultural crops.*

Section 33 (2) stipulates that no person is allowed to harvest forest produce from land that is not classified as forest, unless harvesting is done in accordance with a licence issued under subsection (4) of the Act, or under the circumstances referred to in subsection (1) or section 24 (3) thereof.

Section 33 (3) sets out the procedure and qualifications for harvesting forest produce under circumstances others than those referred to in subsection (1) of the Act. Section 33 (3) also requires any person who wishes to harvest from communal land neither legally occupied by any person nor classified as a forest, or from state land which is not a classified forest, to apply for a licence in a prescribed form and manner to a licensing officer designated or appointed for the area. Wood-carvers are not excluded from this subsection.

Section 33 (4) lays down that a licence may be issued to an applicant who has duly submitted an application, on condition that he/she pays a royalty prescribed by the Minister. A further condition is prescribed by section 33 (5), which stipulates that the

635 Section 10 (1).

licensing officer is obliged to obtain the consent of the Chief or traditional authority authorised by law to grant rights over communal land. This confirms the authority that traditional leaders hold over communal land.

A wood-carver from Katji-na-katji described the procedure for harvesting as follows: [636]

> *First, one obtains a permit from the traditional leader. After this, one would go to the Directorate of Forestry offices, where one pays N$80 for one tree. The permit states what tree one is permitted to harvest. If you get a permit to cut* muguva[637]*, then you can only harvest that, nothing else. On the form, you are required to state which tree you want to cut and this is the very same you are going to harvest.*

The Licensing Officer at the Directorate of Forestry in Rundu gave the following explanation: [638]

> *We are responsible for issuing permits. There are three types: harvesting permits, transporting permits, and marketing permits. We only give permits for dead trees, and issue no more than 10 permits for a maximum of 50 trees per month. This does not apply to community forest areas, because these have their own management plan. On communal land, the Government is in control. After having issued a permit we go and inspect the area to see if the correct trees and the correct number of trees were cut. But the majority of people do not harvest according to the permit. Instead of cutting dead trees, they cut living trees. The harvesting permit is valid for one month. After harvesting, we expect the permit holders to come back to our office and apply for transport permits. A transport permit is needed in order to move the trees from where they were harvested to where they are going to be processed.*

Harvesting without a licence or harvesting in a way not covered by the licence is an offence in terms of the Act. According to section 45 (1) (a), a person contravening section 33 (2) commits an offence and may be sentenced to a fine not exceeding N$8,000, or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment. Where a Forest Officer has reasonable grounds to believe that there has been a contravention of the Forest Act or that such contravention will occur, according to section 34 (1), he/she may, in writing, order the suspension of a licence and require the licence holder to take the necessary measures to remedy or prevent the contravention. Confiscation of the wood is the normal practice where a person has contravened the law. The Licensing Officer explained:[639]

636 Field note 1.
637 See supra.
638 Field note 5.
639 (Ibid.).

> *Normally, when we get a person harvesting, transporting or selling without a permit, we confiscate the wood. That depends on the quantity of wood involved. If the wood is a lot, amounting to one or two metric tons, we would impose a fine of N$300. If the person refuses to pay, he/she has to appear in court. The products will be confiscated.*

Wood-carvers are not impressed by the legislation, pointing at the fees involved and the transport expenses as hindrances to their progress in wood-carving.[640] In this regard, several wood-carvers suggested that the permits should rather be made available by traditional leaders to avoid the unnecessary travelling expenses.[641]

When asked whether the distance to be travelled to apply for a permit would not serve as an impediment to those who cannot afford travelling costs, the Licensing Officer answered: [642]

> *For someone to travel 300 km just to get a N$15 permit is not reasonable. In our Directorate, there is a plan to put some substations in areas like Nkurenkuru, Divundu, and so on. But at this moment, there is nothing we can do: the programme has already been introduced and to change it is very difficult. We know how difficult it is; that is why we are encouraging them to establish community forests. With that they will not need to come to Rundu just for the permit.*

As demand in kiaat increased, traditional leaders realised the tree's importance and added it to the list of protected trees. In days gone by, according to oral tradition, any person could cut down a tree and carve it without prior legal arrangement.[643] No fee needed to be paid: there was only the practice that young trees were not allowed to be harvested. This was to ensure that trees continued to exist. For the protection of trees, there was the practice that only the inhabitants of a specific community could harvest trees in their area.[644]

Traditionally, only valuable trees were specifically protected. Trees were generally classified as valuable if they produced fruit. Fruit trees were not allowed to be cut down unless permission had been granted by the traditional authority.[645] The purpose of this law was to preserve fruit trees, since many families depended on them. The kiaat was traditionally not part of this protected group: there was no value attached to it, although the leaves and pods were used as fodder for livestock.[646]

640 Field notes 1, 2 and 3.
641 Field note 1.
642 Field note 5.
643 Field note 8.
644 Field notes 7 and 10.
645 Field notes 4 and 11.
646 Field note 11.

Today, the *Ukwangali* community has laws to protect trees.[647] For example, any person who wants to harvest a kiaat tree is required to obtain permission to do so from the traditional authority.

The laws of *Ukwangali* state the following:[648]

- Wood-carvers are generally not allowed to use living trees.
- Only specific harvesting methods are allowed.
- Permission is required for harvesting trees.
- The harvesting of trees is only allowed by specific persons in specific areas.
- The burning of forests is prohibited.

The harvesting of young trees is also forbidden. This rule was found to be common knowledge amongst wood-carvers.[649] The wood-carvers held that this rule did not affect their activities negatively, because their creations were generally better and stronger if they used wood from a dry and dead tree. As to how wood-carvers themselves protected trees, the leader of the Namibia Wood-carvers' Association answered as follows: [650]

> *We use dead trees because we do not want to use up trees, so that the future may also see our trees. We leaned this from our parents. We want the future generation to continue wood-carving. Those in the timber business are temporary. We are permanent. If you destroy your own wealth, the country will fall. Tourists come to see our carvings.*

The law that no young trees may be harvested covers all trees, including those that are generally allowed to be harvested. The fine for violating this rule will depend on the number of young trees cut. A senior traditional leader put it as follows:[651]

> *Trees are also human beings: the older they are the more useless they become. The young ones are the most useful ones because they can produce, and the old and the dead have no purpose anymore. Therefore, it is better to destroy the older or dead trees and leave the young. With this at least you know there will be trees tomorrow.*

Another practice that serves to preserve trees is the method used to glean their produce. Only axes are to be used: combine harvesters and chain saws are banned.

647 Field notes 4 and 11.
648 (Ibid.).
649 (Ibid.).
650 Field note 10.
651 (Ibid.).

The reason for this is that an individual can only harvest a limited number of trees with an axe:[652]

> *With the white man's machine, the whole forest can be harvested, including the young trees and the fruit trees.*

Where a person would like to use a harvester, they first need to obtain permission from the traditional authority.[653] In any event, the locals – who are mostly the ones who do wood-carving – do not have these machines since they cannot afford them.

At first, the permit requirement did only apply to the harvesting of living trees, so there was no need for permission to harvest a dry tree.[654] This position has changed, however; permission is now also required for harvesting dead trees.[655] The traditional authority will only allow someone to cut down a tree if they have applied for a permit to do so, have stated their purpose for doing so, and have paid the required N$20 permit fee.[656]

The fact that a rule governs and limits harvesting in specific areas contributes to preventing overexploitation as this rule bars people from outside the community from using the community's resources.[657]

The law that does not allow the burning of trees applies to all trees.[658] Anyone who intentionally sets fire to the forest pays a fine of five head of cattle.[659] Making fire in a forest is a serious offence because it cannot be controlled.

According to a senior traditional leader, any person who contravenes the laws in place for the protection of trees is punished accordingly:[660]

> *Any person who goes against the wishes of the elders and those above him is cursed … If there are laws in place by our elders, you should respect them because they put them there for a reason. If you don't, then you will be punished. If you go against them*

652 (Ibid.).
653 Field notes 4 and 11.
654 Field note 3.
655 (Ibid.).
656 Field notes 1 and 2.
657 (Ibid.).
658 Field notes 4 and 11.
659 Field note 4.
660 Field note 11.

> *it means you don't respect them, and that is an insult and for that you will be punished severely.*

The punishment for the offences differs according to whether or not the offender is an inhabitant of the respective area. The following applies to any person caught without a proper permit:[661]

> *[T]he person will pay N$30 per tree … The money goes into the community account. Because these trees grow on the Chief's land, they are in the Chief's hands. The forest is on the Chief's land. Even people from the Forestry office only get trees through the Chief. The Chief is* mwenya-evhu *("the owner of the soil"), so the trees belong to him.*

Apart from paying fines, offenders contravening the laws governing the protection of tress may also have their illegally harvested produce confiscated from them.[662] Many wood-carvers are not keen to contravene the law as such an exercise would render the input of time and energy fruitless:

> *You are wasting your energy because, once you are found, the trees will be confiscated. And you will be found out. Even if you harvest during the night there will always be someone who will see you. You cannot hide the tree. If you are making carvings, you will need to sell the products; and normally, you will be required to show a permit at any checkpoint along the road.*[663]

Although no police force exists in the area, interviewees emphasised that people did not get away with contravening the law because every person in the community played the role of police officer. Nothing could be hidden in the area. There would always be someone who saw the culprit, and such a person would not keep the information to him-/herself. No one specifically watched out for offenders, but the control lay in the hands of the community itself.[664] The community had a moral, albeit not legal, duty to act as overseers. According to the wood-carvers, if everyone else had to go to the trouble of paying the necessary fees, they would not let anyone who was contravening the law to go the easy way.

661 Field note 4.

662 The confiscation of illegally harvested trees by traditional authorities needs further enquiry. The question to be explored is what happens to the confiscated wood, and what the role of the Forest office is with respect to this. Concerns about these issues were raised by traditional leaders of the *Ukwangali* and *Mbunza* communities during a workshop in February 2008, when the results of this study were reported to these communities in the Kavango Region.

663 Field note 1.

664 Field note 3.

Offenders pay fines in accordance with the judgements of the traditional authority. Cattle are regarded as highly valued assets, and to lose cattle is considered a severe punishment. No person would wish to lose cattle over a tree.

## 3. Conclusion

Despite efforts from government and its local counterparts, the destruction and over-harvesting of kiaat trees continues. This is manifested in the fact that the traditional leaders of the Kavango Region, in consultation with the relevant Ministry, decided to suspend the harvesting of kiaat trees for a certain period after they understood that the trees were being over-utilised. The community needs to develop a better understanding of the need to protect natural resources. Once they have understood this need, their attitude would change and more effective cooperation between communities and the government could be expected. Consideration should be given to creating a platform where wood-carvers, traditional leaders and Forestry officers could come together and map out a common strategy for the protection of trees. Such a platform would also allow one to lay the foundations for the reconciliation of statutory law – namely, the Forest Act – and customary law.

# Forest conservation and the role of traditional leaders: A case study of the Bukalo Community Forest

*Mwendekwa Muhongo*

## 1. Introduction

The policy of involving local communities in the management of forests dates back to the time immediately after Namibia's Independence. This involvement means the transfer of rights to natural resources to local communities in terms of government policy on community-based natural resource management.[665]

Before the enactment of the Forest Act,[666] there was no legislative provision for the establishment of community forests. The Forest Act was, therefore, a landmark legislative effort towards the realisation of the aims and objectives of the Convention on Biological Diversity of which Namibia is a signatory and the Millennium Development Goals, which are instruments that strive towards the sustainable utilisation of natural resources and improved rural livelihoods.[667] The Millennium Summit on Sustainable Development adopted the Millennium Declaration in recognition of the need to save millions of people from extreme poverty, and spelled out the eight goals with associated targets for 2015. Goal 7 calls for measures to ensure environmental sustainability.

The idea behind the establishment of community forests is to empower communities to manage local forest resources.[668] The involvement of the community was considered a crucial tenet for the achievement of the objectives of community forestry, since these are the primary consumers of forest resources. Local knowledge used in this

665 Statutory powers to manage the forests were devolved in terms of the Nature Conservation Amendment Act, No. 5 of 1996, which enables a group of persons residing on communal land to apply to the Minister to declare their land a conservancy. See more on the Community Forestry in North-eastern Namibia Project of the Directorate of Forestry (Ministry of Agriculture, Water and Forestry), Deutscher Entwicklungsdienst (ded/German Development Service) and Kreditanstalt für Wiederaufbau/KfW Entwicklungsbank (KfW/German Development Bank) at http://www.cfnen.org.na; last accessed 13 June 2007. Cf. also Hinz (2003b:4).

666 No. 12 of 2001.

667 Republic of Namibia (2004a).

668 Section 15, Forest Act.

way is complemented by expertise from the Community Forestry in North-eastern Namibia (CFNEN) Project, which supports community forests.[669] In November 2004, the first Community Forest Agreements were signed between the Minister of Agriculture, Water and Forestry and the targeted communities.[670] Several additional forest areas were declared community forests by the end of 2006.[671] They include the Bukalo, Hans Kanyinga, Kwandu, Lubuta, Masida, Mbeyo, M'kata, Ncamagoro, Ncaute, Ncumcara, Okongo, Sikanjabuka and Uukolonkadhi community forests.

This study concentrates on the Bukalo Community Forest, an area that lies 38 km south-east of Katima Mulilo in the Caprivi Region. The focus of the study is to analyse and evaluate the effectiveness of community forestry. Since the management and effectiveness of the community forest is largely dependent on the local community, the traditional authority plays a central role in the establishment and management of the forest.

The investigation into the role of the traditional authority in managing the community forest pointed towards considering other governmental and non-governmental stakeholders. Amongst the former were the *Deutscher Entwicklungsdienst* (ded / German Development Service) and the *Kreditanstalt für Wiederaufbau* (KfW / German Development Bank).[672] Part of this study, therefore, investigates how governmental and non-governmental stakeholders cooperate with the traditional authorities.

The primary research questions asked were as follows:

- Does the *Masubiya* Traditional Authority, the authority under which the Bakalo Community Forest falls, live up to its responsibilities to protect natural resources?
- What are the provisions of customary law related to this?

669 Field note 7.

670 Republic of Namibia (2005). The CFNEN Project, which is based on the Forest Act, assists local communities with establishing their own community forests, and with managing and utilising them in a sustainable manner. With the provision of logistical, administrative and technical support, communities are empowered to protect and preserve their indigenous forests as a basis not only for the community's quality of life, but also for income generation aimed to improve local livelihoods. See also http://www.cfnen.org.na; last accessed 28 April 2008.

671 Government Gazette 3590 of 2006.

672 Republic of Namibia (2005).

Section 15 of the Forest Act mentions traditional authorities as important stakeholders in the establishment and management of community forests. This places the running of community forests within the ambit of traditional governance. In other words, the traditional authority is involved in conservation. The Forestry Management Committee is elected by the Bukalo *Khuta*[673], to which the Committee is accountable.[674]

The basic assumption of this study is that both statutory law – the Forest Act – and customary law can make valuable contributions to nature conservation and sustainable utilisation, provided the two branches of the law are harmonised, integrated, and kept in equilibrium, so that one does not overshadow or obliterate the other.

Empirical research for this study was conducted from 14 May to 2 August 2007. Such research was necessary because community forestry is still in its infancy, and this study is the first field research on the subject matter in Namibia.[675] A total of 19 group and individual interviews were conducted.

## 2. Community forest in progress

What is the difference between a *community forest* and a *conservancy*? What is the relationship between the two, when territories overlap or one borders the other? To answer these questions, the Technical Advisor for Forestry in the German Development Service commented that a *community forest* is very often misunderstood to be equivalent to a *conservancy*:[676]

> *This may be attributed to the fact that there is experience of the effects of the establishment of a conservancy because there is the nearby Salambala Conservancy.*[677] *There is always fear of losing traditional land use rights, i.e. land for grazing, farming and settling.*

However, unlike in conservancies, the grazing, farming and settling rights are maintained in the community forest.[678] Community forests and conservancies have in common that revenue collected through community forestry benefits the community:[679]

673 The highest level of the *Masubiya* Traditional Authority.
674 (Ibid.:clause 6).
675 Acknowledged by Ms Magdalene ya Kasita, National Coordinator, Community Forestry.
676 Field note 7.
677 The Salambala Conservancy borders the Bukalo Community Forest.
678 (Ibid.).
679 Mench (2006:3).

> *Community forestry is about the sustainable management of forest resources by local people. Community forests are forested areas selected and demarcated by local people for the protection and sustainable use of trees, shrubs and other plants.*

The primary objective of community forestry is to empower communities by giving them the responsibility and ownership of forest resources. Apart from the right to generate income for the community, this responsibility entails the right to issue permits for the use of forest resources.

The Forest Act provides the legal framework for the establishment of community forests managed by their communities. This means that the requirements set forth in section 15 of the Act had to be complied with before the entity known as the *Bukalo Community Forest* could come into existence.

Customarily, any project envisaged to take place within the jurisdiction of the *Masubiya* Traditional Authority first needs the Bukalo *Khuta* to involve the respective sub-*khuta*.[680] It is the duty of the *Silalo Induna* concerned, in his capacity as the leader the sub-*khuta*, to give the requested local input to the matter referred it to the Bukalo *Khuta*.[681] In the case of the planned Bukalo Community Forest the sub-*khuta* and the *Khuta* agreed to and approved its establishment.[682]

Notably, without the involvement of the traditional authority, the idea of a community forest would have been in vain. *Natamoyo* Ntonda[683] commended the idea of community forestry as a great concept that helped conserve forest resources for the community's benefit. He went on to say that –[684]

> *... we are the custodians of the land and, therefore, we accepted that our cooperation and understanding was important for the benefit our people ... Our people wanted it and we realised that we needed to give them a helping hand.*

The Directorate of Forestry also organised community meetings to heighten awareness of community forestry among them. The local radio service in Silozi, the lingua franca in the Caprivi Region, also assisted in informing communities about the envisaged community forest.[685]

680 Field note 13.
681 (Ibid.).
682 (Ibid.).
683 The *Natamoyo* is the Munitenge's principal advisor, and represents the royal family. *Munitenge* in *Silozi* is the title of the supreme leader of the *Masubiya* community and means "king".
684 Field note 2.
685 (Ibid.).

During the whole process in preparing and implementing the Bukalo Community Forest it was seen to be important that all community matters remained under the authority of the *Khuta* and that, in particular, traditional land use practices and rights were maintained. The expertise of the German Development Service was accepted on a technical level only.[686]

The establishment of the Bukalo Community Forest was preceded by the signing of a Memorandum of Understanding between the Bukalo community – represented by the *Masubiya* Traditional Authority, and the Directorate of Forestry – represented by the District Forestry Officer. The Directorate was assisted by the German Development Service and the German Development Bank via the CFNEN Project.

The CFNEN Project, which is a cooperative venture between the Directorate and the said German development agencies, supports communities in organising their forest management bodies, capacity-building, participatory rural appraisal, land use planning, area surveys, boundary demarcation, mapping, resource assessment, resource monitoring, and forest management plans.[687]

The Project currently operates in Tsumkwe (Otjozondjupa Region), Rundu (Kavango Region), and Katima Mulilo (Caprivi Region).[688] The Project was piloted in 1999, and will be current up to 2011.[689] The donor is the German Government, which funds the project through the German Development Bank. The Bank monitors whether the envisaged goals are achieved. Continuous assessment determines whether the Project is operating as agreed and planned. Plans are also under way to expand the Project to the whole of Namibia.[690]

Several training workshops were conducted by the German Development Service. These training workshops included exchange visits to other community forests, notably the one entrusted to the Kwandu community.[691] The German Development Service also provided material support for the Forestry office, which houses the Bukalo sub-*khuta* as well.[692]

686 Field note 7.
687 http://www.cfnen.org.na; last accessed 28 April 2008.
688 Field note 7.
689 (Ibid.).
690 (Ibid.).
691 Field note 3.
692 (Ibid.).

Furthermore, the Project arranged for a stall at the local market for all eight community forests in the Caprivi Region.[693] This creates employment and a monthly salary for the salesperson.[694] The current salesperson is a woman from the Sifuha Community Forest, where she learnt about community forestry through meetings by the Management Committee of her respective community forest.[695] Resources for sale at the market stall include rafters, poles, firewood, droppers, grass, and reeds. These resources are supplied by the community forests on order.[696]

According to the aforementioned Memorandum of Understanding, a constitution for the community forest had to be drafted. This was done by the Forest Management Committee assisted by the German Development Service.[697] The constitution prescribes how the community forest should be managed, and defines the powers, rights and duties of the stakeholders involved, including the Forest Management Committee and the *Masubiya* Traditional Authority.

The Committee is responsible for the day-to-day administration of the forest.[698] Cooperation with the community on all matters concerning the use of land is of utmost importance to the Committee. Its accountability to the Bukalo *Khuta* includes annual financial reporting.[699]

In accordance with the Bukalo Community Forest constitution, the Committee is to be elected by the *Khuta*.[700] Despite this, it was the Bukalo community as a whole that elected the members of the first Committee. The *Khuta* confirmed and approved the election. According to the constitution, the Committee should consist of four members, namely a chairperson, a vice-chairperson, a treasurer and a secretary. While this research was being conducted, the post of chairperson was vacant because the incumbent had been to take up traditional duties at the *Khuta*.[701]

The constitution also provides for the position of an honorary forester. The duty of this office-bearer is to represent the Forest Management Committee in its routine

693 (Ibid.).
694 (Ibid.).
695 Field note 16.
696 (Ibid.).
697 Field note 7.
698 Part of this is, for example, planting new trees. This recently happened where there was a need to fill gaps with new teak trees because a few of the existing trees had been destroyed by young elephants.
699 Clause 6, Bukalo Community Forest Constitution.
700 Clause 1, Bukalo Community Forest Constitution.
701 Field note 3.

work in the forest.[702] This position is currently also vacant owing to insufficient funds.[703]

According to the Memorandum of Understanding, a woman representative is to be part of the Forest Management Committee. The vice-chairperson of the Bukalo Community Forest stated that women are particularly beneficial to conservation because they possess knowledge about forest resources, as well as how such resources can be used to improve rural livelihoods and reduce poverty.[704] She added that –[705]

> *[m]any women possess extensive knowledge about plants and how they can be used for food, medicine, fodder and crafts. Women farmers and gardeners sow, weed, apply fertilisers and pesticides, harvest, and conserve plant products. After harvesting, rural women are responsible for storing, processing and marketing the product.*

Women collect wood for domestic and commercial use. One female villager who was issued with a commercial permit for firewood stated that she the firewood she had harvested from the Bukalo Community Forest was sold in Katima Mulilo.[706] She was happy that she could be issued with such a permit from a community office, and she used the profits generated to pay her children's school fees and to buy other necessities. Indeed, because of their involvement in food production and other income-generating activities –[707]

> *... women are the key to environmental conservation, more efficient production and distribution of food, better nutrition, and improved livelihoods of rural communities. The importance of women as food providers and for environmental protection is also increasing as fewer and fewer men are willing to engage in farming activities. Men are leaving rural areas in search of employment and income opportunities in cities. In contrast, employment opportunities for rural women are often severely limited due to a lack of access to education and training.*

The task of the Forest Management Committee is to develop a Forest Management Plan (FMP) for submission to the Minister of Agriculture, Water and Forestry. The FMP is one of the requirements to be fulfilled before a community forest can be proclaimed in the *Government Gazette*.[708] The Bukalo FMP was approved by the *Masubiya* Traditional Authority on 13 July 2004.

---

702 Clause 10, Bukalo Community Forest Constitution.
703 Field note 3.
704 (Ibid.).
705 Terefe (2005:2).
706 Field note 8.
707 Terefe (2005:2).
708 Section 15, Forest Act.

The FMP contains a number of important provisions for forest management. It identifies the boundaries of the forest and regulates forest resources – especially those with a high commercial value being by high demand. The FMP further regulates fire protection and lays down areas for other land use, like pasturage, farming, or settlement.[709] The Forest Management Committee controls and supervises the implementation of the FMP. The Committee is also empowered to issue permits for wood and non-wood resources listed in the Plan.[710] Violation of the FMP will be prosecuted by the *Khuta*, while the imposition of a fine and its value are at the *Khuta's* discretion.

Clause 12 of the Bukalo Community Forest constitution authorises the Forest Management Committee, in cooperation with the *Khuta* and the District Forestry Office, to enact by-laws.

The use of the forest is only open to the inhabitants of the areas where the forest is situated. The use of the forest by foreigners or people from outside communities is subject to permission by the traditional leader of the village concerned.

The Department of Forestry's former function of issuing permits has, as stated earlier, been relegated to Forest Management Committee.[711] This Committee acts on behalf of the *Khuta*, which although it has no authority to issue permits, it has the discretion to decide that permits will not be issued for certain forest areas.[712] For instance, this is of importance with respect to the Kakwali Forest Area in particular, which lies north of Bukalo and is considered the forest of the Chief. It is under special protection for its cultural importance. This means that permits for this area require the authorisation of the Chief.[713] No permits are currently being issued. In view of the overall policy to protect natural resources against exploitation, this practice appears to be an effective tool in the hands of the traditional authority.[714]

The Forest Management Committee issues permits to harvest dead wood, to cut living trees for construction, and to collect non-wood resources such as grass.[715] The permits cover both domestic and commercial usages. For local residents, a permit costs N$15 for collecting firewood or poles for building. Collecting resources on a commercial basis costs N$100. So far, 60 commercial permits have been issued for

709 http:www.met.gov.na; last accessed 25 August 2007.
710 Field note 3.
711 Field note 7; see also section 15 of the Forest Act.
712 Field note 3.
713 (Ibid.).
714 (Ibid.).
715 (Ibid.).

collecting pieces of wood that have fallen naturally, i.e. dead wood.[716] Firewood for sale is collected further away than domestically used firewood is.[717]

A permit is issued for permission to harvest in a specific forest area only – not the entire forest. Should a permit holder harvest in an area other than that specified in the permit, such person will be fined and their harvest confiscated.[718]

The transfer of use rights to the community is still conditional insofar as the Department of Forestry reserves the right to provide the community with block permits, which are the basis for the permits to be issued to applicants. With respect to the Bukalo Community Forest, a Forestry official explained this as follows:[719]

> *The Bukalo Community Forest received a block permit on 27 January 2006 for dead wood resources which are currently being harvested. The block permit was granted by the Directorate of Forestry's office in Katima Mulilo, which provided for permits for 428 dead timber trees and 255 cubic metres of dead mopane firewood. This block permit was valid for six months with the possibility of extending it.*

While interviews for this study were being conducted, the Bukalo Forest Management Committee was busy collecting dead wood for sale. The wood was cut and packed in 8 kg bags, and sold for N$5 a bag. The Committee indicated that more than 1 metric ton of dead mopane wood had already been harvested since June 2007 up to the period in which the interviews were being conducted.[720]

Eight young people are currently employed to harvest and cut firewood for the Forest Management Committee. It was initially agreed that the workers would receive N$50 per working day.[721] This has since changed, and new contracts have been entered according to which payment depends on the income generated by selling the harvested wood.[722]

The profit that comes from activities of this kind is paid into the community fund, which was created to support development in the community.[723] As per clause 6 of the Bukalo Community Forest constitution, the Committee is obliged to keep the

716 (Ibid.).
717 Field note 7.
718 (Ibid.).
719 Mench (2006:3).
720 Field note 3.
721 Field note 3.
722 Field note 4.
723 See clause 6 of the Constitution.

*Khuta* informed about the fund. The *Khuta* also has the power to decide on how the money will be used, and to authorise payments from the fund to members of the Committee.[724] At the end of each financial year, the Committee is required to present their budget for the following year to the respective sub-*khuta* and *Khuta*.[725]

The research revealed a number of problems that affect the implementation of the community forest. One related to inconsistencies flowing from the separate management of community forests on the one hand, and conservancies on the other. This issue has also attracted the attention of government officials in the two ministries under whose jurisdiction community forests and conservancies fall.[726] Proposals are on the agenda to integrate the Bukalo Community Forest with the Salambala Conservancy. However, the vice-chairperson of the Bukalo Forest Management Committee had reservations about the proposed integration because it would lead to problems in the distribution of income.

It was nevertheless obvious that community forests could play a complementary role in wildlife management.[727] In the case of Bukalo, which borders the Salambala Conservancy, it could be considered that hunting of animals from the conservancy would be allowed in the community forest, which would entail the sharing of profits. This is the point where agreement has not yet been reached.[728] As Shigwedha points out, –[729]

> *[w]hile the two concepts – the concept of community forest and the concept of conservancy – follow similar approaches, they are based on different laws, are implemented by different ministries, and have specific technical requirements for resource management. This often emerges as an obstacle when communities want to implement both components in one specific area and benefit from both wildlife and vegetation.*

Apart from the aforementioned managerial difficulties in administering geographically closely related community forests and conservancies, the interviews with community stakeholders revealed a number of other problems that concern the effective establishment of community forests. The first problem related to community forest boundaries as such forests were not fenced. One spoke instead of *areas of responsibility* when determining land under the jurisdiction of a community forest.

724 Clause 7 of the Constitution.
725 Field note 3.
726 Shigwedha (2007:7).
727 Republic of Namibia (2005).
728 Field note 3.
729 Shigwedha (2007:7).

In the case of the Bukalo Community Forest, a special boundary problem exists with respect to the neighbouring Sikanjabuka Community Forest. Both forests were declared at the same time.[730] Because of the unclear boundaries, people with harvesting permits landed up in trouble because they did not know which of the two forests they were working in. It should be noted, however, that the deeper reason for the confusion lies in the fact that the Sikanjabuka Community Forest is situated on *disputed* land between the *Masubiya* and the Mafwe Traditional Authorities. Both authorities claim that this land is under their respective jurisdiction.[731]

Another problem raised was the problem of transporting firewood. Money generated from the issuing of permits is used to pay for transport. Local contractors are paid N$300 per transport load. In other words, a substantial part of the income generated goes towards transport costs.[732]

Administrative problems were also pointed out. It was stated that the Committee's office lacked the necessary equipment such as a photocopier, computer and printer.[733]

## 3. Conclusion

The most important finding of the research was that the establishment and management of community forests did not interfere with traditional governance. On the contrary: it complemented customary law and practices in the achievement of increased and more productive conservation of forest resources. The restriction placed on the use of forest resources by the traditional authority is effective.[734] Traditional leaders at local level also accept the responsibility of administering the laws on forest protection by reporting culprits to the *Khuta*.[735]

All in all, and despite the problems described above, the Bukalo Community Forest enjoys acceptance by the people of the area. It generates income and contributes to the implementation of the government policy on protecting natural resources.

730 Sikanjabuka Community Forest was declared by Notice 41 in Government Gazette 3590.
731 Field note 14.
732 Field note 3.
733 (Ibid.).
734 Field note 13.
735 (Ibid.).

From the perspective of customary law, being the law of the people, the integration of the concept of community forests into the system of traditional governance is an important step towards harmonising national policies and laws with customary law, and it enhances community development and the ecological sustainability of the resources.

# Part VII:

# Findings and the way forward

# Findings and the way forward

*Manfred O. Hinz*

## 1. Summary of the findings

A broad range of empirical material has been collected by the authors of the essays. The list of field notes compiled by all who contributed shows that a representative range of information could be covered: traditional and modern stakeholders, ordinary villagers and people who spend only part of their time in the village, younger and older people, people with different degrees of formal education, women and men were interviewed. A gender balance was not always achieved although it was part of the overall instruction to the researchers that women's voices were to be given prominence. The majority of households in the northern and central part of the country are led by women.[736] In their capacity as heads of households, women are in many instances closer to nature than men. However, in some cases, it proved impossible to get women's views because the allocation of land and the granting of grazing rights were seen to be the business of men. Had the researcher who experienced this been a woman, or had he had the chance to stay in the field for a longer period, perhaps answers would have been different.

All researchers went out with questionnaires. For the first few days they tested whether the questions they had drafted at home were suited to the task. In many cases, the questions had to be changed, shortened or simplified. Of course, it helped that the majority of the researchers were able to communicate in the respective vernacular. This language competency was particularly important with respect to the use of terms for which no easy interpretation was available. At the end, the questionnaires were not more than guides that had to be adapted as the situation demanded, as some of the researchers explained. Adaptations occurred in focus group discussions in particular.

All researchers were required to devote space in their essays to reflect their experiences in the field and to record the problems they had encountered. Some of these problems were of a serious nature. For example, the researcher who investigated the land dispute between the Owambo cattle farmers and the members of the *Ukwangali* community at one stage reached a point where her supervisor – the author of this

736 Werner (2008:6ff).

concluding chapter – almost cancelled the research due to reports of violence in the area. Much simpler problems were also to be noted, such as interviewees who expected payment or other compensation for the time spent with the researchers. What is the reliability of information for which money is expected? What is the value of information that was given while emotions were running high everywhere? What is the value of the content if information was recorded under time pressure – either on the part of the interviewee or the researcher? These are difficult questions, and can sometimes be impossible to answer. Nevertheless, they had to be asked – even if it were only to create more sensitivity as regards evaluating the research findings.

The results of research under the given circumstances are, therefore, representative to a limited degree only: much more fieldwork would have been necessary to paint a fully representative picture. Nevertheless, what the research revealed does represent trends, and these can lead to further questions and to further research.

Tulimeke Koita showed that there was an awareness of the need to protect the soil against exploitation. However, it was also clear that not much had been translated into legal mechanisms. The main reason for this was that the relationship between human beings and the land is, in the dominant perception of the people, a matter of nature and a matter of being God-given. God and nature have provided land and secured its availability *since time immemorial*. It will therefore be up to nature and God to secure the sustainability of land. In other words, there is a tension between inherited knowledge and knowledge that has entered the domain of knowledge more recently; and, as a consequence of the increased need for land, that tension needs further elaboration and educational input.

Julia Mushimba's research findings can to some extent be placed within the context opened up by Koita's findings. While the causes of the land dispute between *Ukwangali* and *Owambo* farmers can be traced back to a time when *Ukwangali* and *Oukwanyama* entered into an agreement that benefited *Owambo* cattle farmers, the changed conditions after independence also changed the conditions underlying the agreement between the two communities. The increased need for land by *Owambo* cattle farmers, caused by various factors – amongst which is the creeping commercialisation of communal land in the *Oshiwambo*-speaking communities (i.e. through fencing of land against customary law principles) – led to an increased pressure on communal land in the Kavango Region. The wrong perception that the Namibian Constitution created by introducing the right to free movement, as it guarantees, was that by doing so it granted the right to settle freely on communal land.[737] This impacted on the perception of the concept of *communal land*. In fact,

737 The right to move freely (Article 21 (1) (g) of the Constitution) is guaranteed subject to the law of Namibia; cf. also Article 22 (2) of the Constitution.

the constitutionally accepted concept of *communal land*[738] is rendered irrelevant in an understanding according to which one is free to make one's home on communal land wherever one sees it fit. Tensions are, therefore, unavoidable between those who adhere to this misunderstanding and those who insist in their inherited traditional rights to safeguard communal land and its tenure in accordance with customary law.

Mavetja Rukoro and Philanda Blockstein investigated the allocation of customary land and grazing rights under customary law in two different communities. The specific purpose of these case studies was to establish whether – and if so, to what extent – issues related to the sustainable use of land and grazing facilities would be part of the decisions allocating land use rights. A very particular problem in both case studies was that neither the traditional authority in Ovitoto nor the one at Berseba enjoy recognition under the Traditional Authorities Act, which provides for the recognition of traditional leaders. In both cases it was found that an awareness of the problems (the limited availability of grazing, the increasing demand for grazing facilities) existed, but so did a reluctance to attend to them more directly in view of the pressure of livestock breeders for grazing facilities. Of course, the low degree of commitment in respect of applying measures to support sustainability can, to some extent, be blamed on the traditional structures in both cases being hampered by a lack of recognition, but this would be too simplistic. The Ovitoto case shows that there are rules in place when it comes to farmers who want to use an area in Ovitoto for grazing for limited periods only. It appears that these rules work and thus contribute to the sustainability of grass. Not much, however, is done about people residing in Ovitoto permanently. This is an interesting point, as it shows the limits of customary law with respect to the sustainable use of natural resources. Despite awareness of the need to regulate the use of the grazing resources, limiting the size of livestock held by a farmer who belongs to a given community is beyond the possibility – one may even say *factual political jurisdiction* – of traditional authorities.

Mbushandje Ntinda's research was privileged insofar as the researcher could observe court cases against people charged for the illegal cutting of immature grass. The law of *Uukwambi* defines the illegal cutting of grass as a punishable offence. Cutting immature grass is forbidden because it prevents the grass from seeding, and thus from laying the foundation for the grass to grow the following year. The wider context of this specific *Uukwambi* law shows that the *Uukwambi* Traditional Authority has a well-developed understanding of the need to protect natural resources in its

738 Article 102 (5) of the Constitution describes the main function of the Council of Traditional Leaders as being *to advise the President on the control and utilisation of communal land.* This reference to *communal land* is an implicit recognition of communal land and the customary law that governs this part of the land.

territory, and to provide for a framework for their sustainable use. Without going into the details of the cases observed, their adjudication as well as the final decisions taken show that the law on grass is a working and, therefore, valuable instrument in the implementation of the overall policy to protect biodiversity. In other words, the factual implementation of biodiversity-protecting customary law is promising evidence of this.

The unwritten rule reported in the research according to which grass particularly suitable for thatching is not allowed to be used for animal consumption should lead to follow-up research that would concentrate on the anticipated knowledge of people that some grasses are more valuable than others as they have different properties. Is the grass suitable for thatching the only type of grass that requires special treatment? Where do grasses of specific properties grow? Are the legal mechanisms in place appropriate for the protection of these special types of grasses?

Victory Gabriel's case study looked at the protection of herbs, amongst them the devil's claw, which used to be found in the southern part of the territory of the *Uukwambi* Traditional Authority. The researcher was confronted with complaints by the traditional authority that this important natural resource had been subjected to exploitation by people from outside who had come to *Uukwambi* to search for it without permission, contrary to the long-standing requirement to do so under *Uukwambi* law. Moreover, the researcher found that the Chief's reports on the harvesting of devil's claw by outsiders were true with respect to other medicinal plants as well. When the researcher explored why there was not a more active customary response to the exploitation of medicinal plants, the explanation he was given was very challenging: he was told that the use of plants that carried medicinal properties was, in one way or another, understood to be close to pagan practices and not acceptable within the framework of the missionaries' Christianity. This explanation is challenging in view of the understanding of traditional knowledge as outlined above in the assumptions for the research. The post-independence right to culture that was to open for the liberation of the socio-political climate in Namibia by restoring the space for and place of traditional governance and customary law obviously has difficulty in reaching into the basis of traditional knowledge: there is as yet no harmonisation between inherited ancestral knowledge on the one hand, and certain elements of knowledge imported during the era of colonialism on the other.

Tomas Nekongo's study looked at the manner in which customary law controls fishing activities in the seasonally flooded plains that stretch from southern Angola to the pans of the Etosha National Park. The research, again conducted in the *Uukwambi* area, showed that customary laws existed to regulate the permitted periods and manner of fishing. These rules are more strictly applied in the populated areas and less in the southern parts of the *Uukwambi* territory, which are mainly used

for grazing. The respondents explained to the researcher that the existing traditional system of individual custodianship for certain *iishana* was no longer in place. The researcher was able to record court cases where people found fishing before the date set by the traditional authority for such activities were taken to the traditional court. The perpetrators were fined, their fishing gear was confiscated, and the confiscated gear was auctioned for the benefit of the community fund.

A recently held feedback workshop[739] attended by representatives from all *Oshiwambo*-speaking communities and held at the headquarters of the *Uukwaluudhi* Traditional Authority revealed that observations made by the researcher in *Uukwambi* coincided with the situation in the other *Oshiwambo*-speaking communities. The workshop also emphasised that the main good protected by customary law regulating fishing was water, as the source of life, and it included fish living in that water.

Clever Mapaure's research added to that done by Nekongo from a historical perspective in that that it explored the socio-culturally deeply rooted traditional drive to protect fish resources in a community, which at one point had been forced to give up fishing. The most important result of Mapaure's research is that the traditional mechanisms geared towards the sustainable use of the fishery resources remained a firm part of the traditional knowledge of the Topnaar community. The Topnaar were also able to translate their fish-oriented policy to what became their natural symbol of identity – the *!nara* plant.

Ainna Kaundu's research, along with that conducted by Vetu Uanivi, on customary law relating to the use of wood can, to some extent, be compared to the studies by Rukoro and Blockstein. Like grass for grazing, wood is a resource under pressure in circumstances that are very difficult to control. Wood for carving and building is in high demand, as it is for making fire with which to prepare food. Both studies showed that customary law was able to differentiate between different species of trees. Both studies also showed the limits of implementing customary law in view of the community members' obvious need to exploit forest resources. However, an additional element comes into the picture, namely the interface between the application of customary law and statutory law. This interface appears to be problematic. Hence, the competencies between traditional and state authorities require clarification. Such clarification would certainly contribute to the better protection of this very important natural resource.

Mwendekwa Muhongo's study of a recently established community forest can be seen as a case of successful cooperation between a traditional authority and the

739 February 2008, King Taapopi's palace, Tsandi.

state's administration bodies with respect to managing forest resources although, as in the studies by Kaundu and Uanivi, the regulation of community forests requires some further clarification. In addition, the reported success of the *community forest* concept will lead to new questions with respect to managing forestry resources outside community forests, which so far cover only a limited part of the country's total forest resources.[740]

But back to the assumptions. The combined research has shown that customary law has mechanisms to protect biodiversity and natural resources, albeit with certain indicated limitations. The same limitations also determine the extent to which these mechanisms are implemented. With these limitations in mind, there is reason to assume the correctness of the first assumption.

As anticipated in the second assumption, traditional communities have knowledge about the value of biodiversity and the need to protect it against non-sustainable external and internal exploitation. Although this knowledge is very often bound by social and economic constraints, in accordance with the third assumption it indeed has the potential to be transformed into societally efficient norms.

The law administered by traditional communities certainly has a more sustainable impact on the protection of biodiversity than the concurrent norms of the state. Under customary law, traditional communities enjoy more or less full responsibility for the administration of natural resources. This finding bears out the fourth assumption. However, the examples of difficulties caused by the complex interface between statutory law and customary law need further exploration.

Where traditional communities are reluctant to employ mechanisms of customary law or to develop them further although awareness should suggest dictating such a development, there is need for political intervention. The administration of the allocation of land and grazing rights is a case in point, as is the regulating of the forest resources. Balancing economic interests against those of environmentally sustainable use, the examples explored show that decisions are more likely to surrender to economic interest than to take a stand for biodiversity and sustainability.

The case of the plants with medicinal properties provides an interesting insight into the workings of traditional knowledge. Established traditional knowledge appears to be stigmatised by the force of the Christian religion in the retained interpretation of Christianity by missionaries – or, in a broader sense, to what is propagated as the 'modern'. Nevertheless, this strife for so-called modernity has obviously not

740 See Cobbert & Daniels (1996:11–19); Shishome et al. (2008).

fully eradicated traditional (pagan) knowledge or practices, although many of these practices are admittedly not practised openly.

## 2. Biodiversity and the ancestors

The environmental discourse in general and the discourse in anthropology in particular have for years been occupied with interpreting ecological behaviour and approaches to the environment by what are called *traditional societies*. Traditional conservationism is a topic that has filled countless pages in anthropological publications.[741] Having linked the findings of the research presented in this publication to the assumption that guided its implementation, it seems worthwhile to place the results in a broader legal and political anthropological framework that will determine the way forward. A short summary of what is understood by *traditional conservationism* or by relating *biodiversity to the ancestors* will be helpful in preparing the skeleton of this framework.

Environmental and anthropology-based environmental literature allows for the identification of two extreme views about traditional concepts of *nature conservation*:[742]

- *The one denies the existence of concepts of traditional conservationism or ignores them because they are said to be irrelevant in view of the modern mainstreams which prevail in environmental approaches; and*
- *The other overemphasises traditional conservationism. Traditional communities and their environmentalist approaches are said to reflect positions of the so-called Indian[743] eco-saint who always knew what to take from nature and never went as far as modern societies did – in their exploitation of nature to the point of irreparable destruction.*

Ecological anthropology has undergone important theoretical changes. One of its last transformations no longer believes in the Indian 'eco-saint',[744] the 'noble savage' and other myths that were the products of European escapists. The American anthropologist Headland can be quoted here: his views led to a far-reaching debate amongst scholars in this field.[745] Headland is a moderate revisionist, searching for a

741 Cf. Gerlitz (1992); Ingold (2000); the collection of articles in Grim (2001); but also Hinz (2003b:19ff) and Proepper (Forthcoming).
742 The following relies on Hinz (2003b:19ff).
743 Indian from the Americas, i.e. Native Americans.
744 Cf. Bolz (1994).
745 Headland's (1997) article was published in *Current Anthropology*. Ten scholars reviewed his article, with Headland responding. See also Vol. 101 of *The American*

middle road which he defines as *history-grounded* and *of good anthropology*.[746] He argues that *all ecosystems have been greatly modified by humans for thousands of years*.[747]

Radical revisionism, on the other hand, rejects the views held by many that –[748]

> *... tribal peoples lived generally in great harmony, health, and happiness and in balance with their stable environment.*

*Primitive polluters* is the title of a publication by the anthropologist Rambo.[749] Its message is to demonstrate –[750]

> *... the essential functional similarity of the environmental interactions of primitive and civilised societies.*

In an even more recent, brief, but empirically founded response to the debate on Headland's revisionism,[751] the hypothesis was submitted that people in traditional societies do conserve, but do so only in respect of *natural resources whose depletion they can envisage*.[752] The author of the hypothesis, Dye, adds that such societies must –[753]

> *... rely on very limited data to ascertain whether a particular resource is being seriously depleted.*

In his research among a group of rain forest people in Papua New Guinea, Dye saw how crocodiles that had gathered in a small lake – the only bit of water available to them in an extraordinary dry season – were harvested to extinction. This occurred alongside the community's refusal to use long gill-nets for fishing in the lake, because they "would fish out the lake" by doing so.[754]

---

*Anthropologist*, particularly Kottak (1999:23ff).

746 Headland (1997:609).
747 (Ibid.:605).
748 Edgerton (1992), quoted by Headland (1997:607).
749 Rambo (1985).
750 (Ibid.:2).
751 Dye (1998:352f).
752 (Ibid.:353).
753 (Ibid.).
754 (Ibid.).

Why is there a lack of conservationism in the case of the crocodiles, but conservationism in the case of the fish? Dye answers this by referring to the fact that the community had already experienced having wiped out fish when they had used their traditional way of fishing, i.e. by poisoning fish in pools in small streams. Dye discussed this with the villagers, who numbered only 125, saying that they would never be able to fish out a lake measuring five square miles, but they were resolute in their defence:[755]

> *What does he know, with only 10 years here? And anyway, he doesn't even fish.*

Dye's explanation that the lack of conservationism resulted from the lack of capacity to assess probabilities and the lack of traditionalised experience is certainly helpful to place conservationist concerns within the respective societal context. The efficiency of mechanisms of balancing short-term societal interests in using and consuming natural resources against long-term interests in sustaining those same resources depends on all sorts of factors; and these factors determine the actual situation of the given society or community and the environmental framework they live in. It is not only the knowledge of the consequences of certain behaviour, however: such knowledge must also – as the villagers' answer to Dye shows – have become part of the collective memory.

Dye's arguments did not reach out to this last point. Reaching out to it would have meant delving into the very difficult legal sociological and anthropological question of how knowledge becomes societally accepted, and how such knowledge is transformed into, again societally accepted, normative principles.

Bodley, who is one of the anthropologists whom revisionists criticise as a supporter of the 'noble savage' argument, warns against the exaggeration of revisionism that focuses on myths, which are easy to target, but, at the same time, *miss the point of the cultural ecological realities*.[756] Contrary to what revisionists hold against him, Bodley quotes from his own writing where he does, in fact, employ a balanced view.[757] While he stresses, on the one hand, that *man has always been a significant force for environmental modification* and that *primitive cultures have sometimes seriously disturbed their local environment*, on the other he also states that *primitive cultures achieved a far stabler environmental adaptation than presently assumed by industrial civilisation*.[758]

755 (Ibid.).
756 Bodley (1997:612).
757 Bodley (1976).
758 (Ibid:47).

Anthropological records are full of reports on rites that have formed part of traditional approaches to natural resources. What Mapaure retrieved from earlier research and what was confirmed by members of the Topnaar community[759] is just one example to which many others can be added.[760] Traditional interventions into nature, such as fishing or hunting, had to be counterbalanced by acts of restoration and re-harmonisation. However, the interventions were not undertaken from a position of strength and superiority of humans over nature,[761] but from a position of caution. From a modern perspective, one may ask whether traditional rites were performed to secure the necessary supremacy over the animals the hunter wanted to hunt, or rather to prepare for a situation of disturbed forces which would arise with the killing of the animal and, thus, prompting efforts to bring the situation back to equilibrium.

If the first were the prevailing function of the rites, then it would be very easy to understand why they became redundant: not only because of diverging ideological and religious influences, but also because of the increasingly available modern weapons that secured superiority and rendered the inherited practices superfluous. If the second were the function, an element of true and genuine traditional conservationism could be assumed. Whether this alternative approach would entail more than achieving the same goal through different avenues, or a goal that was grounded more securely, is difficult to ascertain. But even if only the first possibility were true, it would be worthwhile to pursue. To those whose way of life is more closely aligned to traditional concepts than to modern ones, a conservationism based on the traditional avenue would be more convincing than one based on modern approaches.[762]

In other words, and as it apparently gains increasing prominence in the interpretation of what is called *traditional*, instead of juxtaposing the so-called 'traditional' to the so-called 'modern', one should rather emphasise that the so-called 'traditional' of today is but one manifestation of several possibilities of modernity, or an *alternative modernity*.[763] Such an interpretation will, indeed, open an unbiased approach to assess environmental perceptions and practices to the benefit of the protection of the environment and natural resources.

759 See above.

760 Hinz (2003b:16ff) refers to some Namibian records.

761 Cf. Hinz (1974:69ff).

762 The Constitutional Court of South Africa held that it would be more convincing for certain parts of the South African population to argue against the death penalty by referring to *ubuntu* than to international and national human rights discourses. Cf. *S v. Makwanyane* 1995 (6) BCLR 665 (CC).

763 See Hinz (2008:59ff), with further references.

## 3. The way forward

The concluding observations on the way forward will take as their point of departure these remarks on traditional conservationism. They will do so by recalling the already quoted section 3 (2) (c) of the Traditional Authorities Act,[764] according to which traditional leaders have the –

> *... duty to ensure that the members of the respective communities use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.*

Is the duty expressed in the quoted provision from the Traditional Authorities Act a new duty that the legislators found necessary to add to the inherited list of tasks of traditional authorities? Was the wording done in reference to the list of government policy principles spelled out in Article 95 (l) of the Constitution of Namibia, or is the quoted task a mere confirmation of what was in any event traditionally part of the duties of a traditional leader?

Furthermore, why did the lawmakers find it necessary to translate the environmental requirement of the Constitution into the Traditional Authorities Act and not, for example, into the Local Authorities and Regional Councils Acts?[765] Would this not have been much more important – since traditional communities, by virtue of their direct social and economic dependence on their environments, have a genuine interest in the sustainable management of their natural resources and, therefore, would not need to be called upon to be environmentally sensitive? What is the explanation of the quoted sub-section in the Traditional Authorities Act referring to the *benefit of all persons in Namibia* and not simply to *all persons*, irrespective of domicile? Is this limitation intended to mean that the use of water from the Okavango River, for example, which may have negative implications for the people in Angola, should be of no concern to the traditional authority that has the say on the Namibian side of the river?

The problems reflected in these many and difficult questions have their reasons, at least to some extent, in the uncertainty of modern law and policymakers to give traditional governance its place in society in general and in the structure of government, or – in the sense of the remarks on traditional conservationism – in the uncertainty associated with assessing the dimensions of what was called *alternative modernities*. Although

764 No. 25 of 2000.

765 Local Authorities Act (23 of 1992), as amended, and Regional Councils Act (22 of 1992), as amended.

the legislative orientation of traditional environmental responsibility to persons in Namibia was most probably not meant as an attempt to prevent environmental responsibility from becoming supranational, i.e. beyond national borders, but rather to secure the extension of traditional responsibility beyond 'tribal' borders.

With the chosen wording, however, the lawmakers unfortunately lost the chance to link local interests to global ones, although the Earth Summit of 1992 and Agenda 21 – its overarching policy instrument – devoted considerable effort to do just that. Chapter 28 of Agenda 21 stands at the beginning of successful movements worldwide to engage local authorities in the global process to achieve sustainability as the basic ingredient of societal policies and interventions. Chapter 26 of Agenda 21 complements Chapter 28 and the roles of local authorities, by referring to *indigenous peoples* as being equally relevant actors as other societal entities in the process towards sustainability.[766] Therefore, it would have set a strong political signal to refer leaders of traditional communities to the fact that problems that appear on the surface to be local were indeed relevant to humankind as a whole. The lost chance in linking the traditional with the international, i.e. transforming a globally supported international policy into an important legal domestic framework, is in all probability the reason for not including the call for sustainability in either the Local Authorities Act or the Regional Councils Act.

The reasons for the second omission are easier to trace than for the first. The reluctance to write Agenda 21 implications into either the Local Authorities Act or the Regional Councils Act can be understood in view of the fact that what we see today in the movements of local authorities to join the universal battle for sustainability and protection of the environment is the result of a development that did not fall from heaven with the Rio Conference.[767] This is true not only for Europe and the United States of America, where local authorities have achieved a consolidated position throughout the countries concerned, but more so in other parts of the world, including Africa, where many local authorities are still struggling for financial and political survival.

766 The mention of *indigenous peoples* in Chapter 26 of Agenda 21 is primarily a reference to *indigenous peoples* in the sense defined in the ILO Conventions and the UN Declaration on the Rights of Indigenous Peoples quoted in the Introduction to this publication. The use of this definition is motivated by the fact that Paragraph 26.2 of Agenda 21 takes explicit note of the said international instruments. However, the introductory words of paragraph 26.2 read as follows: *Some of the goals inherent in the objectives and activities of this programme …*: This could be understood to mean that the programme envisaged by Agenda 21 has a wider range, and that what is found in the quoted instruments are just examples of that with which the Agenda is concerned.

767 Cf. here Hilliges & Nitschke (2007:14ff).

Reference was already made to the uncertainty of the lawmakers to locate traditional governance appropriately in the overall societal and state system. Are traditional leaders – and, for that matter, African customary laws – things that should be left to the past and replaced by modern law? Will traditional governance and customary law be able to respond appropriately to modern needs? Can traditional governance and customary law be brought in line with the requirements of the principles of democracy and human rights?

As shown elsewhere,[768] Namibia and many other African countries have found answers to these questions. On the one hand, governments recognise the existence of traditional governance and customary law as being relevant to their societies; but on the other, both inherited structures have instilled a great quantum of scepticism into the debate about the scope of recognition. The scepticism is partly nourished by the above-quoted questions, influenced in particular by ignorance of the potential of traditional authorities and customary law – potential to contribute effectively to peace and welfare in the communities to which they apply, and beyond. Indeed, the research assembled in this publication underlines the potential of traditional authority and customary law. The research has shown that traditional rule and customary law are grounded in local knowledge and wisdom. Local wisdom governs practice in many instances; in others where this is not the case, it could be made available if desired.

Taking note of what has been said about the potential of traditional governance and customary law needing to be acknowledged in development strategies, the way forward has to pay specific attention to an element that has been underestimated thus far in respect of the inherited land tenure systems one finds in most traditional communities, Describing the basis for action, Chapter 26 of Agenda 21 states the following in its first paragraph:

> *Indigenous people and their communities have an historical relationship with their lands .... . In the context of this chapter the term* lands *is understood to include the environment of the areas which the people concerned traditionally occupy. ... They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.*

Whatever the concept of *indigenous peoples* is for the Agenda,[769] the quoted statement is also relevant for *traditional communities* in the broader sense. The anthropological fact that many traditional communities see *land* as an encompassing entity that includes what is underneath and above the soil; includes what moves on the soil and

768 Cf. Hinz (2006b).

769 See the remarks on this above.

in water; and includes, in a wider sense the living and the dead, has not been fully explored yet in legal terms. Who owns trees? Who owns wildlife? Who owns water? Who owns mineral resources? Who owns knowledge? How can all these resources be managed and administered in a way that supports sustainability for the benefit not only of local owners, but also of those beyond the boundaries of the village, in a national and even global sense? Approaches to these questions can only be found in research that takes on very concrete fields in which problems related to the questions have emerged.

Consultations with stakeholders about the research in this publication have shown that there is substantial concern about the relationship between conservancies in terms of the Nature Conservation Amendment Act, on the one hand, and community forests in terms of the Forest Act, on the other. This was said in a meeting with traditional leaders of *Oshiwambo*-speaking communities about the *Uukwaluudhi* conservation projects, but also in a meeting with traditional leaders from the Caprivi Region. More research is needed to delve into this problematic relationship more deeply. However, common sense already reveals that conservancies and community forests dealing, from a traditional point of view, with only different aspects of the same holistically defined *land*, but falling under two different ministries, will obviously lead to administrative problems. Furthermore, earlier research has shown that there is a need to consider what can be called *alternative* or *comprehensive conservancies*: conservation areas that give traditional communities responsibility and authority over all the natural resources in their area of jurisdiction, and not just over one that has been artificially separated from the rest, such as 'wildlife' or 'forests'.[770] The example of the constitution of the Nyae Nyae Conservancy in the appendix hereto demonstrates that its drafters could not limit the content to 'wildlife' although the law governing conservancies was meant to be only about wildlife. Indeed, the Nyae Nyae constitution is an impressive attempt to develop customary law into a creative lawmaking act beyond what the Nature Conservation Amendment Act envisaged.

There are several challenges of which the work ahead needs to take note. The first is to strengthen attempts to offer feedback to the researched communities on research results. It is only with feedback exercises that allow people to speak openly and freely about how to improve customary law that it will actually develop. Consultations on the basis of feedback to the communities are also able to stimulate and strengthen dormant or suppressed caches of traditional knowledge.

The second challenge is one that is inherent in the approach to traditional knowledge as employed in the BIOTA Sub-project. The field studies assembled in this publication have shown that, in many cases, members of local communities were not aware that

770 Hinz (2003b:97ff).

traditional knowledge was a valuable asset: one that general law envisaged as an asset under the umbrella of intellectual property rights. The apparent international trend in transforming – or, rather, dissecting – culturally determined social and, in terms of the quote from Chapter 26 of Agenda 21, holistic entities into marketable commodities will have to be reviewed, as will the consequences of such marketing.[771]

The third challenge is that of cooperation between natural science and social science researchers. Multi-, inter- and transdisciplinarity has been on the BIOTA agenda since its inception. Would it not be advisable to request natural scientists (botanists, soil specialists, etc.) to deliberate where, in their view, their research reaches beyond the sphere of their disciplines and touches on the sphere of the social sciences? Alternatively, or additionally, natural scientists could be asked to think about areas of interest that could be submitted to social scientists to complement natural science research.

Which of the above challenges will be the toughest, and whether the work ahead will match the challenges set, remains to be seen. However, international and even national policies to protect natural resources and biodiversity will fail if the power of local responsibility is marginalised and the input of local communities is not given broader space in the implementation of protection policies.

771 There is already important literature that has to be explored further, amongst which are Bennett (1985); Kirk (1999:9ff); and various articles in Pottage & Mundy (2004).

## List of field notes

*T. Koita*

| | |
|---|---|
| Field note 1: | 12 July 2006; Rev. K. A. Lihongo; male; land recipient; Mupini |
| Field note 2: | 13 July 2006; Ms F. Neromba; Headwoman; Mupini |
| Field note 3: | 13 July 2006; Mr V. Shikukumwa; Secretary to the Land Board; Ministry of Lands, Resettlement and Rehabilitation; Rundu |
| Field note 4: | 13 July 2006; Mr J. Milinga; Land Use Planner; Ministry of Lands, Resettlement and Rehabilitation; Rundu |
| Field note 5: | 14 July 2006; *Hompa* A. Kaundu and Mr L. Kambanzera; *Mbunza* Traditional Authority; Sigone |
| Field note 6: | 14 July 2006; Mr A. Kannyinga; Current Land Board chairperson and previously the representative of the Ministry of Environment and Tourism on the Land Board; Rundu |
| Field note 7: | 15 July 2006; Mr B. M.; land recipient; Gcamade |
| Field note 8: | 15 July 2006; Mr S. Sintango; Traditional Authority; Rundu |
| Field note 9: | 24 July 2006; Mr M. P.; land recipient; Windhoek |
| Field note 10: | 24 July 2006; Land recipient; male; Windhoek |
| Field note 11: | 16 July 2006; Land recipient; female; Kayira-yira |
| Field note 12: | 15 July 2006; Land recipient; male; Sinzogoro |
| Field note 13: | 16 July 2006; Land recipient; male; Kasote |
| Field note 14: | 25 July 2006; Land recipient; male; Windhoek |

*J. Mushimba*

| | |
|---|---|
| Field note 1: | 1 July 2006; Mr M. U.; Mpungu |
| Field note 2: | 21 June 2006; Senior Headman Rudolf Ngondo; *Ukwangali* Traditional Authority; Rundu |
| Field note 3: | 26 June 2006; Ms Ellia Frieda Nsinano; member of the Kavango Communal Land Board; Rundu |
| Field note 4: | 27 June 2006; community member; Rundu |
| Field note 5: | 27 June 2006; community member; Rundu |
| Field note 6: | 3 July 2006; Governor John Thiguru; Rundu |
| Field note 7: | 14 July 2006; *Hompa* Daniel Sitentu Mpasi; Kahenge |
| Field note 8: | 14 July 2006; Police Officer; Rundu |
| Field notes 9–19: | 15 July 2006; group interviews, men; Zigizi village |
| Field notes 20–24: | 15 July 2006; group interviews, women; Zigizi village |

*N. Mbushandje*

| | |
|---|---|
| Field note 1: | 16 June 2004; *Uukwambi* Traditional Authority Headquarters; Uukwangula |
| Field note 2: | 18 June 2004; focus group interview; *Uukwambi* Traditional Authority; Uukwangula |
| Field note 3: | 18 June 2004; *Elenga Enene* Herman Iipumbu; *Uukwambi* Traditional Authority; Uukwangula |
| Field note 4: | 19 June 2004; focus group interview; Ogongo cuca shop; Ogongo village |
| Field note 5: | 21 June 2004; Mr Sakaria Kuudhingua; Headman; Ogongo village |
| Field note 6: | 21 June 2004; focus group interview with village elders; Ogongo village |
| Field note 7: | 23 June 2004; Mr G. Tjiho; Lecturer; Ogongo Agricultural College |
| Field note 8: | July 2004; Mr Sem Shikongo; Ministry of Environment and Tourism; Windhoek |

*R. Rukoro*

| | |
|---|---|
| Field note 1: | 11 May 2005; Chief Vipuira Kapuuo; Ovitoto Traditional Authority; Otjomuise 3; Windhoek |
| Field note 2: | 12 May 2005; Councillor Oscar Tjaera; Ovitoto Traditional Authority; Okandjira; Ovitoto |
| Field note 3: | 12 May 2005; Senior Councillor Libbius Tjongarero; Ovitoto Traditional Authority; Otjongombe; Ovitoto |
| Field note 4: | 12 May 2005; Mr U. K.; farmer; Ombungururu; Ovitoto |
| Field note 5: | 13 May 2005; Traditional Councillor Arnold Kakujaha; Okaokongundja, Ovitoto |
| Field note 6: | 13 May 2005; Ms K. K.; farmer; Okaokongunja; Ovitoto |
| Field note 7: | 14 May 2005; Traditional Councillor Oscar Tjaera; Ovitoto Traditional Authority; Okandjira; Ovitoto |
| Field note 8: | 14 May 2005; Mr Gotlieb Kazombiaze; farmer; chairperson of Water Point Committee; Otjongombe; Ovitoto |
| Field note 9: | 14 May 2005; Mr Amon Muharukua; Senior Traditional Leader; Okasuvanjuuo; Ovitoto |
| Field note 10: | 14 June 2005; Mr Marvin Sisamu; Ministry of Lands, Resettlement and Rehabilitation; Windhoek |
| Field note 11: | 12 May 2005; Senior Traditional Councillor Moses Katjaimbo; Senior Traditional Councillor; Ovitoto Traditional Authority; Okaokongundja; Ovitoto |

| | |
|---|---|
| Field note 12: | 15 May 2005; Amon Muharukua; Senior Traditional Leader; Okasuvanjuuo; Ovitoto |
| Field note 13: | 7 July 2005; Mr Willem Odendaal; Legal Assistance Centre; Windhoek |
| Field note 14: | July 2005; Mr J. van der Colf; Development Planner; Ministry of Agriculture, Water and Forestry; Windhoek |
| Field note 15: | July 2005; Mr Marchel Mieze; Agricultural Extension Technician; Okandjira; Ovitoto |
| Field note 16: | 4 July 2005; Mr Kamaitunguavi Hindjou; Secretary to the Traditional Authority; Okandjira; Ovitoto |
| Field note 17: | 4 July 2005; group discussion with youngsters; Okamboro; Ovitoto |
| Field note 18: | 4 July 2005; Mr T. M.; farmer; Okamboro; Ovitoto |
| Field note 19: | 5 July 2005; Traditional Councillor Anton Kazondunge; Okandjira; Ovitoto |
| Field note 20: | 5 July 2005; Mr E. K.; farmer; Okandjira; Ovitoto |
| Field note 21: | 22 August 2005; Mr Sem Shikongo; Ministry of Environment and Tourism; Windhoek |

*P. Blockstein*

| | |
|---|---|
| Field note 1: | 2 May 2005; Mr S. D. Isaaks; Senior Councillor; Keetmanshoop |
| Field note 2: | 4 May 2005; Mr J. C. Hupita; chairperson: Karas Communal Land Board; Keetmanshoop |
| Field note 3: | 3 May 2005; Mr T. D.; Farmer; Berseba |
| Field note 4: | 3 May 2005; Mr M. Coleman; Councillor; Berseba |
| Field note 5: | 3 May 2005; Mr T. D.; Farmer; Berseba |
| Field notes 6–7: | 2 May 2005; Chief J. Isaaks; Traditional Leader; Keetmanshoop |
| Field note 8: | 22 August 2005; Mr S. Shikongo; Ministry of Environment and Tourism; Windhoek |
| Field note 9: | 5 May 2005; Mr D. Boois; Governor, Karas Region; Berseba |
| Field note 10: | July 2005; Chief S. Goliath; Traditional Leader; Keetmanshoop |
| Field note 11: | 4 May 2005; Mr C. Jacobs; Councillor; Berseba |

*V. Gabriel*

| | |
|---|---|
| Field note 1: | 11 June 2004; Mr N. Kisting, Biodiversity Working/Support Groups' Coordinator; Ministry of Environment and Tourism; |

| | |
|---|---|
| | Windhoek |
| Field note 2: | 16 June 2004; *Elenga Enene* H. Iipumbu; *Uukwambi* Traditional Authority, Uukwangula village |
| Field note 3: | 17 June 2004; *Elenga Enene* H. Iipumbu and members of the *Uukwambi* Traditional Authority: Mr A. K. Iipumbu, Ms R. Shivolo, Mr J. Petrus and Mr E. Hamunyela; Uukwangula village |
| Field note 4: | 18 June 2004; interviewees opted to remain anonymous; Omayuunda, Ogongo village |
| Field notes 5–6: | 19 June 2004; Ogongo Agricultural College; Ogongo village |
| Field note 7: | 21 June 2004; Mr S. Kuudhingwa (Headman), Ms H. M., Mr J. K., Mr I. M., Mr S. I., Mr W. M.; Ogongo village |
| Field note 8: | 22 June 2004; Mr P. Kosina; Lecturer; Ogongo Agricultural College |
| Field note 9: | 25 June 2004; Mr M. Endjambi; Headman; Iihama village |

*T. Nekongo*

| | |
|---|---|
| Field note 1: | 2 May 2005; Mr K. A.; fisherman; Ondangwa y*Uukwambi* village |
| Field note 2: | 2 May 2005; Governor Sacky Kayone; Governor of the Omusati Region; Ogongo |
| Field note 3: | 3 May 2005; Ms Albertina Ipinge; Regional Head Aquaculture Directorate: Ministry of Fisheries and Marine Resources; Oshakati |
| Field note 4: | 4 May 2005; group interview with Mr Sackaria Kuudhingwa Senior Councillor *Uukwambi* Traditional Authority; Ms F. K.; Mr E. K.; fisherman; Endjeno village |
| Field note 5: | 5 May 2005; Mr C. S.; fisherman; Onatshiku village |
| Field note 6: | 28 June 2005; Mr Timoteus Namwandi; Regional Development Planner; Omusati Region; Outapi |
| Field note 7: | 29 June 2005; *Elenga Enene* Herman Iipumbu; *Uukwambi* Traditional Authority; Oshakati |
| Field note 8: | 30 June 2005; Mr J. K.; community member; Ogongo |
| Field note 9: | 8 October 2005; Mr S. S.; elderly man, originally from the Okeeke village in *Uukwambi*; Singles' Quarters; Katutura; Windhoek |

*C. Mapaure*

| | |
|---|---|
| Field note 1: | June 2007; *Gaob* Seth Kooitjie of the Topnaar; Walvis Bay |

Field note 2: June 2007; Mr G. D.; Walvis Bay
Field note 3: June 2007; Various villagers
Field note 4: June 2007; Mr Albertus Kooitjie; Secretary; Topnaar Traditional Authority; Walvis Bay

*V. Uanivi*

Field note 1: 20 July 2007; Mr G. T.; community member; Talismanus
Field note 2: 20 July 2007; Mr Jackson Uazenga; teacher; Talismanus
Field note 3: 20 July 2007; Mr K. N.; community member; Talismanus
Field note 4: 21 July 2007; Mr B. N.; farmer and shop owner; Olistera
Field note 5: 21 July 2007; Mr M. M.; farmer; Olistera
Field note 6: 21 July 2007; Mr S. U.; committee member; Okapuka
Field note 7: 23 July 2007; Mr T. P.; committee member; Okapuka
Field note 8: 23 July 2007; Ms J. V.; commuity member; De Hoek
Field note 9: 23 July 2007; Mr K. M.; community member; De Hoek
Field note 10: 24 July 2007; community member female; De Hoek
Field note 11: 24 July 2007; Mr O. K.; farmer; Okarimbungu
Field note 12: 25 July 2007; Mr N. N.; farmer; Otjikoto
Field note 13: 25 July 2007; Mr S. T.; community member; Helena
Field note 14: 26 July 2007; Mr M. K.; community member; Helena
Field note 15: 26 July 2007; Mr J. K.; community member; Helena
Field note 16: 27 July 2007; Traditional Councillor Samuel Nguvauva; *Ovambanderu* Traditional Authority; Erindi
Field note 17: 27 July 2007; Mr I. K.; community member; De Hoek
Field note 18: 28 July 2007; Mr A. R. M.; community member; Saint Peter
Field note 19: 29 July 2007; Mr G. K.; community member; Saint Peter
Field note 20: 30 July 2007; Mr P. K.; community member; Saint Peter
Field note 21: 31 July 2007; Mr Marvin Simasiku; Extension Officer; Ministry of Agriculture, Water and Forestry; Gobabis
Field note 22: 31 July 2007; Mr Dax Gawagab; Ministry of Lands Resettlement and Rehabilitation; Gobabis
Field note 23: 30 September 2007; Traditional Councillor Kazapua; *Ovambanderu* Traditional Authority; Helena

*A. Kaundu*

Field note 1: 2 May 2005; Wood-carver; male; 31 years old; Katji-na-katji
Field note 2: 2 May 2005; Wood-carver; male; elderly; Katji-na-katji
Field note 3: 2 May 2005; Wood-carver; male; adult; Katji-na-katji
Field note 4: 3 May 2005; Mr R. Mukuve; Headman; Katji-na-katji

| | |
|---|---|
| Field note 5: | 5 May 2005; Mr F. Litaranga; Officer at the Directorate of Forestry: Responsible for the issuing of permits; Rundu |
| Field note 6: | 5 May 2005; Member of the Mcara Community Forest Committee; male; Mile 20 |
| Field note 7: | 6 May 2005; Wood-carver; male; adult; Mile 20 |
| Field note 8: | 6 May 2005; Son of the interviewee of field note 7; male; Mile 20 |
| Field note 9: | 6 May 2005; Wood-carver; male; adult; Mile 20 |
| Field note 10: | Mr P. Ndumba; Leader of the Namibia Wood-carvers' Association; Okahandja |
| Field note 11: | 27 June 2005; Mr D. Kasiki; Senior Headman and Advisor to the Chief; Rundu |
| Field note 12: | 28 June 2005; Wood-carver; male; adult; Mbangura wood-carving; Rundu |

*M. Muhongo*

| | |
|---|---|
| Field note 1: | 14 May 2007; Ms Magdalene ya Kasita; Community Forestry Officer; Ministry of Agriculture, Water and Forestry; Windhoek |
| Field note 2: | 14 June 2007; *Natamoyo* ShaKachana Ntonda; Bukalo *Khuta* |
| Field note 3: | 24 July 2007; Mr Leonard Sanzila; Bukalo Community Forest Office; Bukalo |
| Field note 4: | 24 July 2007; Mr M. K.; employee Bukalo Community Forest; Bukalo |
| Field note 5: | 24 July 2007; Mr M. M.; employee Bukalo Community Forest; Bukalo |
| Field note 6: | 24 July 2007; Mr M. M.; community member; Mahoto village |
| Field note 7: | 25 July 2007; Dr Andreas Mench; Technical Adviser for Forestry; CFNEN Project; Katima Mulilo |
| Field note 8: | 30 July 2007; Ms J. S.; community member; Bukalo |
| Field note 9: | 30 July 2007; Mr G. L.; employee Bukalo Community Forest; Bukalo |
| Field note 10: | 30 July 2007; Mr F. S.; employee Bukalo Community Forest; Bukalo |
| Field note 11: | 30 July 2007; Mr A. K.; employee Bukalo Community Forest; Bukalo |
| Field note 12: | 30 July 2007; Mr M. K.; employee Bukalo Community Forest; Bukalo |
| Field note 13: | 31 July 2007; *Induna Silalo* Maswabi Sinvula; Bukalo Sub-*khuta;* Bukalo |

## BIBLIOGRAPHY


Abbott, F., T. Cottier & F. Gurry. 1999. *The international intellectual property system. Commentary and materials*, Vol. 1 and 2. The Hague/London/Boston: Kluwer Law International.

Adams, M. & P. Devitt. 1992. *Grappling with land reform in pastoral Namibia*. Pastoral Development Network, Overseas Development Institute, available at http://www.odi.org.uk/pdn/papers/paper32a.html; last accessed 22 November 2007.

Algotsson, E. 2006. "Traditional authorities and the enforcement of conservation laws: A case study of Bushbuckridge and Chief Mnisi's Tribal Authority". Unpublished paper presented at the Linguistic Society of America Summer Institute, Wits Law School, University of the Witwatersrand, Johannesburg, July 2006.

Altieri, M. A. & L. C. Merrick. 1987. "In situ conservation of crop genetic resources through maintenance of traditional farming systems". *Economic Botany*, 41(1):98.

Amoo, S. K. 2000. "The exercise of the right of sovereignty and the laws of expropriation of Namibia, Zambia and Zimbabwe". In Hinz, M. O. & S. K. Amoo (Eds). *The Constitution at work: Ten years of Namibian nationhood*. Windhoek: University of Namibia.

Amoo, S. K. 2001. "Towards comprehensive land tenure systems and land reform in Namibia". *Southern African Journal of Human Rights*, 2001, 17(1):88.

Barnard, P. (Ed). 1998. *Biological diversity in Namibia: A country study*. Windhoek: Namibian National Biodiversity Task Force.

Barnard, P., S. Shikongo & J. Zeidler. 2000. *Biodiversity and development in Namibia: Namibia's ten-year 2000–2010 Strategic Plan of Action for Sustainable Development Through Biodiversity Conservation*. Windhoek: Ministry of Environment and Tourism.

Bennett, T. W. 1985. "Terminology and land tenure in customary law: An exercise in linguistic theory". *Acta Juridica*, 1985:173–187.

Bennett, T. W. 1996. "Customary law in constitutional and international perspective". In Bennett, T. W. & M. Rünger (Eds). *The ascertainment of customary law and the methodological aspects of research into customary law: Proceedings of Law Reform and Development Commission 1995 Workshop, Law and Development Commission*. Windhoek: Ministry of Justice, 45–54.

Bennett, T. W. 2004. *Customary law in South Africa*. Lansdowne: Juta.

Bennett, T. W. & N. S. Peart. 1983. "The dualism of marriage laws in Africa". *Acta Juridica*, 1983:145.

Berat, L. 1990. *Walvis Bay, Decolonisation and International Law*. New Haven/ London: Yale Historical Publications.

Berkes, F. 1993. Traditional ecological knowledge in perspective". In Inglis, J. T. (Ed.). *Traditional ecological knowledge: Concepts and cases*. Ottawa: International Program on Traditional Ecological Knowledge, International Development Research Centre.

Bethune, S., M. Griffin & D. Joubert. 2004. *National review of invasive alien species. Report for the Southern Africa Biodiversity Support Programme*. Windhoek: Directorate of Environmental Affairs, Ministry of Environment and Tourism; available at http://www.biodiversity.org.na/ias/National%20Review%20of%20Invasive%20Alien%20Species,%20Namibia.pdf; last accessed 12 September 2007.

BIOTA. 2003. *BIOTA Southern Africa. Project proposals for the Second Phase*, Vol. 1. Hamburg: University of Hamburg.

BIOTA. 2004. *BIOTA Southern Africa. Pilot phase (2000–2003) – Final report*. Hamburg: University of Hamburg.

BIOTA. 2006a. *BIOTA Southern Africa. Project proposals for Phase III, Part A*. Hamburg: University of Hamburg.

BIOTA. 2006b. *BIOTA Southern Africa. Project proposals for Phase III, Part B*. Hamburg: University of Hamburg.

BIOTA. 2007. *BIOTA Southern Africa. Second Phase (2003–2006) – Final report*. Hamburg: University of Hamburg.

Blaikie, W. G. 2004. *The personal life of David Livingstone* http://www.gutenberg.org/files/13262/13262-h/13262-h.htm; last accessed12 March 2008.

Bodley, J. 1976. *Anthropology and contemporary human problems*. Menlo Park, CA: Cummings.

Bodley, J. 1997. "Reply to Headland (1997)". *Current Anthropology*, 38:611ff.

Bolz, B. 1994. "Indianer als Öko-Heilige". In Lindig, W. (Ed.). *Indianische Realität. Nordamerikanische Indianer in der Gegenwart*. München: Deutscher Taschenbuch Verlag: bvbv.

Botelle, A. & K. Kowalski. 1995. *Changing resource use in Namibia's Lower Kuiseb River Valley: Perceptions from the Topnaar community. Working Paper No. 8*. Lesotho. Institute of Southern African Studies, National University of Lesotho.

Brockington, D. 2002. *Fortress conservation: The preservation of the Mkomazi Game Reserve*. Oxford: James Currey Ltd.

Bruhns, P. & M. O. Hinz (Eds). 1997. *The role of traditional authority in a changing Namibia: First National Traditional Authority Conference – Proceedings*. *CASS Paper No. 37*. Windhoek: Centre for Applied Social Sciences, University of Namibia.

Budack, K. 1983. "A harvesting people on the South Atlantic Coast". *South African Journal of Ethnology*, 6:1–7.

Büscher, B. & T. Dietz. 2005. "Conjunctions of governance: The state and the conservation–development nexus in Southern Africa". *The Journal of Transboundary Environmental Studies*, 4:1–15.

Cobbert, A. & C. Daniels. 1996. *Legislation and policies affecting community-based natural resources management in Namibia: Research report*. Windhoek: Legal Assistance Centre.

Colchester, M. 1993. "Pirates, squatters and poachers: The political ecology of dispossession of the native peoples of Sarawak". *Global Ecology and Biogeography*, Letter 3:158–179.

Costanza, R. 2001. "Visions, values, valuation, and the need for an ecological economics". *Bioscience*, 51(6):459–468.

Cottier, T. & P. C. Mavroidis (Eds). 2003. *Intellectual property: Trade, competition and sustainable development*. Ann Arbor: University of Michigan Press.

CRIAA SA–DC/Centre for Research, Information, Action in Africa – Southern Africa Development and Consulting. 1998. "The Devil's Claw Resource Management Project". Available at: http://www.criaasadc.org/devilsclaw.htm; last accessed 4 April 2008.

D'Engelbronner-Kolff, F. M. 1998. "The people as law-makers: The juridical foundation of the legislative power of Namibian traditional communities". In D'Engelbronner-Kolff, F. M., M. O. Hinz & J. L. Sindano (Eds). 1998. *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books, 62ff.

D'Engelbronner-Kolff, F. M., M. O. Hinz & J. L. Sindano (Eds). 1998. *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books.

Davelid, M. & E. Hast. 1998. *The importance of the Makalani Palm in Ngone Village*. Uppsala: Swedish University of Agricultural Sciences International Office.

Dentlinger, U. 1983. "Social and spatial mobility along the Kuiseb River in the Namib Desert, Namibia". Unpublished MA thesis, University of Cape Town, Cape Town.

Duxbury, J. & S. Dickinson. 2007. "Principles for sustainable governance of the coastal zone: In the context of coastal disasters". *Science Direct*; available at http://www.sciencedirect.com/science/article/B6VDY-4NFXGBW-1/2/512f04f133941de72bc6d8a43a453503; last accessed 10 April 2007.

Dutfield, G. 2000. *Intellectual property rights, trade and biodiversity*. London: Earthscan Publications.

Dye, T. W. 1998. "On tribal conservationists". *Current Anthropology*, 39:352f.

Eirola, M. 1992. *The Ovambogefahr – The Ovamboland Reservation in the making: Political responses of the Kingdom of Ondonga to German colonial power, 1884–1910*. Rovaniemi: Historical Association of Northern Finland.

Ekpere, J. A. 2000. "TRIPS: Biodiversity and traditional knowledge: OAU Model law on Community Rights and Access to Generic Resources". Unpublished paper, Lagos. Organisation of African Unity: Scientific, Technical and Research Commission, PMB 2359.

Elelo. 1994. *OoVeta (OoMpango) dhoShilongo shOndonga; The Laws of Ondonga.* In *Elelo lyOpashgwana lyOshilongo shOndonga: Traditional Authority of Ondonga*. Oniipa: Evangelical Lutheran Church in Namibia.

Elphick, R. 1977. *Kraal and castle: Khoikhoi and the founding of white South Africa*. New Haven/London: Yale University Press.

Erasmus, G. 1991. "The Namibian Constitution and the application of International Law in Namibia". In, Van Wyk, D., M. Wiechers & R. Hill: *Namibia Constitutional and International Law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, pp 81ff.

Erkkila, A. & H. Siiskonen. 1992. *Forestry in Namibia 1850–1990*. Silva Carelica: University of Joensuu.

Faasen, H. & S. Watts. 2007. *Local community reaction to the 'no-take' policy on fishing in the Tsitsikamma National Park, South Africa*; available at www.sciencedirect.com/science/article/; last accessed 1 August 2007.

Falk, T. 2007. "Communal farmers' natural resource use and biodiversity preservation: A new institutional economic analysis from case studies in Namibia and South Africa". PhD thesis, Department of Business Administration and Economics, Philipps University, Marburg.

FAO/Food and Agriculture Organisation of the United Nations. 2005 [Online]. *Global forests resources assessment 2005*; available at http://www.fao.org/forestry/site/28679/en/; last accessed 3 November 2007.

Finger, J. M. & P. Schuler (Eds). 2004. *Poor people's knowledge: Promoting intellectual property in developing countries*. Oxford: Oxford University Press.

First, R. 1963. *South West Africa*. London: Penguin Books.

Fleisch, A. & G. Möhlig. 2002. *The Kavango peoples in the past: Local historiographies from northern Namibia*. Köln: Rüdiger Köppe Verlag.

Fuller, B. 1996. "The enclosure of range lands in the eastern Oshikoto Region of Namibia". *Social Science Division (SSD) Research Report No. 24*. Windhoek: Multidisciplinary Research Centre, University of Namibia.

Gerlitz, P. 1992. *Mein Totem ist zornig: Mensch und Natur in archaischen Kulturen*. Olten Freiburg/Br: Walter Verlag.

Glazewski, J., N. K. Kangueehi & M. Figueira. 1998. "Legal approaches to protecting biodiversity in Namibia". In Barnard, P. (Ed.). *Biological diversity in Namibia: A country study*. Windhoek: Namibian National Biodiversity Task Force, pp 279–297.

Goechnev G. P. & I. R. Gunning. 1980. "Namibia, South Africa, and the Walvis Bay dispute". *The Yale Law Journal*, April, 89(5):903–922.

Graham-Kordich, K. 2003. *Local perceptions of the Turtle Conservation Project in Gandoca Manzanillo Wildlife Refuge, Costa Rica*. Victoria: University of Victoria.

Griffiths, J. 1986. "What is legal pluralism?". *Journal of Legal Pluralism and Unofficial Law*, 24:1–55.

Grim, J. A. (Ed.). 2001. *Indigenous traditions and ecology: The interbeing of cosmology and community*. Harvard: Harvard University Press.

Groombridge, B. (Ed.). 1992. *Global biodiversity status of the Earth's living eesources: A report compiled by the World Conservation Monitoring Centre*. London: Chapman & Hall Publishers.

Gupta, A. K. 2007. *WIPO-UNEP study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge*. available at http://www.wipo.int/tk/en/publications/769e_unep_tk.pdf; last accessed 20 August 2008.

Headland, T. N. 1997. "Revisionism in ecological anthropology". *Current Anthropology*, 38:605ff.

Heath, C. & A. Kamperman Sanders (Eds). 2005. *New frontiers of Intellectual Property Law. IP and cultural heritage – Geographical indications – Enforcement – Overprotection*. Oxford/Portland, Oregon: Hart Publishing.

Henschel, J., R. Dausab, P. Moser & J. Fallen (Eds). 2004. *!Nara – Fruit for development of the !Khuiseb Topnaar*. Windhoek: Namibia Scientific Society.

Heyns, P. 2005. *Water institutional reforms in Namibia: Water Policy 7*. Windhoek: Department of Water Affairs, Ministry of Agriculture, Water and Rural Development.

Heywood, V. H. (Ed.). 1995. *Global biodiversity assessment: United Nations Environment Programme.* Cambridge: Cambridge University Press.

Hilliges, G. & U. Nitschke. 2007. *Städte als Partner für nachhaltige Entwicklung – Bilanz und Perspektive. 15 Jahre nach dem Erdgipfel für Umwelt und Entwicklung von Rio de Janeiro (Material No. 15)*. Bonn: Servicestelle Kommunen in der einer Welt.

Hinz, M. O. 1974. "Von der Gewerbeordnung zum Atomgesetz: Zur Kritik des Umweltrechts". In Doran, C. F., M. O. Hinz & P. C. Mayer-Tasch (Eds). *Umweltschutz – Zur Politik des peripheren Eingriffs*. Darmstadt Neuwied: Luchterhand, pp 69ff.

Hinz, M. O. 1990a. "ILO Convention 107: Legal and anthropological remarks". *Law and Anthropology*, 5:201ff.

Hinz, M. O. 1990b. "Folk Law": Recht von unten – Zur Theories des 'Legal pluralism'." In Denninger, E., M. O. Hinz, G. Roellecke & P. C. Mayer-Tasch (Eds). *Kritik und Vertrauen. Festschrift für Peter Schneider*. Frankfurt/M: Verlag Anton Hain, pp 122ff.

Hinz, M. O. (assisted by Santos Joas). 1995b. *Developing Customary Law: Self-stated Laws of Namibian communities and Customary Law consultations with traditional leaders*. Windhoek: Centre for Applied Social Sciences, University of Namibia.

Hinz, M. O. 1997. "Law reform from within: Improving the legal status of women in northern Namibia". *Journal of legal pluralism and unofficial law*, 39:69–79.

Hinz, M. O. 1998. "Communal land, natural resources and traditional authority". In D'Engelbronner-Kolff, F. M., M. O. Hinz & J. L. Sindano (Eds). *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books, pp 183–227.

Hinz, M. O. 2002. "Local knowledge and its legal protection". Unpublished paper presented at the International Trade Law Workshop of the International Development Law Institute presented by the Trade Law Centre for Southern Africa and the University of Namibia, hosted by the University of Stellenbosch, Stellenbosch, 24 June–12 July 2002.

Hinz, M. O. (assisted by Santos Joas). 2003a. *Customary Law in Namibia: Development and perspective* (Eighth Edition). Windhoek: Centre for Applied Social Sciences, University of Namibia.

Hinz, M. O. 2003b. *Without chiefs there would be no game: Customary Law and nature conservation*. Windhoek: Out of Africa Publishers.

Hinz, M. O. 2004a. " 'to the extent to which such customary law does not conflict with this Constitution …': Customary law: Constitutional problems and jurisprudential perspectives". Unpublished paper presented at the Workshop on Women's Rights under Customary Law, Lusaka, 3–4 March 2004.

Hinz, M. O. 2004b. *Local knowledge and biodiversity. Preliminary observation about the implementation of sub-project S.11.4*. Windhoek: University of Namibia.

Hinz, M. O. 2005. *Preliminary results of BIOTA II. S.11.4 work package and prospects for BIOTA III*. Windhoek: Faculty of Law, University of Namibia.

Hinz, M. O. (Ed., with HK Patemann). 2006a. *The shade of new leaves: Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag.

Hinz, M. O. 2006b. "The project of 'tradition': Constitutionalism in Africa". In Hinz, M. O. & F. T. Gatter (Eds). *Global responsibility – local agenda: The legitimacy of modern self-determination and African traditional authority*. Berlin: Lit Verlag, pp 17–28.

Hinz, M. O. 2006c. "Legal pluralism in jurisprudential perspective". In Hinz, M. O. (Ed., with H. K. Patemann). *The shade of new leaves: Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag, pp 29–45.

Hinz, M. O. 2008. "Traditional governance and African customary law: Comparative observations from a Namibian perspective". In Horn, N. & A. Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, pp 59ff.

Hinz, M. O. & J. W. Kwenani. 2006. "The ascertainment of customary law". In Hinz, M. O. (Ed., with H. K. Patemann). *The shade of new leaves: Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag, pp 203–214.

Hinz, M. O. & J. Malan (Eds). 1996. *Communal land administration: Second National Traditional Authority Conference.* Windhoek: Centre for Applied Social Sciences.

Hoering, U. 2004. *Biopirates in the Kalahari? How indigenous people are standing up for their rights – The experience of the San in Southern Africa*. Bonn: Church Development Service.

Hopwood, G. 2005. *Regional councils and decentralisation at the crossroads*. Windhoek: Konrad Adenauer Foundation; available at http://www.kas.de/proj/home/pub/8/1/year-2005/dokument_id-6975/index.html; last accessed 15 February 2008.

Hosten, W. J., A. B. Edwards, C. Nathan & F. Bosman (Eds). 1977. *Introduction to South African law and legal theory* (First Edition). Durban: Butterworths.

Hulme, D. & M. Murphree (Eds). 2001. *Community conservation in Africa; African wildlife and livelihoods*. London: James Currey Ltd.

Hutton, J., W. A. Adams & J. C. Murombedzi. 2005. "Back to the barriers? Changing narratives in biodiversity conservation". *Forum for Development Studies*, 2:341–370.

Ingold, T. 2000. *The perception of the environment. Essays in livelihood, dwelling and s*kill. London/New York: Routledge.

International Chamber of Commerce. 2006. *International Chamber of Commerce protecting traditional knowledge.* Discussion Paper No. 450/2009 prepared by the Commission on Intellectual Property, International Chamber of Commerce. Available at http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectualproperty/Statements/Protecting_Traditional_Knowledge.pdf; last accessed 23 April 2008.

Jones, B. T. B. 2000a. *Case studies on information support to NRM policy – Namibia: Consultant's final report*; available at http://www.cta.int/pubs/wd8018/index.htm or at http://www.agricta.org/pubs/wd8018/wd8018.pdf; last accessed 19 January 2008.

Jones, B. T. B. 2000b. "Empowering communities to manage natural resources: Where does the new power lie? Case studies from Namibia". *DEA Research Discussion Paper No. 40*. Windhoek: Directorate of Environmental Affairs, Ministry of Environment and Tourism.

Jones, B. T. B. 2002. *Sustainable use of natural resources in an era of land reform and change in Southern Africa: A Namibian case study*. Windhoek: African Sustainable Use Specialist Group.

Jones, B. T. B. & M. W. Murphree. 2004. "Community-based natural resource management as a conservation mechanism: Lessons and directions". In Child, B. (Ed.). *Parks in transition: Biodiversity, rural development and the bottom line*. London: Earthscan, pp 63–104.

Keulder, C. 1997. *Traditional authorities and regional councils in Southern Namibia*. Windhoek: Friedrich-Ebert-Stiftung.

Kinahan, J., J. Pallett, J. Vogel, J. Ward & M. Lindeque. 1991. "The occurrence and dating of elephant tracks in the silt deposits of the Lower !Kuiseb River, Namibia". *Cimbebasia*, 13:37–43.

Kirk, M. 1999. *Land tenure, technological change and resource use: Transformation processes in African agrarian systems*. New York: Peter Lang.

Kiss, A. & D. Shelton. 2004. *International Environmental Law*. Ardsley, NY: Transnational Publishers Inc.

Klee, G. A. (Ed.). 1980. *World systems of traditional resource management*. New York: Halsted Press.

Köhler, O. 1969. *Die Topnaar-Hotenttotten am unteren Kuiseb: Ethnological and linguistic studies in honour of N. J. van Warmelo*. Pretoria: Government Printer, pp 99ff.

Kojwang, H. O. & M. Chakanga. 2002. "Trees outside forests: Namibia". In Bellefontaine, R., S. Petit, M. Pain-Orcet, P. Deleporte & J. G. Bertault (Eds). *Trees outside forests – Towards a better awareness*. *FAO Conservation Guides*, 35; available at http://www.fao.org/docrep/005/y2328e/y2328e00.HTM; last accessed 13 February 2008.

Kottak, C. P. 1999. "The new ecological anthropology". *American Anthropologist*, 101:23ff.

Kustaa, F. F. O. 2004. *Germany's genocide in Namibia: The case of the Herero and Nama people, 1904–1907*. Minnesota, MN: University of St Thomas; available at http://ovahererogenocideassociationusa.org/images/Document%20pdfs/Kustaa's%2German.pdf; last accessed 5 October 2007.

LeBeau, D. 2003. *Dealing with disorder: Traditional and Western medicine in Katutura (Namibia)*. Köln: Rüdiger Köppe Verlag.

Leffers, A. 2003. *Gemsbok bean and Kalahari truffle: Traditional plant use by Ju/'hoansi in north-eastern Namibia*. Windhoek: Gamsberg Macmillan.

Lovejoy, TE. 1980. "Changes in biological diversity". In Council on Environmental Quality and the U.S. Department of State (Eds). *The global 2000 report to the President, Vol. 2: The technical report*. Penguin Books; Harmondsworth.

Madhav, R. 2005. *Book review: Ørebech, P., Bossleman, F., Bjarup, J., Callies, D., Chanock, M. & Petersen H. The role of customary law in sustainable development. Cambridge: Cambridge University Press*. *Law, Environment and Development Journal*, 3/1, 2007: 82; available at http://www.leadjournal.org/content/07082.pdf; last accessed 21 October 2007.

Maithufi, I. P. 2002. "The law of property". In Bekker, J. C., J. M. T. Labuschagne & L. P. Vorster. *Introduction to legal pluralism in South Africa, Part I*. Durban: Butterworths, pp 53–67.

Matose, F., A. Mandondo, A. Mosimane & K. Aribeb. 2006. "The membership problem in people-centred approaches to natural resource management in Southern Africa". *Programme for Land and Agrarian Studies (PLAAS) Policy Brief No. 20* (PB20).

McGurk, C. R. 1981. "The *Mbunza*". In Gibson, G. D., T. J. Larson & C. R. McGurk. *The peoples of Kavango*. Wiesbaden: Franz Steiner Verlag GmbH, p 84.

McNeely, J. A., K. R. Miller, W. V. Reid, R. A. Mittermeier & T. B. Werner. 1990. *Conserving the world's biological diversity*. Washington, DC: World Bank Publications.

Mench, A. 2006. "Establishment of a woodlot and a fruit orchard in the emerging Community Forest of Sifuha". *The Forest for People: Community Forestry in North-eastern Namibia (CFNEN) Quarterly News Bulletin*, 4, October–December.

Mendelsohn, J. & S. Obeid. 2003. *Sand and water: A profile of the Kavango Region*. Cape Town: Struik Publishers.

Menges, W. 2006. "Eviction order grated against communal farmers". *The Namibian*, 12 February.

Menski, W. 2006. "Cherrypicking customs: On what happens when custom is not taught". In Hinz, M. O. (Ed., with H. K. Patemann). *The shade of new leaves: Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag, pp 395ff.

Menski, W. 2007. *Comparative Law in a global context: The legal systems of Asia and Africa* (Second Edition). Cambridge: Cambridge University Press.

Morin-Labatut, G. M. & S. Akhtar. 1992. "Traditional environmental knowledge: A resource to manage and share". *Development Journal of the Society for International Development*, 4:24.

Mubita, O. 1995. "Drought effects on forests and woodlands". In Moorsom, R., J. Franz & M. Mupotola (Eds). *Coping with aridity: Drought impacts and preparedness in Namibia – Experiences from 1992–1993*. Frankfurt am Main/ Windhoek: Brandes & Apsel/Namibian Economic Policy Research Unit.

Müller, M. A. N. 2007. *Grasses of Namibia* (Revised Edition). Windhoek: Ministry of Agriculture, Water and Forestry.

Neumann, R. P. 1998. *Imposing wilderness: Struggles over livelihood and nature preservation in Africa*. Berkeley: University of California Press.

Nichols, P. 2004. "Marine fisheries management in Namibia: Has it worked?". In R. U. Sumaila, D. Boyer, M. D. Skogen & S. I. Steinshamn (Eds). *Namibia's fisheries: Ecological, economic and social aspects*. Delft: Eburon Academic Publishers, pp 319–332.

Norse, E. A. & R. E. McManus. 1980. "Ecology and living resources biological diversity". In Council on Environmental Quality. *The eleventh annual report of the Council on Environmental Quality*. Washington, DC: US Government Printing Office, pp 31–80.

Oguamanam, C. 2006 *Indigenous knowledge in International Law – Intellectual property, plant biodiversity and traditional medicine*. Toronto: University of Toronto Press.

Okoth-Ogendo, H. W. O. 1976. "African land tenure". In Heyer, J., J. K. Maitha & W. M. Senga (Eds). *Agricultural development in Kenya: An economic assessment*. Nairobi: Oxford University Press, p 152.

Paing, Soe, Than Lwin, Khin Chit, Thaw Zin & Ti Ti. 2006. "The role of traditional medicine in the treatment of multidrug-resistant pulmonary tuberculosis, Myanmar*". Regional Health Forum*, Vol. 2; available at http://www.searo.

who.int/LinkFiles/Regional_Health_Forum_CommunicableDiseases.pdf; last accessed 15 January 2008.

Patemann, H. 2002. *Traditional authorities in process: Tradition, colonial distortion and re-appropriation within the secular, democratic and unitary state of Namibia*. Windhoek: Traditional Authorities Recognition Assistance Project, Centre for Applied Social Sciences.

Poolman, J. 2005. "Vyftig boere aangekla". *Die Republikein*, 10 March.

Posey, D. A. 1985. "Indigenous management of tropical forest ecosystems: The case of the Kayapó Indians of the Brazilian Amazon". *Agroforestry Systems*, 3:189.

Pospíšil, L. 1971. *Anthropology of law: A comparative theory*. New York/Evanston/San Francisco/London: Harper & Row.

Pottage, A. & M. Mundy (Eds). 2004. *Law, anthropology, and the construction of the social: Making persons and things*. Cambridge: Cambridge University Press.

Prinsloo, D. 1976. "Walvis Bay and the Penguinis Land: The legal status of Walvis Bay". *South African Yearbook of International Law* (SAYIL), 2:187.

Proepper, M. [Forthcoming]. "Dimensions of environmental interaction. Culture and biodiversity in Kavango". Ph D dissertation. Hamburg: University of Hamburg.

Rambo, A. T. 1985. *Primitive polluters: Semang impact on Malaysian tropical rain forest ecosystems.* Ann Arbor: Museum of Anthropology, University of Michigan.

Republic of Namibia. 1992. *Namibia's Green Plan. Draft plan*. Windhoek: Republic of Namibia.

Republic of Namibia. 1994a. *The Tourism White Paper*. Windhoek: Ministry of Environment and Tourism.

Republic of Namibia. 1994b. *Land-use planning towards sustainable development*. Windhoek: Directorate of Environmental Affairs, Ministry of Environment and Tourism.

Republic of Namibia. 1995a. *The Community-based Tourism Policy*. Windhoek: Ministry of Environment and Tourism.

Republic of Namibia. 1995b. *Namibia's Environmental Assessment Policy – For Sustainable Development and Environmental Conservation*. Windhoek: Directorate of Environmental Affairs, Ministry of Environment and Tourism; available at www.met.gov.na/programmes/eia/eiapolicy/NAMIBIAEIApolicy.pdf; last accessed 20 January 2008.

Republic of Namibia. 1995c. *White Paper of the Responsible Management of the Inland Fisheries of Namibia*. Windhoek: Directorate of Resource Management, Ministry of Fisheries and Marine Resources.

Republic of Namibia. 1995d. *The National Agricultural Policy*. Windhoek: Ministry of Agriculture, Water and Rural Development.

Republic of Namibia. 1996. *Namibia Forestry Strategic Plan*. Windhoek: Directorate of Forestry, Ministry of Agriculture, Water and Rural Development.

Republic of Namibia. 1997. *Regional Planning and Development Policy*. Windhoek: National Planning Commission.

Republic of Namibia. 1998a. *A Decentralisation Policy for the Republic of Namibia: Decentralisation, development and democracy*. Windhoek: Ministry of Regional and Local Government and Housing.

Republic of Namibia. 1998b. *Namibia National Land Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Republic of Namibia. 1999a. *The National Policy on Enabling the Safe Use of Biotechnology*. Windhoek: Ministry of Higher Education, Vocational Training, Science and Technology & Namibian Biotechnology Alliance.

Republic of Namibia. 1999b. *The Draft National Tourism Policy*. Windhoek: Ministry of Environment and Tourism.

Republic of Namibia. 2000a. *Decentralisation in Namibia – Situation analysis*. Windhoek: Ministry of Regional and Local Government and Housing.

Republic of Namibia. 2000b. *White Paper on National Water Policy for Namibia: Policy framework for equitable, efficient and sustainable water resources management and water services.* Windhoek: Ministry of Agriculture, Water and Rural Development.

Republic of Namibia. 2001a. *Revised Draft Tourism Policy 2001–2010*. Windhoek: Ministry of Environment and Tourism.

Republic of Namibia. 2001b. *Namibia's Aquaculture Policy – Towards responsible development of aquaculture*. Windhoek: Ministry of Fisheries and Marine Resources.

Republic of Namibia. 2001c. *National Resettlement Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Republic of Namibia. 2001d. *Development Forestry Policy for Namibia*. Windhoek: Ministry of Agriculture, Water and Forestry; available at http://www.mawf.gov.na/Directorates/Forestry/policy.html; last accessed 7 January 2008.

Republic of Namibia. 2001e. *Guidelines for the Standard Constitution of Water Point Associations*. Windhoek: Directorate of Rural Water Supply, Ministry of Agriculture, Water and Rural Development.

Republic of Namibia. 2002a. *Second National Development Plan (NDP2)*. Windhoek: National Planning Commission.

Republic of Namibia. 2002b. *National Land Use Planning Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Republic of Namibia. 2002c. *National Land Tenure Policy*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Republic of Namibia. 2003. *Annual Report: Communal Land Boards – in terms of section 13 (1) of the Communal Land Reform Act 5 of 2002*. Windhoek: Ministry of Lands, Resettlement and Rehabilitation.

Republic of Namibia. 2004a. *Namibia's Vision 2030: Policy framework for long-term national development*. Windhoek: Office of the President; also available at http://www.npc.gov.na; last accessed 12 August 2007.

Republic of Namibia. 2004b. *Namibia's Aquaculture Strategic Plan*. Windhoek: Directorate of Aquaculture, Ministry of Fisheries and Marine Resources.

Republic of Namibia. 2004c. *Namibia's Draft Wetland Policy*. Windhoek: Ministry of Environment and Tourism & Wetlands Working Group.

Republic of Namibia. 2005. *Community Forestry Guidelines*. Windhoek: Directorate of Forestry, Ministry of Agriculture, Water and Forestry.

Republic of Namibia. 2007. *The Constitution of the Republic of Namibia* (Revised). Windhoek: Ministry of Information and Broadcasting.

Richardson, BJ. 2004. *Indigenous environmental management regimes in the developing world: Self-determination, survival and sustainability*. Manchester: University of Manchester School of Law.

Rodin, R. J. 1985. *The ethnobotany of the Kwanyama Ovambos*. Lawrence, Kansas: Allan Press.

Rosenberg, K. 2004. "The advancement of traditional knowledge protection in international and national law since July 2002". Unpublished paper, Centre for Applied Social Sciences, University of Namibia.

Ruppel, O. C. 2006. "Nature conservation in Namibia: Customary Law to complement statutory Environmental Law?" Unpublished paper presented at the Second United Nations Environment Programme Symposium for Environmental Law Lecturers in Africa: Entebbe, Uganda, 27 September 2006. Forthcoming in *UNEP Journal of African Environmental Law and Policy*, 1.

Ruppel, O. C. 2007. *Interdisziplinäre Schlüsselqualifikation Mediation – Rechtliche Rahmenbedingungen und akademische Ausbildungsmöglichkeiten.* Hamburg: Verlag Dr Kovac.

Ruppel, O. C. 2008a. "Third-generation human rights and the protection of the environment in Namibia". In Horn, N. & A. Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, pp 101–120.

Ruppel, O. C. 2008b. "The Human Rights and Documentation Centre at UNAM". In Horn, N. & A. Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, pp 131–140.

Ruppel, O. C. 2008c. "Teaching and research of Environmental Law in Africa and Namibia". Unpublished paper presented at the International Colloquium on the Teaching of Law in Africa, Windhoek, 27 March 2008.

Ruppel, O. C. & S. Bethune. 2007. *Review of Namibia's policy and legislative support to the sustainable use of wetlands in the Zambezi Basin*. Report for World Conservation Union (IUCN); available at http://www.ramsar.org/features/features_namibia_review.pdf; last accessed 20 August 2008.

Sánchez, V. & C. Juma (Eds). 1994. *Biodiplomacy: Genetic resources and international relations*. Nairobi: African Centre for Technology Studies Press.

Shigwedha, A. 2005. "Kavango grazing tension worries President". *The Namibian*, 23 November.

Shigwedha, A. 2007. "Wildlife and vegetation legislation to integrate". *The Namibian*, 2 August.

Shishome, A., J. Shitundeni & J. M. O'Brien. 2008. *Community Forestry and Extension Development Project (CFED) in North-central Namibia*; available at http://www2.dwaf.gov.za/dwaf/download.asp?f=CDs%5CSustainable%5C3+Namibia+CFED.pdf&docId=1198; last accessed 13 April 2008.

Shiva, V. 1997. *Biopiraterie. Kolonialismus des 21. Jahrhunderts. Eine Einführung*. Münster: Unrast.

Shivute, O. 2005. "Farmers give ultimatum to Government". *The Namibian*, 24 November.

SWAA/South West African Administration. 1979. *Reconnaissance Report on Ovitoto*. Windhoek: Department of Water Affairs, p 7.

Tchamba, N. M. & R. B. Weladji. 2003. "Conflict between people and protected areas within the Bénoué Wildlife Conservation Area, North Cameroon". *Oryx*, 37:72–79.

Terefe, H. 2005. "Rural women are a main key to conserving the environment". *The Forest for People: Community Forestry in North-eastern Namibia (CFNEN) Quarterly News Bulletin*, 2, April–June.

Terry, M. E., F. Lee & K. le Roux. 1994. *A survey on natural resource-based craft production and marketing in Namibia*. Windhoek: World Wildlife Fund (WWF) Living in a Finite Environment (LIFE) Program & The Rössing Foundation.

Tiffen, M. 1996. "Capital and land: Blind spots in the study of the resource-poor farmer". In Leach, M & R Mearns (Eds). The lie of the land: Challenging received wisdom on the African environment. Oxford/Portsmouth: The International African Institute in Association with James Currey/Heinemann, p 169.

Tshosa, O. 2001. *National Law and international Human Rights Law: Cases of Botswana, Namibia and Zimbabwe*. Burlington: Ashgate Publishing Company.

UNCTAD–ICTSD/United Nations Conference on Trade and Development – International Centre for Trade and Sustainable Environment. 2005. *Resource book on TRIPS and development*. Cambridge: Cambridge University Press.

UNIN/United Nations Institute for Namibia. 1988. *Namibia: Perspectives for national reconstruction and redevelopment*. Lusaka: UNIN.

Van Wyk, B.-E. & N. Gericke. 2000. *People's plants: A guide to useful plants in Southern Africa*. Pretoria: Briza Publications.

Van Wyk, B.-E. & G. Smith. 2003. *Guide to the aloes of South Africa*. Pretoria: Briza Publications.

Van Wyk, B-E & M. Wink. 2003. *Medicinal plants of the world*. Pretoria: Briza Publications.

Vigne, R. 1975. *A dwelling place of our own*. London: International Defence and Aid Fund.

Vigne, R. 2000. "The hard road to colonization: The Topnaar (Aonin) of Namibia, 1670–1878". *Journal of Colonialism and Colonial History*, 1(2).

Von Koenen, E. 1996. *Heil-, Gift und essbare Pflanzen in Namibia*. Göttingen: Klaus Hess Verlag.

Warren, DM. 1991. "Using indigenous knowledge in agricultural development". *Discussion Paper No. 127*. Washington, D.C.: World Bank.

Werner, W. 2008. *Protection for women in Namibia's Communal Land Reform Act: Is it working?* Windhoek: Legal Assistance Centre.

WHO/World Health Organisation. 2001. *Legal status of traditional medicine and complementary/alternative medicine: A worldwide review*. Available at libdoc.who.int/hq/2001/WHO_EDM_TRM_2001.2.pdf; last accessed 27 April 2008.

Wilson, E. O. 1985. "The biological diversity crisis". *BioScience*, 35:700–706.

WIPO/World Intellectual Property Organisation. 2000. *May 15–26 Conference of parties to the CBD*. Geneva: WIPO.

WIPO/World Intellectual Property Organisation. 2001a. *First session 30th April to 3rd May: Consolidated analysis of the legal protection of traditional cultural expressions*. Geneva: WIPO.

WIPO/World Intellectual Property Organisation. 2001b. *First session 30th April to 3rd May: Review of the provisions of Article 27.3(b) of the Trade-Related Aspects of International Property Rights (TRIPS) Agreement*. Geneva: WIPO.

WIPO/World Intellectual Property Organisation. 2006. *Intellectual property and traditional knowledge: Booklet No. 2*. Geneva: WIPO. Also available at http://www.wipo.int/ freepublications/en/tk/920/wipo_pub_920.pdf; last accessed on 20 August 2008.

Woeller, A. 2005. *Die Landfrage und Landreform in Namibia*. München: Herbert Utz Verlag. Also available at http://www.utzverlag.de/buecher/40555dbl.pdf; last accessed 19 August 2008.

World Bank. 2007. *Atlas of global development*. Glasgow: Harper Collins.

World Resources Institute, World Conservation Union & United Nations Environment Programme in consultation with the Food and Agriculture Organisation of the United Nations & the United Nations Educational, Scientific and Cultural Organisation. 1992. *Global Biodiversity Strategy: Guidelines for action to save, study and use Earth's biotic wealth sustainably and equitably*; available at http://www.wri.org/biodiv/pubs_description.cfm?pid=2550; last accessed 24 October 2007.

WTO TRIPS Council; Note of the Secretariat dated 9 March 2006; IP/C/W/370/Rev.1; available at http://www.wto.org/english/tratop_e/trips_e/ipcw370r1.pdf; last accessed 4 November 2007.

Wulfmeyer, M. 2006. *Bildung für nachhaltige Entwicklung im globalen Kontext. Das Beispiel Namibia.* Frankfurt/London: IKO – Verlag für Interkulturelle Kommunikation.

# APPENDIX I: CONSTITUTION OF THE NYAE NYAE CONSERVANCY

## CONSTITUTION OF THE NYAE NYAE CONSERVANCY

1. **PREAMBLE**

1.1 Whereas Cabinet has approved with Decision No. 8th/16.03.95/005 Namibia's policy on Wildlife Management, Utilization and Tourism in Communal Areas:

1.2 Whereas the objectives of said Policy are:

i) "To remove discriminatory provisions of the Nature Conservation Ordinance, 1975 (Ordinance No. 4 of 1975) by giving rights over wildlife to communal area farmers that were previously only enjoyed by commercial farmers."

ii) "To link conservation with rural development by enabling communal farmers to derive a direct financial income from the sustainable use of wildlife and tourism."

iii) "To provide an incentive to rural people to conserve wildlife and other natural resources, through shared decision-making and financial benefit."

1.3 Now therefore, the members of the community of the Nyae Nyae Farmers Co-operative wish to establish a Conservancy as provided for in sections I, 14 (4), 28 A (I) and 84 (2) of the Nature Conservation Ordinance (No. 4 of 1975) as amended by the Nature Conservation Ordinance Amendment Act 1996, in order to:

i) enable its members to gain the right to sustainably manage and utilize wildlife and to retain the income derived from such sustainable management and utilization;

ii) enable its members to gain the exclusive right to develop tourism accommodation and operate guided tours within the boundaries of the conservancy;

iii) acquire, hold and manage income and property on behalf of and for the benefit of the community; and

iv) promote the economic and social well-being of the members of the conservancy by equitably distributing the benefits generated through consumptive and non-consumptive exploitation of the wildlife.

1.4 The Nyae Nyae Farmers Co-operative Conservancy is based on the traditional Ju/'hoan land management system existing in the area. The n!ore system of land ownership was officially recognized by the Government of Namibia in 1991 at the National Conference on Land Reform.

1.5 Further, the Nyae Nyae Farmers Co-operative Conservancy is sub-divided into four "districts". These districts provide the basis for representation, communication and local level decision-making. As such, the community places the highest value on regular n!ore and district meetings, as well as on an Annual General Meeting (e.g: RADA meeting), as appropriate fora for discussion and decision-making.

1.6 Recognizing the above, the Nyae Nyae Farmers Co-operative Conservancy includes all land users who have usufruct rights based on either: 1) an ancestral claim; or 2) having been granted such rights by the traditional authority. Individuals with these rights are called N!ore Kxaosi.

1.7 The Nyae Nyae Farmers Co-operative Board of Management is designated the "traditional authority" by the members of the Ju/'hoan community.

1.8 The Nyae Nyae Farmers Co-operative Board of Management is designated the conservancy committee by the community.

1.9 The Nyae Nyae Conservancy Committee shall manage the conservancy within the constraints of the constitution and shall have ultimate authority with regards all activities related to the conservancy.

1.10 The community adopted this constitution at an Annual General Meeting ( RADA meeting) held on 13-15 May, 1996 at Baraka, Tsumkwe Constituency.

## 2. NAME AND ADDRESS

2.1 The name of the conservancy shall be the Nyae Nyae Farmers Co-operative Conservancy, hereafter referred to as "the Conservancy".

2.2 The address of the Conservancy shall be P.O. Box 45, Grootfontein, Namibia.

## 3. MANAGEMENT OF THE CONSERVANCY

3.1 The Conservancy shall be managed by a conservancy committee as provided for in sections I and 28 A (1) and (2) of the Nature Conservation Ordinance (No. 4 of 1975) as amended by the Nature Conservation Ordinance Amendment Act of 1996. The conservancy committee provides an institutional structure so that collective interest subsumes and reconciles internal and sectional divisions.

3.2 Day-to-day management decisions regarding the Conservancy are taken by the NNFC management committee, under the overall guidance and direction of the conservancy committee. The conservancy committee consults regularly (bi-monthly) with the Conservancy members, via district level meetings, regarding the operational decisions taken by the committee.

3.3

3.3 The conservancy committee is answerable to the members of the conservancy for the implementation of said conservancy via the NNFC Board of Management.

3.3 In matters of policy, amendments to the constitution, and other matters that affect Conservancy members equally or when the decision of one district may cause undue suffering by another district, an annual general meeting (RADA meeting) is the decision making forum.

3.4 The community wishes that its conservancy shall be managed in a manner which is non-discriminatory, equitable, democratic and accountable to its members, and that members are protected against abuse of power by other members.

## 4. BOUNDARY DESCRIPTION OF THE CONSERVANCY

The Nyae Nyae Conservancy's eastern boundary coincides with the national border between the Republic of Namibia and the Republic of Botswana. The most northern point along this boundary is 21 degrees 00' E and 19 degrees 10' S and the most southern point is at 20 degrees 00'S where the boundary turns west and follows the veterinary cattle fence until it intersects with a north/south going track at 19 degrees 54'E. It follows this track northwards until it reaches the borehole known as !Am!'ha (19 degrees 52' 47'' E and 19 degrees 37 ' 21" S). From !Am!'ha the boundary continues straight in a north eastern direction to the borehole known as Tjeka (20 degrees 06' 47" E and 19 degrees 34' 21" S). From Tjeka the boundary continues north along a track until it intersects with the main road to Tsumkwe (20 degrees 06 '47" E and 19 degrees 30' 21" S). From this point the boundary runs eastward following the center of the main road until the 20 degrees 14' longitude. From this point the boundary continues north until a point at 20 degrees 25' E and 19 degrees 10' S. It then goes north until a point 20 degrees 14' E and 19 degrees 10' S where it joins the southern boundary of Khaudum Game Park and continues east to the boundary of Botswana at 21 degrees 00' E and 19 degrees 10'S.

The area that will be proclaimed by the Ministry of the Regional and Local Government as Tsumkwe village will be exempted from the conservancy area. The area to be proclaimed as a village is 30 kilometer squared. A rough outline of the area is shown on the attached map of the Conservancy area. The Nyae Nyae Conservancy covers an area of 9023 square kilometer.

## 5. OBJECTIVES

5.1 The primary objective of the Conservancy shall be to enable the members of the Conservancy to derive benefits from the sustainable management and consumptive

and non-consumptive utilization of wildlife in the Conservancy.

5.2 In order to achieve the above, the Conservancy shall:

i) manage the wildlife in accordance with acknowledged conservation principles contained in the Wildlife Management Plan drawn up in conjunction with the Ministry of Environment and Tourism;

ii) utilize the wildlife resource in a sustainable way for the economic and social benefit of the members of the Conservancy;

iii) retain all income derived from such utilization as allowed by the laws of the Republic of Namibia and use such income for purposes agreed upon by the Nyae Nyae Conservancy Committee.

5.3 Other objectives of the Conservancy shall be to:

i) acquire, hold and manage property for the benefit of and on behalf of its members subject to the terms and conditions of this constitution;

ii) establish, monitor, and enforce rules and sanctions for the sustainable management of wildlife resources in Nyae Nyae;

iii) as agreed by the Conservancy Committee use some of the revenue generated through the activities of the Conservancy to ensure the financial sustainability of the Conservancy, including wildlife management activities and conservancy committee operations;

iv) ensure community residents are actively participating in decision-making in the Conservancy.

## 6. OPERATING PRINCIPLE

6.1 The powers of the conservancy committee shall be used in accordance with the overriding principles of fairness and equity, which shall require that the conservancy committee deal with the community's property and rights in accordance with the objects of this constitution and only for the benefit of the members.

6.2 The conservancy committee shall endeavor to ensure that all members receive similar or equal benefits, and that there is no material discrimination between members: provided that the conservancy committee may differentiate between members on reasonable and necessary grounds and provided further that an attempt is made to equalize any disparity and to ensure equity and fairness as between members.

## 7. PROPERTY OF THE CONSERVANCY

7.1 The Conservancy may acquire, hold and manage further and additional assets, property, and rights, and no further constitution or amendments to this constitution shall be required to vest the Conservancy with such further property and assets.

## 8. THE CONSERVANCY COMMITTEE

8.1 GENERAL AND SPECIFIC POWERS OF THE CONSERVANCY COMMITTEE

8.1.1 The conservancy committee shall manage the Conservancy and administer its property and rights for the benefit of the members and it shall have all the necessary executive and other powers and authority to do so.

8.1.2 Subject to the terms of this constitution, the restricted powers referred to hereafter and any directions contained in resolutions passed by the members in general meeting (RADA meeting), the conservancy committee shall exercise its powers as it considers appropriate to achieve the objectives of the Conservancy.

8.1.3 The general powers of the conservancy committee are the following:

i) To employ staff and consultants;

ii) To distribute to members, invest or re-invest in any financial institution, or otherwise use, the proceeds of any assets or any monies of the conservancy as approved by the district meetings, and/or general meeting as necessary;

iii) To borrow monies on such terms and conditions as the conservancy committee may consider appropriate for any of the objectives of the Conservancy, subject to the direction of the district meetings, and/or general meeting as necessary;

iv) On behalf of the conservancy members, to enter into agreements relating to the consumptive and non-consumptive use of game;

v) To institute or defend any legal arbitration proceedings, and to settle any claims made by or against the Conservancy.

8.1.4 The specific powers of the conservancy committee are the following:

i) To acquire, receive, hold and manage on behalf of and for the benefit of the members, the property, rights and assets of the

conservancy whether in the nature of land, buildings, real rights, money or other tangible or intangible assets of whatsoever nature.

ii) Natural Resource Management

- to develop a wildlife management plan
- to represent the interests of the conservancy members with regard to natural resource and wildlife management
- to apply to the MET for quotas for the use of wildlife
- to determine how game will be used once quotas are set
- to determine technical inputs and training required
- to initiate projects for improved wildlife management
- to establish a problem animal management programme
- to manage a community ranger system
- to manage livestock numbers

iii) Generation and Distribution of Benefits

- to develop tourism initiatives within the conservancy
- to represent the conservancy in negotiations with business ventures
- to oversee the management of income and expenditure accounts
- to ensure benefits are distributed according to the terms of this constitution and organize distribution
- to negotiate conflicts that arise regarding benefit distribution between districts and/or villages.

8.2 THE RESTRICTED POWERS OF THE CONSERVANCY COMMITTEE

8.2.1 The powers of the conservancy committee to manage and administer the property, rights and assets of the Conservancy (including the allocation of exclusive interests or benefits to individual members) may be limited by the terms of a developmental plan or Government policy, provided that such plan shall have been adopted by resolution passed by a majority of members at a general meeting (e.g:RADA) and terms of such plan shall bind the conservancy committee until amended.

8.2.3 The conservancy committee may not lease the property, its rights, or any part thereof or incur any obligations affecting its property or rights without the prior approval by resolution of a majority of members at the district meetings, and/or general meeting as necessary;

8.2.4 Any decision to amend this constitution, de-register, dissolve the conservancy or distribute the property, rights and assets shall by a two-thirds majority of members in general meeting (e.g: RADA meeting); provided that the notice convening such meeting shall be required to indicate the nature of the business to be considered.

8.3 TENURE OF OFFICE OF CONSERVANCY COMMITTEE MEMBERS

8.3.1 There shall be a minimum of 17 members of the conservancy committee, including: the twelve NNFC Board of Management members (three from each district); and a minimum of five members of the NNFC management committee.

8.3.2 The members of the Conservancy Committee shall be elected by the members of the conservancy from amongst their number at district level meetings and they shall remain in office for two years. Conservancy committee members may be re-elected for a further term of office.

8.3.3 The members of the NNFC management committee are viewed as "staff" of the NNFC and are chosen by the RADA for their skills and expertise in the roles they play. The Conservancy Committee reviews their performance on an annual basis. They may be replaced by Conservancy Committee in accordance with the relevant Labour Act or by a General Meeting.

8.3.4 Vacancies on the conservancy committee shall be filled by elections held in the affected district. If a NNFC Management Committee member is removed, their replacement will assume their place on the conservancy committee.

8.3.5 A district meeting may remove or substitute conservancy committee members and, in the case that the conservancy committee decides to expand the membership of the committee, elect additional members provided that the notice for such a meeting shall state the intention to propose a resolution for the removal and/or nomination of such conservancy committee member(s).

8.3.6 A consensus of Conservancy Committee members shall be entitled to recommend to those conservancy members in the affected district the removal of any one of the district conservancy committee members in the interest of the association and on reasonable grounds.

8.3.7 Prior to the adoption of a resolution to remove a conservancy committee member, s/he shall be given the opportunity to address the conservancy committee and relevant district meeting with reference to the reasons for her/his proposed removal.

8.3.8 A conservancy committee member shall vacate his/her position, if:

i) he/she resigns;
ii) he/she becomes unfit and/or incapable of acting as a conservancy committee member; or

iii) he/she is removed in terms of a resolution passed in accordance with the provisions of clauses 8.3.5 and 8.3.6.

8.3.9 Members of the Conservancy Committee shall not receive remuneration for their services as conservancy committee members, but may receive an allowance when they are absent from home for at least one night.

8.4 CONSERVANCY COMMITTEE MEETINGS

The conservancy committee shall regulate its meetings and conduct its proceedings as it considers appropriate, provided that:

8.4.1 the Chairperson shall convene a meeting of the conservancy committee at least once every two months, and as requested by conservancy committee members, provided such members have stated reasons for the holding of such a meeting;

8.4.2 where possible, conservancy committee members shall receive notice and a proposed agenda prior to any meeting;

8.4.3 the quorum shall be 11 conservancy committee members, as long as each district and the management committee is represented by at least one person;

8.4.4 conservancy committee members who have an interest in any decision to be considered by a meeting shall declare such interest and remove him/herself from attendance and participation in such a decision;

8.4.5 minutes of all proceedings of the conservancy committee and an attendance record shall be kept;

8.4.6 members of the Conservancy may attend meetings of the conservancy committee, and may be invited to speak at committee meetings.

## 9. FINANCIAL MATTERS

9.1 The conservancy committee shall ensure that proper accounting records and books of account are kept. The conservancy committee shall appoint a treasurer, to be approved by the Permanent Secretary, who shall report to an anual general meeting of the community on the income received and the manner in which it has been utilized by the conservancy committee and districts.

9.2 Financial statements shall be prepared at least once a year in accordance with generally accepted accounting principles and practice, and such statements shall be

audited and certified by an independent accountant or accounting officer in the customary manner.

9.3 All contracts, cheques and other documents requiring signature on behalf of the conservancy, shall be signed in such a manner as the conservancy committee may from time to time decide, provided that at least two members of the conservancy committee shall sign such documents.

9.4 The conservancy committee shall ensure that all monies received by it shall forthwith on receipt be deposited in a suitable account opened in the name of the Conservancy with a registered bank, mutual bank or with such other financial institution.

## 10. MEMBERSHIP

10.1 The members shall be all adult persons, 18 years or older, eligible to benefit from the resources of the conservancy and shall include the following:

10.1.1 All members of the community (i.e: long-term, legal residents) who are Namibian citizens (i.e: renounced citizenship in another country) and have indicated that they accept the rights and obligations of members in terms of the conservancy constitution, including the wildlife strategy. Members of the community are defined as those individuals who either:

i) can demonstrate an ancestral claim to the area (i.e: has relatives currently or in the past living on one of the N!oresi); or

ii) has been granted permission to use the land and resources by the traditional authority.

10.1.2 On an application from a prospective member who is a Namibian citizen and has indicated (in writing) that s/he accepts the rights and obligations of members in terms of the conservancy constitution, including the wildlife strategy. A prospective member of the community is defined as:

i) the relative by blood or marriage of an existing member; or

ii) a person who has been granted permission by the traditional authority to use land and other resources in Nyae Nyae.

10.2 The Conservancy Committee shall establish and maintain a membership register, which shall include the name, residential N!ore, identity and birth certificate numbers, age, and gender of each member.

which shall include the name, residential N!ore, identity and birth certificate numbers, age, and gender of each member.

## 11. RIGHTS AND OBLIGATIONS OF MEMBERS

11.1 All members shall have the following basic rights:

11.1.1 to attend, speak, and vote at any district meeting and to be represented by a N!ore Kxao or other person at a general meeting.

11.1.2 to inspect any minutes or other records of decisions of district or RADA meetings and the conservancy committee meetings.

11.1.3 to inspect and make copies of the financial statements and records of the conservancy.

11.1.4 to inspect the membership register.

11.1.5 access to the resources of the conservancy set aside for communal use by all members.

11.2 Subject to this constitution, all members shall be eligible to receive benefits as outlined in the benefit distribution plan in section 15 below.

11.3 All members shall have the following general obligations:

11.3.1 to abide by the lawfully taken decisions of the conservancy committee, such as:

i) to follow the rules and regulations set out below in the strategy for sustainable wildlife management and utilization;

ii) to respect the conservancy committee's role in negotiating agreements with outside investors;

11.3.2 not to kill, harm, or otherwise interfere with any wildlife or habitat upon which wildlife depends without the permission of the conservancy committee or unless provided for in the Wildlife Management Plan and subject to the provisions of the Nature Conservation Ordinance.

## 12. GENERAL MEETINGS

12.1 District level meetings will be held bi-monthly, following conservancy committee meetings, to consult with Conservancy members, including the receipt of reports from the conservancy committee, giving guidance and direction to the conservancy

committee, determing the use of funds received by the district under the conservancy, and attending to such other business as may be necessary in terms of this constitution.

12.2 An annual general meeting (e.g: a RADA meeting) shall be held once a year on not less than 14 days prior notice to members. An annual general meeting shall be held to determine policy governing the Conservancy, amendments to the constitution, and other matters that affect Conservancy members equally or when the decision of one district may cause undue suffering by another district.

12.3 Notice of district and general meetings to members shall occur in the matter that shall ensure adequate notice to members as decided by the conservancy committee.

12.4 For general meetings, minutes and the number of participants shall be recorded.

## 13. TERMINATION OF MEMBERSHIP AND OTHER SANCTIONS

13.1 Membership of the Conservancy shall be terminated on the death of a member and may be terminated by resignation in writing with the mark of the member.

13.2 The conservancy committee shall be entitled, subject to any directions which may be given in terms of a resolution by the members in a district or general meeting, to remove from the membership register the name of any member whom it may consider on reasonable grounds no longer eligible for membership on the condition that prior to such termination of membership, he or she shall be given an opportunity to make representations with regard to any relevant matter at issue at a District and/or conservancy committee meeting.

13.3 The conservancy committee shall be entitled to suspend certain or all membership rights for a stated period not exceeding one year, and to suspend or withdraw any exclusive and/or shared rights, interests and/or any benefit in relation to the property or rights of the conservancy, or impose conditions applicable thereto: provided that such member shall be given opportunity to make representations with regard to any relevant matter in issue at a district and/or committee meeting.

## 14. DISPUTE RESOLUTION AND CONCILIATION

14.1 In order to facilitate the expeditious and inexpensive resolution of disputes and to avoid unnecessary litigation, any member, conservancy committee member or the conservancy committee shall in the first place attempt to resolve disputes and differences by negotiation and amicable accommodation in accordance with this constitution. See section 8.1.4 for the specific power of the conservation committee to mediate disputes regarding benefit distribution between districts.

14.2 Should it become evident that the dispute might be usefully resolved through mediation and negotiation, or a fact-finding investigation by a third party, the parties to the dispute shall appoint a conciliator to assist them in resolving the dispute.

14.3 The conservancy committee shall appoint a conciliator if requested to do so by three or more conservancy committee members, a district meeting, or a general meeting.

14.4 The right is reserved for any member to apply to court in the event of any refusal or failure on the part of the conservancy committee to give proper effect to the principles of equity, equality, and non-discrimination, or to implement the terms of this constitution in accordance with its intent and purpose.

## 15. BENEFITS DISTRIBUTION PLAN

15.1 Benefits will be distributed according to the following principles:

15.1.1 The conservancy committee shall recognize individual usufruct rights over resources held by the N!ore Kxaosi.

15.1.2 Furthermore, when any individuals undertake an enterprise that is possible only through the use of property held in common by the conservancy members, the enterprise will belong to that individual, but he/she will pay a fee for the use of the jointly-held resources.

15.1.3 Any individual employed in an activity using jointly-held resources will receive his/her full compensation directly.

15.2 Benefits will be distributed according to the percentage breakdown in the table:

| Income | All people in Nyae Nyae (NNFC) | District | N!ore Kxao |
|---|---|---|---|
| Subsistence Hunting | -- | -- | 100% |
| Sale of Live Game | 100% | -- | -- |
| Trophy Hunting | 100% | -- | -- |
| Resource Use Fees | 50% | 30% | 20% |
| Community Tour Camps | 10% | 30% | 60% |
| Film Production | 50% | 20% | 30% |
| Joint Ventures | 40% | 30% | 30% |

15.3 Funding allocation to the N!ore

Funds will accrue to the n!ore where an activity occurs (i.e: the site of a tourism venture). Funds will be distributed to the N!ore Kxao as soon as they are received by the conservancy committee. The N!ore Kxao will then distribute the funds equally to the members of his/her n!ore. In the case that the resource is seen as "belonging" to more than one n!ore, it will be left to the N!ore Kxaosi to allocate the funds between themselves.

15.4 Funding allocation to the District

Funds will also accrue to the district where an activity occurs (i.e: the site of a tourism venture). Funds will be distributed to the district at a public meeting on an annual basis in accordance with the decisions of the residents of that district. This may be in the form of a household dividend or a project, as agreed to by the residents. In the case that the resource falls under more than one district, the conservancy committee will allocate funds.

15.5 Funding allocation to the NNFC.

Funds will also accrue to the NNFC/conservancy committee on behalf of all Ju/hoan people in Nyae Nyae. These funds will be deposited into an account and may be used by the conservancy committee for the operation of the conservancy, including support for the community ranger program, vehicle operation, a capital fund, and committee operations, among other items.

15.6 When a problem animal is shot, the NNFC/conservancy committee may, at its discretion, distribute a portion of the NNFC's funds as compensation for damage.

15.7 The conservancy committee will review annually the benefit distribution plan to ensure: 1) that adequate funds (and not excessive funds) are received by the NNFC for the sustainable management of the NRM Programme; 2) that the plan remains "equitable"; and 3) that any inconsistencies are addressed. The conservancy committee will report their findings to the anual general meeting where any decisions to amend the distribution plan will be taken.

## 16. STRATEGY FOR THE SUSTAINABLE MANAGEMENT AND UTILIZATION OF WILDLIFE

Attached as annex 1 to this constitution is the Wildlife Strategy for the Nyae Nyae Conservancy. This strategy provides for the sustainable management and utilization of wildlife. Members of the Conservancy agree to develop a Wildlife Management Plan.

17. **DISSOLUTION**

17.1 The conservancy may be dissolved if conservancy status is revoked by the Minister, Ministry of Environment and Tourism, finding that the conservancy is not operating according to the constitution.

17.2 The conservancy may otherwise only be dissolved by a two-thirds majority of all members in a general meeting of which three months notice shall have been given to all members.

17.3 On dissolution, all assets remaining after payment of all debts and liabilities of the conservancy shall be handed over to the NNFC for the benefit of its members.

18. **AMENDMENTS**

This constitution may be amended by the vote of two thirds of the members in a general meeting of which one months notice shall have been given to all members.

ADOPTED at the Annual General Meeting (Rada meeting) at Baraka, Tsumkwe Constituency on 13-15 May, 1996.

As Witnesses:

1. ..... _____

**TITLE:**

2. .....

As Witnesses:

1. ..... _____

**TITLE:**

2. .....

**ANNEX 1**

**WILDLIFE STRATEGY**
**NYAE NYAE CONSERVANCY**

## 1.0 AIMS OF THE NYAE NYAE CONSERVANCY

1.1 Wildlife is a critical element of the diversified production system of the people of Nyae Nyae, the Ju/hoansi. Hunting and gathering, along with agriculture and livestock, form the basis of their survival strategies in an area of limited economic, educational, and political opportunities, as well as periodic drought and insecure access to resources. Wildlife species found in Nyae Nyae, such as roan antelope, wild dog, leopard, buffalo, elephant, and giraffe, are also of national importance.

1.2 The community residing in the Nyae Nyae area of Tsumkwe District wishes to establish a conservancy to:

1.2.1 restore and sustainably manage and utilize the area's wildlife for the benefit of present and future generations and for maintaining Namibia's biodiversity; and

1.2.2 promote the economic and social well-being of the members of the conservancy by equitably distributing the benefits generated through consumptive and non-consumptive exploitation of the wildlife.

1.3 The community is fully committed to sustainably managing the wildlife resources and will undertake the strategy outlined in this document in an effort toward meeting that commitment. A Wildlife Management Plan will be developed during the first year of implementation of the conservancy.

## 2.0 OVERVIEW OF THE NATURAL RESOURCES IN THE CONSERVANCY

The proposed Nyae Nyae Conservancy covers 9023km$^2$ in size and falls within the semi-arid ecological zone, receiving between 300-500 mm of average annual rainfall. It is enclosed by fences on two sides: 1) in the east by the border fence with Botswana; and 2) in the south by the veterinary fence at the 20th parallel. The western boundary is just east of Aasvoelnes. The northern boundary of the conservancy is the Khaudum Game Reserve cutline, a wilderness area of 3,841 km$^2$. Wildlife, including lion and elephant, leave the park in the winter months in search of food and water and the conservancy area forms part of their range.

The Nyae Nyae Conservancy area consists of a system of seasonal pans and wetlands. The mixture of clay pans and non-porous calcrete makes it unique in the Kalahari area. In years of good rainfall, the clay pans and the large areas of calcrete are inundated. The pans and wetlands attract a large number of water and wading birds, including flamingos and pelicans, in the summer months. Endangered Wattled Cranes, snipe, the rare Slaty Egret and many migrants from Europe are found when the pans are full.

The vegetation of the conservancy area is characterized by mixed broadleaf and acacia woodland where the dominant species include several types of Combretum and the weeping wattle (*Peltophorum africanum*). Other important species are baobab (*Adansonia digitata*), tamboti (*Spirostachys africana*) marula (*Sclerocarya caffra*) and mangetti (*Ricinodendron rautanenii*).

The conservancy area is home to a number of animal species that are rare or endangered in Namibia or across the African continent. Elephant, wild dog, leopard, and roan antelope are among the key species. There are also lion, cheetah, giraffe, blue wildebeest, red hartebeest, eland, gemsbok, kudu, and ostrich. There is a remnant herd of buffalo which was cut off from its migration route to the Okavango Delta in neighboring Botswana when the border fence was erected.

## 3.0 PRIORITY SPECIES

As illustrated in Table 1, giraffe, eland, roan antelope and gemsbok are priority species, particularly given their importance to the local subsistence economy. As tourism develops, elephant, buffalo, wild dog, and leopard will increase in importance in the eyes of the community. The community is committed to increasing and maintaining the numbers of these wildlife populations.

*Table 1: Priority Species as Rated by Community Members*[1]

| criteria for ranking importance | Roan | Elephant | Buffalo | Eland | Giraffe | Gemsbok | leopard & wild dog |
|---|---|---|---|---|---|---|---|
| Healing[2] | 0 | 3 | 1 | 8 | 7 | 6 | 0 |
| Meat | 5 | 0 | 3 | 6 | 7 | 4 | 0 |
| Household items:shoes arrows/water containers) | 4 | 0 | 0 | 8 | 8 | 5 | 0 |
| Photographic Safaris | 4 | 5 | 4 | 2 | 4 | 1 | 5 |
| Professional Hunting | 6 | 5 | 5 | 2 | 0 | 1 | 6 |
| National Biodiversity | 5 | 4 | 3 | 3 | 4 | 2 | 4 |

Two species, in addition to those discussed above, that are of potential importance in the Nyae Nyae Conservancy are kudu and impala. Both of these species have a high growth rate (approximately 11% and 18% respectively) and are very appropriate for subsistence

[1] Community members were given 25 markers/criteria to allocate between species. The more points, the more value attached to that species.

[2] Selected species are cultural important to the Ju/'hoansi. Only the animal's spirit is used to provide guidance to traditional healers.

hunting or cropping schemes. Building up the numbers of these species could result in reduced pressure on the key species currently used for meat (i.e: giraffe, eland, and roan). At present, there are no impala in the conservancy area.

## 4.0 LIMITING FACTORS TO INCREASING POPULATIONS OF PRIORITY SPECIES

4.1 Wildlife has been declining in the Nyae Nyae Conservancy area over the past decade. Various factors are thought to be contributing to this, including:

4.1.1 Certainly the construction of fences, particularly the border fence with Botswana and the veterinary fence separating Nyae Nyae from the Gam area to the south, is having a negative impact. In addition, the construction of new roads to reach the Gam area has negatively affected the animal populations.

4.1.2 According to the community, illegal hunting, particularly of buffalo, giraffe, and roan, is not at a sustainable level.

4.1.3 A lack of water and competition for water between people and wildlife are critical constraints.

4.1.4 Poaching by people from outside of the community is a limiting factors.

4.1.5 The competition for habitat between people and wildlife is a key factor. The influx of people and livestock from Botswana, part of a government repatriation effort, will place further pressure on the area's wildlife.

4.1.6 The high incidence of livestock loss to predators and the lack of effective problem animal control has resulted in the community holding negative attitudes towards predators.

## 5.0 STRATEGY TO ADDRESS LIMITING FACTORS AND TO INCREASE WILDLIFE POPULATIONS

5.1 It is accepted by both the MET and Nyae Nyae community that the recently constructed fence along the 20th parallel is having a negative impact on wildlife populations in the conservancy area. However, inadequate information is known to either quantify this impact or develop a management plan to reduce the impact. Both the Community Rangers and the MET Rangers will make regular patrols along the fence. This information will be discussed with the N!oresi Kxaosi in the south and the Conservancy Committee who will, with MET and Veterinary Services, develop a plan for management of the fence.

5.2 The community agrees that illegal hunting, particularly of buffalo, giraffe, and roan, is not at a sustainable level and that these species must be protected in the short-term to allow populations to increase and make sustainable utilization feasible in the longer-term. The Conservancy Committee will establish, monitor, and enforce rules and sanctions for the sustainable management of wildlife

resources in Nyae Nyae.

5.3 The community and MET also recognize the importance of wildlife in the local subsistence economy, specifically in the supply of meat. Given the community's commitment to the sustainable use of wildlife, the possibility of re-introducing impala as a highly productive species will be explored as part of the Wildlife Management Plan to be developed in the first year of implementation of the Nyae Nyae Conservancy. The successful introduction and sustainable hunting of impala could reduce the pressure on other species.

5.4 To address the limiting factors of lack of water and competition for water between people and wildlife, the community proposes the development of three additional game water points. The community agrees that these waterpoints must be unsettled and otherwise left undisturbed by people and livestock. All waterpoints must be maintained. Three criteria were used for the preliminary identification of boreholes that merit a feasibility assessment, including:

- to limit costs, there should be an existing borehole so that only an engine and minimum infrastructure is required;
- there must be a game waterpoint relatively close-by so that the proposed waterpoint will be able to attract and be used by existing game; and
- wildlife must already be present in the broader area.

*Table 2: Identification of Waterpoints for Further Study*

| Name | Location | Infrastructure needed | Waterpoint Closeby | Wildlife Presence | Next Steps |
|---|---|---|---|---|---|
| Kxauruma or Tchagagare | Central District West of Aha Hills | Engine needed; borehole needed at Kxauruma | Greenspos | Yes | MET assess vegetation in May; CRs to monitor WL every two weeks |
| !Habi Pan | Western District | Engine needed; borehole exists, but needs to be dug deeper | North of Nyae Nyae pan | Yes, wet season. Part of migratory route | MET assess vegetation June/July; MET ask Dept. Water Affairs as to depth of hole, water delivery |
| /I!xao | Western DistrictWest of N≠aqmtjoha | No borehole, water may be pumped from nearest waterpoint to the north | West of G/Aq!oma | Yes, part of migratory route | MET assess vegetation June/July; ask Water Affairs as to depth of hole, water delivery |
| Future possible ones | Western District | No borehole | West of G/Aq!oma | Yes, potential for more | MET/NNFC jointly assess in Sept/Oct |

5.5 With implementation of the conservancy, the MET will continue to perform an anti-poaching function. However, the MET will work in much closer collaboration with the Community Rangers in order to apprehend offenders. The MET will provide training to Community Rangers in law enforcement, provide guidelines on the kinds of information needed to prosecute a case, and notify the Conservancy Committee of all case numbers pending in the conservancy area so that the committee can more easily follow-up on their resolution. The Community Rangers will continue to report cases of poaching by both members of the community and by outsiders to the MET.

5.6 The community agrees that a land-use plan needs to be developed as part of the Wildlife Management Plan. Areas for livestock, wildlife, and joint use will need to be identified. Furthermore, the community agrees that the number of livestock should be limited to allow for an increase and sustainable management of wildlife. The Ju/'hoan community currently has a holding of 514 cattle. They propose that the numbers of cattle in the area be limited to 2,000.

5.7 Lion, elephant and leopard have the most significant impact upon peoples' livelihoods in Nyae Nyae, with lions being considered the most destructive. Community Rangers will gather data on predator kills, including: what is being killed, how often, day/night, and location.

5.7.1 Although lions in the Nyae Nyae Conservancy cause considerable livestock loss, the community agrees that lions have a high consumptive and non-consumptive value and that they should be used sustainably. Although lions occur in Nyae Nyae at low densities, the community has the right to protect life and property from lions and other predators. It is proposed that a lion quota is reserved for problem animals. This will be difficult given that the lion population fluctuates with emigration and immigration.

The following options will be followed as far as possible, depending on resources and the presence of a trophy hunter:

5.7.1.1 **Lion kill cattle in veld at night:** ensure cattle are kept in kraal at night.

5.7.1.2 **Lion break into kraal or visit village during day time:** live sale (subject to permit to move animal because of disease) or allow trophy hunter to shoot animal.

5.7.1.3 **Lion threaten people:** this would often require an immediate response and that either the community or MET destroy the animal. If time allows, the Conservancy Committee can explore the possibility of the trophy hunter shooting the animal. The protection of human life is of paramount concern and options other than immediate shooting should only be explored if loss of life is not imminent.

5.7.2 The density of leopards in Nyae Nyae is relatively high while stock losses, relative to those caused by lion, are low. Leopards are a particularly sought after

species by photographic tourists and trophy hunters and the community proposes that a quota be allocated. Trophy hunting will take place in areas where stock losses occur. Where an animal habitually causes stock losses and where the quota has been filled, the Conservancy Committee will submit to MET a request for this additional animal to be shot by a trophy hunter.

5.8 The community agrees that data collection and monitoring is essential to successful wildlife management. In order to make the best decisions, the Conservancy Committee must know what the current numbers of animals are, how they are changing, and why.

5.8.1 The Community Rangers have a critical role to play in monitoring and analysis on the ground and in communicating this information to the community and to the MET. The MET has an important role to play in monitoring the "big picture" and in providing this information to the Community Rangers and to the Conservancy Committee. Data to be collected by the Community Rangers includes:

- distribution of wildlife populations, by species, location and by season;
- age and sex of individuals;
- use of waterpoints; and
- mortality, including predation and hunting.

5.8.2 A method to refine data collection by community rangers will be developed as there is a need to build in an indicator of abundance/trends.

5.8.3 It will also be necessary to establish a vegetation monitoring programme for the areas around waterpoints as part of the Wildlife Management Plan.

**6.0 ANNUAL REVIEW AND AMENDMENTS TO THE STRATEGY**

6.1 In general, an adaptive management approach will be used to exploit the wildlife in the conservancy; that is, population numbers and structures, trophy quality and age, and predation will be closely monitored and the quota adjusted upwards or downwards dependent on trends. Similarly, the Wildlife Strategy proposed here will be monitored regarding its effectiveness in increasing and sustainably managing the wildlife in the conservancy area. The strategy, as well as the Wildlife Management Plan, will be reviewed annually and amended accordingly.

## Appendix II: Bukalo Community Forest Management Body Constitution

Bukalo Forest Management Body Constitution

(Forest Act No. 12, section 15,

Sub-section 2e)

Including Approval of the Traditional Authority

### Constitution of the Forest Management Committee of Bukalo

- The Forest Management Committee is the legal representative of the Khuta in all forestry concerning matters. It is elected by the members of the Khuta.
- The Forest Management Committee shall have at least four members to be a Chairperson, a Vice Chairperson, a Secretary and a Treasurer. The Forestry Committee shall represent all community members.
- The members of the Forest Management Committee need to be confirmed or elected newly after the period of one year by the Khuta. In the case of unreliability or recurring complaints, the members can be replaced earlier according to the decision of the Khuta.
- Conflict among the committee members which they cannot resolve themselves is to be handled by the traditional authority. Committee members who do not attend committee meetings (two consecutive meetings) or do not fulfil their duties should be replaced. All equipment handed over (shirts, bicycle, etc.) is the property of the FMC and to be given back within 14 days.
- The members of the Forest Management Committee need to be permanent residents of the community.

- All members of the Forest Management Committee are fully responsible for the 'Community Forest Fund', an account which consists of money earned by forest[-]concerning activities and used for such activities as well. The money is understood to be the property of the community and can be used as a revolving fund for the community issues as [...] discussed by the Khuta. The Forest Management Committee shall state the Community Forest Fund's status and expenditure incurred as well as planned whenever requested, but at least once a year.
- The members of the Forest Management Committee are not employed on a permanent basis by anyone; they fulfil the duty on an honorable basis and to the benefit of the community. Expenditures and allowances can be paid by the Community Forest Fund according to the Khuta's decision.
- The Forest Management Committee is the legal entity in charge of the co-operation between the community, the District Forest Office and the project 'Community Forestry in North-Eastern Namibia' and in charge of management of the community forest on behalf of the community. The Forest Management Committee shall be the link to other institutions in all forestry matters.
- The Forest Management Committee works hand in hand with the Community and the District Forest Office in order to protect the community forest from forest fires and illegal tree cutting and other illegal forest utilization.
- The Forest Management Committee employs an Honorary Forester. This Honorary Forester represents the Forest Management Committee in the day-to-day routine work in the forest.
- The Forest Management Committee agrees that all activities in the community forest shall be in accordance with the respective Namibian laws and regulations as well as with a management plan.
- The Forest Management Committee establishes the forestry bylaws in connection with the Khuta and the District Forest Office. These bylaws are to regulate all concerned activities and will be reviewed on a yearly basis.
- The Forest Management Committee takes responsibility that the community is informed about all forestry activities.
- In cases of urgency, any Committee member can call up a meeting.
- The respective Namibian laws, i.e. the Forest Act and the forestry bylaws, are to be made known to the community.

# Appendix III: Maps of areas studied

***Biodiversity and the Ancestors: Challenges to Customary and Environmental Law***

***Case Studies from Namibia***

***Biodiversity and the Ancestors*** intends to span an arc between legislative efforts on global, regional, national and local levels and traditional ways of maintaining the environment and its biodiversity. On the one hand, the book serves as a guide to the broad range of provisions directly and indirectly relating to the protection of biological diversity. On the other hand, the case studies provide a unique insight into the practices, customs and customary laws of people living in traditional settings and from various communities throughout Namibia. The publication is a source of information and provides guidance for lawyers, anthropologists, students, policymakers and all those members of the public interested in environmental concerns, biodiversity conservation and traditional customs in Namibia. It covers a broad variety of topics that include the protection of land, grass, medicinal plants, fish, and trees.

***The editors***

***Manfred O. Hinz*** is a Professor at the University of Bremen and the University of Namibia, specialising in public law, jurisprudence and political and legal anthropology. He is holder of the UNESCO Chair: Human Rights and Democracy at the Human Rights and Documentation Centre (HRDC) of the Faculty of Law at the University of Namibia.

***Oliver C. Ruppel*** is the Director of the Human Rights and Documentation Centre (HRDC) and lectures at the University of Namibia's Faculty of Law. His legal specialisation lies particularly in the field of public international law with a special emphasis on the interrelationship between international trade, human rights and the protection of the environment.

***The case study contributors***

Philanda Blockstein
Victory Gabriel
Ainna Kaundu
Tuilimeke Koita
Clever Mapaure
Ntinda Mbushandje
Mwendekwa Henry Muhongo
Julia Mushimba
Tomas Nekongo
Ray-wood Mavetja Rukoro
Vetu Uanivi

LRDT
Legal Research and Development Trust of Namibia