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Nomos



Chapter 16: Land-Use Planning and the Environment

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1 Introduction

Finally in 2021, the Namibian courts have endorsed the importance of environmental considerations when activities such as mining are undertaken. The court echoed that the Namibian Constitution calls for a generous regime of access to courts.¹

Land is not static and is influenced by dynamic processes and developments.² This calls for a planning approach that is both inclusive and responsive to prevailing and future socio-economic and environmental challenges. In the same vein, it calls for a planning approach that is geared toward sustainable development.

The manner in which land is used has an effect on the environment. Unsustainable land management practices have been identified as one of the threats to the environment in Namibia.³ Sustainable land management is at the forefront of both academic debates, and institutional concerns as many jurisdictions are rethinking and reshaping their existing planning models in an effort to align them to sustainable development.

Globally, Integrated Land-Use Planning (ILUP) assumes a pivotal role as a planning approach to promote sustainable land management, environmental management, and sustainable development.⁴ ILUP assists countries to achieve their national development goals (NDG's). In the same vein, ILUP should domestically assume an important role in the formulation and implementation of policies and laws and decision-making relating to land use.

It has been more than 30 years since Namibia attained Independence and sovereignty to decide on the course of its environment. The question is how Namibia has fared in meeting its vision 2030 objectives, its NDG's, and related action plans using its existing planning model. Second, whether Namibia's existing policy, legislative and institutional frameworks on land use are functioning and whether these frameworks are geared toward sustainable development. It is from this premise, that this chapter revisits the existing land-use planning system in Namibia. The chapter discusses the concept of land-use planning from a developmental perspective. It further outlines the current land-use planning policy, and legislative and institutional frameworks in Namibia.

1 *Confederation of Namibian Fishing Associations & Others v Environmental Commissioner Teofilus Nghitila & Others* (2021) NAHCMD 308 para. 92.

2 Haub (2009:9).

3 GRN (2010a).

4 Kidd (2011:18).

2 The Concept of Land-Use Planning

Land-use planning is concerned with principles of planning as well as with principles of law.⁵ This interrelationship between land-use planning and the law commands an integrated approach to land-use planning. This interrelationship is demonstrated throughout this chapter.

Sustainable development is the focus of the current approaches to land-use planning and land management. The Food and Agriculture Organization (FAO) refers to the following definition of land:⁶

Land is a delineable area of the earth's terrestrial surface, encompassing all attributes of the biosphere immediately above or below this surface including those of the near-surface, climate, the soil and terrain forms, the surface hydrology (including shallow lakes, rivers, marshes, and swamps), the near surface sedimentary layers and associated groundwater reserve, the plant and animal populations, the human settlement pattern and physical results of past and present human activity (terracing, water storage or drainage structures, roads, buildings, etc.).

In terms of the above definition of land, land does not merely relate to the biophysical cover of land but is an interrelationship between the land, plant, animal, and human life on it. On the other hand, land use refers to the function of land or what the land is used for. These uses include residential, business, institutional, industrial, agricultural, tourism, forestry, parks, conservancies, wildlife, mining, farming, transport and so on. Land uses may vary depending on the area to which it relates, as such land uses in urban areas and rural areas may differ. Land-use patterns are often influenced not only by biophysical factors but also by cultural, institutional, and political aspects, as well as demographics and economic dynamics.⁷ Often some of the functions of land must be provided for by the same piece of land, and certain functions of land require or depend on other functions, as illustrated below.

Forest land use might have several economic, environmental and societal functions such as the provision of wood for forestry and/or for renewable energy, have a recreational function, be part of a cultural landscape, regulate the supply of air, water and minerals, support biodiversity in the form of landscape cohesion and maintain ecosystem processes.⁸ These dynamics in land uses can lead to land-use conflicts, amongst others, and – if land uses are not managed – to environmental degradation and even hamper development. The phrase 'planning' has been known by related terms such as urban planning, physical planning, town planning, land-use planning, regional planning, or simply planning;⁹ however, the widely accepted generic term in the planning fraternity is that of land-use planning.

5 Meyer (1987:4); Van Wyk (2012:12).

6 FAO (1995).

7 Batista e Silva (2011:69).

8 Ibid:80.

9 Achaembong (2018:12-13).

In terms of the FAO guidelines,¹⁰ land-use planning is the systematic assessment of land and water potential and alternatives for land use and economic and social conditions to select and adopt the best land-use options. A developmental perspective on land-use planning views it as a cross-sectoral and integrative decision-making process that facilitates the allocation of land uses that give the greatest sustainable benefit.¹¹ In this context, the phrases land-use planning and integrated land-use planning are used interchangeably. According to the FAO, ILUP “assesses and assigns the use of resources, taking into account different uses, and demands from different users, including all agricultural sectors – pastoral, crop and forests – as well as industry and other interested parties.”¹² ILUP is thus a planning approach that involves the allocation of land for different uses across a landscape in a manner that balances economic, social, and environmental values at the national or sub-national level.¹³

Land-use planning and land management are often seen as two separate concepts, but land management is an integral part of land-use planning. Land management, more particularly sustainable land management was defined by the UN 1992 Rio Earth Summit as

the use of land resources, including soils, water, animals and plants, for the production of goods to meet changing human needs, while simultaneously ensuring the long-term productive potential of these resources and the maintenance of their environmental functions.¹⁴

Some of the benefits of land-use planning as a tool of ILUP are the following:

- It can be used to minimise land degradation, rehabilitate degraded areas, and ensure optimal use of land resources for present and future generations;¹⁵
- it can be used to improve the well-being of the people. In this sense, sustainable land management can be used as a tool for poverty eradication, amongst others;¹⁶
- legally binding land-use plans prepared in a participatory manner can prevent land grabbing in cases where such plans address land tenure issues;¹⁷ and
- land-use planning can also be used as a forum for solving land-use conflicts.¹⁸

At the other end, spatial planning seems to distinguish itself from LUP as an approach most responsive to deal with prevailing spatial challenges.¹⁹ Spatial planning is

10 FAO (1993).

11 Haub (2009); GIZ (2011); Becker (2013:11).

12 FAO (2020c:2).

13 Ibid:1.

14 UNCCD (2013).

15 FAO (1993).

16 GIZ (2011).

17 Ibid.

18 Ibid.

19 Some scholars argue that there is no distinction between LUP and spatial planning as both are characterised by the element of integration and public participation in the planning process. Ibid:13-15.

defined as “a set of governance practices for developing and implementing strategies, plans, policies and projects, and for regulating the location, timing and form of development”.²⁰

Proponents of spatial planning outline its benefits as follows:

- It is an approach intended to engage with the distributional implications of allocating land for various activities and how these might be delivered with other public policy outcomes;
- it embraces social, economic, and environmental issues across national, regional and local levels and between different sectors of public policy; and
- it embraces not only a regulatory character but a promotional one that supports businesses and developers to deliver economic development as well as the livelihoods of individuals and households by removing unnecessary regulations, prohibitions, and costs.²¹

3 Environmental Aspects of Land-Use Planning

Land-use planning, development and the environment are interrelated.²² Land itself is a component of the environment, thus the manner in which land is used impacts the other interrelated aspects of the environment such the people, the animal and plant life.

The Supreme Court of Namibia judgement of *Black Range Mining (Pty) Ltd v Minister of Mines and Energy* stated that “[m]ining is a business that par excellence requires regulation by government to protect a range of interests, including the environment and the public interest”.²³ In 2021, the High Court of Namibia echoed the importance of environmental consideration with reference to phosphate mining, in the judgement of *Confederation of Namibian Fishing Associations & Others v Environmental Commissioner Teofilus Nghitila & Others* as follows:²⁴

[T]he issue of delay should - in this case - also be viewed against the relevant environmental and constitutional concerns - and that the court - in its discretion - and in the consideration of what would be in the interests of justice - and with reference to what was at play, namely important environmental issues, which should enjoy constitutional protection - should invoke a more generous approach, as the matter : ‘ (...) shouts out for a decision on the merits, as opposed to form or procedure - which is really what the defence of delay is all about’ and where ‘ (...) it would be a sad day for justice if, 100 years hence, the fish is all depleted (...)’.

20 Achaembong (2018:14-15).

21 Ibid.

22 Principle 25 of Rio Declaration on Environment and Development. Van Wyk (2012:410). Kidd (2011:209).

23 *Black Range Mining (Pty) Ltd v Minister of Mines and Energy N.O and Others* (2014) NASC 4 para. 49.

24 *Confederation of Namibian Fishing Associations & Others v Environmental Commissioner Teofilus Nghitila & Others* (2021) NAHCMD 308 para. 149.

Environmental considerations in land-use planning have taken the forefront, both internationally and domestically. On the international level, the principles of sustainable land management and environmental impact assessment²⁵ were developed as tools for environmental management. Both these principles require that environmental considerations must guide decisions affecting land use. Domestically, environmental considerations in land-use planning and land development are addressed by various policies, plans and legislation.

Under common law, environmental considerations were not addressed in decisions concerning land-use planning.²⁶ With the adoption of the Constitution in 1990 and the enactment of subsequent legislation dealing with or impacting land use, environmental considerations were built into legislative frameworks. Some of the post-independent legislation affecting land use and which have incorporated environmental considerations in land-use planning are: the Urban and Regional Planning Act No. 5 of 2018 (URPA), the Minerals (Prospecting and Mining) Act No. 33 of 1992, the Petroleum Products and Energy Act No. 13 of 1990, the Aquaculture Act No. 18 of 2002, the Water Resources Management Act No. 11 of 2013,²⁷ the Biosafety Act No. 7 of 2006, the Atomic Energy and Radiation Protection Act No. 5 of 2005, and the Forest Act No. 12 of 2001. In 2007, the Environmental Management Act No. 7 of 2007 (EMA) was enacted as the national legislation which mandates those undertaking listed activities such as mining to undertake environment impact assessment. Since not all activities are listed in terms of the Act, sector or industry-specific legislation requiring environmental consideration remains necessary.

4 Planning Levels

Land-use planning takes place at different levels of Government, namely the national, regional and local level. Within these levels of Government, various functionaries have different but interrelated and often overlapping powers and functions in respect of land-use planning. These powers and functions are in most cases dictated by the policy, legislative and institutional frameworks of the jurisdiction concerned.

5 Land-Use Plans

Land-use planning takes place through policy plans and in terms of legislation. On the policy level, land-use plans are usually presented in the form of a document or report

25 Principle 17 of the Rio Declaration.

26 Kidd (2011:209).

27 Not yet in operation.

which sets out the planning area, the responsible authority, the available resources, the maps and statistics relating to the planning area, the specific land uses and alternative uses.²⁸ These plans take the form of land development objectives, integrated development plans and spatial development frameworks,²⁹ amongst others. On the legislative level, land-use planning takes place through statutory instruments.³⁰ Legislation often prescribes the nature and content of the plan as well as the procedure for preparation and adoption and amendment of the plan concerned. Land-use plans commonly prescribed by way of legislation include forest plans, structure plans and zoning schemes amongst others.

6 The Land-Use Planning as a Process

The land-use planning process can be triggered by several factors such as conflicts in land uses, urban development, rural development, environmental damage or natural resource degradation.³¹ Land-use planning does not necessarily take place in terms of predefined stages or steps but is an iterative and cyclical process in terms of which the different stages are revisited to adapt the plan concerned to changing circumstances.³² The five common stages³³ in the land-use planning process are: the organisational stage, the analytical stage; the planning stage; the decision-making stage; and the implementation stage.³⁴

- During the organisational stage, the institution or body that will organise, steer, and guide the entire planning process is identified.³⁵ At this stage, the planning area, as well as the responsible authority, is identified. Furthermore, stakeholders and interested parties to be consulted are identified, notified and consulted.³⁶
- During the analytical stage, information data and information in the form of maps, statistics and maps are identified, collected, and analysed.³⁷ This information relates to present land uses of the area, topographic references and administrative boundaries of the area, as well as the population and legislation that will affect a particular land use.³⁸

28 FAO (1993); Haubt (2009).

29 Van Wyk (2012:246).

30 Ibid.

31 GIZ (2011); Haub (2009).

32 GIZ (2011).

33 There can be fewer or more stages. See FAO (1993).

34 GIZ (2011); Haub (2009); FAO (1993).

35 Haub (2009).

36 Ibid.

37 Ibid.

38 Ibid.

- During the planning stage, a range of reasonable combinations of land uses are identified as well as alternatives for future-oriented changes and the best option is chosen.³⁹ Stakeholders and interested and affected parties are consulted regarding proposed changes, and scoping is carried out to avoid a negative impact on the environment. The purpose of the planning stage is to make sure that the proposed changes are in line with existing policies and laws.⁴⁰
- During the decision-making stage, decisions are taken as to the selected land uses for designated areas as well as the legislation to be complied with to give effect to the land-use plans. At this stage, the land-use plan is prepared and presented to the relevant body for approval in order to be binding.⁴¹

The implementation stage refers to the realisation of the land-use plan. During this stage, the plan is implemented according to agreed timelines and responsibilities as well as available resources.⁴² In order to be effectively implemented, a land-use plan needs to have a binding effect.⁴³

7 Approaches to Land-Use Planning

The top-down approach to land-use planning has been criticised as being often non-participatory and unresponsive to changes.⁴⁴ The top-down approach to land-use planning refers to centralised planning, carried out largely by technical teams on the national level. The plans are then passed on to local levels for implementation.⁴⁵ The bottom-up approach is where land-use plans are based on local decision levels and integrating them in the next higher planning levels.⁴⁶

The FAO⁴⁷ proposes an integrative approach to land-use planning which is constitutive of participatory and comprehensive cooperation between all institutions and groups at national, provincial/regional, and local levels. The FAO also acknowledges that a successful land-use planning system is dependent on the willingness and cooperation of the actors involved to continuously discuss and find solutions to conflicting demands on land uses.⁴⁸

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

47 FAO (1995).

48 Ibid.

8 Current Land-Use Policy and Legislative Framework

8.1 Land-Use Planning Approach

Namibia is following an approach of integrated land management and integrated ecosystem management.⁴⁹ The country is praised for having pursued one of the most progressive wildlife and natural resources management approaches worldwide.⁵⁰ Most notable efforts towards sustainable land management are the conservancy programme by the Ministry of Environment, Forestry and Tourism, the community forest management by the Ministry of Agriculture, Water and Land Reform.⁵¹ The National Planning Commission reports that “[s]ince Independence, Namibia has been committed to developing effective and sustainable uses of land and natural resources which are sustainable and do not threaten future productivity.”⁵² Despite these efforts, the following spatial challenges continue to create turbulences in the socio-economic and environmental landscape of Namibia:

- Unsustainable land management practices;⁵³
- conflicting land-use allocations and uncontrolled land-use patterns;⁵⁴
- the absence of a structured overall planning system in Namibia, conflicting and unclear policies, legislation and responsibilities;⁵⁵
- Namibia is considered to be one of the most unequal societies;⁵⁶
- unemployment;⁵⁷
- lack of serviced land for housing and rising housing prices;⁵⁸
- rise of informal settlements and associated sanitation issues;⁵⁹
- urbanisation;⁶⁰ and
- climate change threats such as droughts and floods.⁶¹

Thus, the planning approach of Government should be one that is both participatory and responsive and aimed at addressing these spatial challenges.

49 Zeidler (2008).

50 Ibid.

51 Haub (2009). Note that some ministries have been merged in 2020. See Proclamation No. 10 as published in Government Gazette No. 7167 of 31 April 2020.

52 NPC (2020:38).

53 GRN (2010a).

54 GIZ (2011).

55 Haub (2009); GIZ (2011); Jones (2009).

56 NPC (2018:3); NPC (2019); NPC (2020:96).

57 Ibid.

58 GRN (2018c). NPC (2020:79).

59 NPC (2020:77).

60 Ottolenghi / Watson (2009). NPC (2020:78).

61 Shikangalah (2020:38-40).

9 Legislative and Policy Framework on Land-Use Planning

Over the past five years, Namibia undertook considerable reform of its legislative and policy frameworks relating to land use. On the policy level, the November 2020 progress report on the implementation of the 176 resolutions of the 2nd Land Conference indicates that nine resolutions are finalised and 142 ongoing.⁶² On the resolution, to mitigate the impact of climate change on productivity, it is reported that the Land Use Plan for Bwabwata National Park developed in 2019 was approved by Cabinet on 13 November 2020.⁶³ The Government committed itself to economic progression and environmental sustainability in terms of NDP5 (2017/18 - 2021/22). The recently launched Harambee Prosperity Plan II (HPP II) of 2021-2025⁶⁴ echoes that Namibia's economic, social and environmental future depends on the Government's ability to place people at the centre of decision making and development. Under the goal, Delivery of Urban Land, Housing & Sanitation, Government aims to conduct a review of the National Housing Policy and develop an Urban Land Reform Policy and Programme in 2021, to address, among others, urban design concepts, a minimum size of erven and mixed developments for more efficient land use. Furthermore, the plan indicates that the National Energy Policy, Renewable Energy Policy and Independent Power Producers' Policy will be operationalised during HPP II. The HPP II further indicates that: "To increase Namibia's benefits from multilateral cooperation, the Government will re-align focus to proactively leverage technical cooperation in crucial areas of national interests such as the blue economy, climate change, agriculture, nuclear technology, environment, energy, education, logistics and ICT." The Country Programming Framework CPF for Namibia reports that:⁶⁵

Concerning natural resources, environmental management and climate change, Namibia aims to transition to a low carbon and climate resilient economy through addressing challenges of energy and water insecurity. Furthermore, there is an aspiration to aggressively seek multilateral financing mechanisms such as the Adaptation Fund, Green Climate Fund (GCF) and the Global Environment Facility (GEF) as well as to explore partnerships through South-South Cooperation including the private sector.

Any planning system should be guided by binding principles developed at the national level to guide land use. The question is what principles guide the land-use planning systems and processes in Namibia. These principles are informed by both, principles of land-use planning and the law. Land-use planning principles⁶⁶ contained in

62 GRN (2018c).

63 GRN (2018c).

64 GRN (2021b).

65 FAO (2019:5).

66 Haub (2009).

international agreements binding on Namibia⁶⁷ as well generally accepted principles of public international law also shape the country's land-use planning system.

The first principle of land-use planning is the principle of sustainability.⁶⁸ This principle echoes that land-use practises must be sustainable, meaning that they meet the needs of the present generation while, at the same time, conserving resources for future generations.⁶⁹ The second is the principle of environmental protection, which echoes that environmental protection constitutes an integral part of and should inform the development process.⁷⁰ The third is the principle of equitability. In terms of this principle, development must equitably fulfil the developmental and environmental needs of present and future generations.⁷¹ Fourth is the principle that land-use practices must be developed, taking into account the developmental opportunities and challenges of the area concerned.⁷² Fifth is the principle of public participation;⁷³ this principle is concerned with the involvement and participation of all persons at the relevant planning level and also that all persons should have access to information on the environment. Sixth is the principle of environmental impact assessment,⁷⁴ which requires that assessment be undertaken of proposed policies and activities which may impact the environment to minimise environmental damage. Seventh is the precautionary principle,⁷⁵ which echoes that serious threats to the environment must be identified and minimised as earliest as possible. Eight is the polluter pays principle,⁷⁶ which echoes that those responsible for damage to the environment pay for the cost for rehabilitating the environment or for the damage. Ninth is the principle of preserving the traditional knowledge and culture of indigenous people,⁷⁷ meaning that land-use practices must have regard to traditional land-use practices. The principles stated here are not conclusive but constitute the core principles that must underpin a country's land-use planning system.

On the statutory level, the Constitution is the basic norm that must guide the current land-use planning system in Namibia. The first principle to inform land-use planning in Namibia is contained in the Preamble of the Constitution. The Preamble echoes that Namibia's land-use planning system should address and correct imbalances created by

67 Namibia has agreed to several environmental agreements; among the most notable are the Banjul Charter on Human and Peoples' Rights with its Article 24 on the right to a satisfactory environment, the Stockholm Declaration, the United Nations Convention on Climate Change and the Kyoto Protocol, the Convention on Biodiversity and the Rio Declaration.

68 Principle 1 of the Rio Declaration.

69 FAO (1993).

70 Principle 4 of the Rio Declaration.

71 Principle 3 of the Rio Declaration.

72 Principle 11 of the Rio Declaration.

73 Principle 10 of the Rio Declaration.

74 Principle 17 of the Rio Declaration.

75 Principle 15 of the Rio Declaration.

76 Principle 16 of the Rio Declaration.

77 Principle 22 of the Rio Declaration.

past land-use policies, practices, and laws. Also, at the forefront of constitutional norms and principles relevant for land-use planning are the democratic values, which are the rule of law, equality, and justice,⁷⁸ which must inform the land-use planning system developed and implemented by Namibia. The Constitution also guarantees rights and freedoms, such as the right to equality before the law,⁷⁹ the right to life⁸⁰ and dignity,⁸¹ the right to property,⁸² the right to culture⁸³ and freedom of speech.⁸⁴ These rights translate into the right of people to participate and voice their opinions, and to give input during the land-use planning process. The Constitution also echoes the principle of sustainable development in Article 95 on the promotion of the welfare of the people. This principle, which is also contained in international agreements binding on Namibia, imposes an obligation on the Government to develop a sustainable land-use planning system. Also important is the principle of administrative justice,⁸⁵ which demands that planning administration must act fairly and reasonably and comply with principles of administrative justice when making decisions related to land-use planning. Furthermore, the Constitution echoes that planning policies and legislation must not infringe on rights and freedoms guaranteed by the Constitution⁸⁶ and must observe the limitations set out in the Constitution.⁸⁷ The two green principles, which should thread the principles enumerated above are, access to information and public participation in the development and implementation of policies and laws impacting land and environment. The EMA sets out principles that must guide the implementation of any law and decisions relating to environmental protection,⁸⁸ which includes land-use planning policies, decisions, and laws.

The URPA⁸⁹ sets out principles of spatial planning/land-use planning as follows:

- Spatial planning must be aimed at redressing past imbalances in respect of access to land, land ownership and land allocation;

78 Article 1(1).

79 Article 10.

80 Article 6.

81 Article 8.

82 Article 16.

83 Article 19.

84 Article 21.

85 Article 18.

86 Article 25.

87 Article 22.

88 Section 3.

89 Came into operation on 3 September 2020. This Act repeals the Town Planning Ordinance No. 18 of 1954 and the Townships and Division of Land Ordinance No. 11 of 1963 and the Removal of Restrictions Ordinance No. 75 of 1975. URPA uses the phrase Spatial Planning and it seems the context is linked to the integration of land-use planning on a national, regional and local level which in itself is also the objective of ILUP.

- spatial planning must contribute to sustainable development by enhancing the natural environment and ensuring that development takes place within environmental limits;
- spatial planning must be aimed at protecting and respecting Namibia's environment, its cultural and natural heritage, including its biological diversity, for the benefit of present and future generations;
- during the preparation, amendment and review of policies and plans dealing with spatial planning, a transparent process of public participation must be followed, which process must afford the general public and persons affected by such policies and plans access to the relevant information in order to provide inputs on matters affecting them;
- spatial planning must optimise the use of existing resources and infrastructure, and decision-making procedures relating to spatial planning must minimise negative financial, social, economic or environmental impacts;
- spatial planning must follow an integrated approach to land use and land development; and
- policies, plans and laws, at national, regional and local level of Government which are dealing with spatial planning must be harmonised and streamlined to the extent possible, and those involved in the implementation of such policies and plans and laws must cooperate in order to avoid land-use conflicts, delays in decision making and minimise negative financial, social, economic or environmental impacts.

These principles guide the application and implementation of URPA and other laws dealing with land-use planning; serve as a general scope and ambit for formulations of policies, plans and laws dealing with spatial planning; and guide the exercise of powers and performance of functions on matters relating to spatial planning under URPA or other laws dealing with spatial planning.⁹⁰ EMA and URPA have introduced land use planning principles, that are binding with reference interpretation and implementation of laws and policies relating spatial planning and environment. However, this represents a piecemeal and sector-based introduction of land use planning principles. It is recommended that at national level, cabinet should direct that all legislation dealing with land use planning and environment should contain the core principles to guide land use planning in Namibia.

On the statutory level, there are various pieces of proposed and enacted legislation that directly deal with or affect land-use planning. The following table contains key legislation dealing with or related to land-use planning in Namibia.

90 Section 3(1).

Table 1: Legislation Related to Land-Use Planning in Namibia

Access to Information Bill	Land Survey Act No. 33 of 1993
Agricultural (Commercial) Land Reform Act No. 6 of 1995 ⁹¹	Minerals (Prospecting and Mining) Act No. 33 of 1992
Aquaculture Act No. 18 of 2002	Mountain Catchment Areas Act No. 63 of 1970
Atomic Energy and Radiation Protection Act No. 5 of 2005	Namibia Investment Promotion Act No. 9 of 2016
Communal Land Reform Act No. 5 of 2002	National Heritage Act 27 No. of 2004
Crown Land Disposal Proclamation No. 13 of 1920	Nature Conservation Ordinance No. 4 of 1975 ⁹²
Decentralisation Enabling Act No. 33 of 2000	Public and Environmental Health Act No. 1 of 2015
Deeds Registries Act No. 14 of 2015	Road, Traffic and Transport Act No. 22 of 1999
Environmental Management Act No. 7 of 2007	Sectional Titles Act No. 2 of 2009
Environmental Management Amendment Bill	Soil Conservation Act No. 76 of 1969
Expropriation Act No. 63 of 1975	Standard Building Regulations of 1970, ⁹³ by town and village councils and building regulations made by various municipal councils
Fisheries and Marine Resources Act No. 27 of 2000	Subdivision of Agricultural Land Act No. 70 of 1970
Flexible Land Tenure Act No. 4 of 2012	Urban and Regional Planning Act No. 5 of 2018
Forest Act No. 12 of 2001	Water Resources Management Act No 11 of 2013 ⁹⁴
Hazardous Substances Ordinance No. 14 of 1974	Wildlife Management and Protected Areas Bill
Inland Fisheries Act No. 1 of 2003	
Land Bill	

Source: Table compiled by the author.

In 2018, Namibia repealed several pre-Independence laws it considered obsolete and not serving any purpose in post-independent Namibia.⁹⁵ The following part will discuss key legislation dealing with land-use planning.

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- 91 The proposed Land Bill, once enacted, will repeal this Act and the Communal Land Reform Act No. 5 of 2002.
- 92 To be repealed by the Wildlife Management and Protected Areas Bill when it becomes a law.
- 93 As adopted in terms of the repealed Standards Act No. 33 of 1962 (repealed by the Standards Act No. 18 of 200; published in Government Notice R.1830 of 23 October 1970, as amended by Government Notice R.1431 of 17 August 1973. Namibia does not have national building standards.
- 94 This Act is not in operation.
- 95 Repeal of Obsolete Laws Act published in Government Gazette 6812 of 31 December 2018. Some of the repealed laws include Housing Levy Ordinance of 1976 and Reservation of State Land for Natives Amendment Ordinance, 1971, amongst others.

9.1.1 The Urban and Regional Planning Act

The URPA creates a legislative framework for spatial planning in Namibia. Whilst the two repealed laws⁹⁶ focussed on land-use planning by local authorities.⁹⁷ The new law integrates spatial planning at the national, regional and local level. Although URPA suggests a top-down approach to land-use planning, the advantage of the proposed planning approach lies in the existing master plans, structure plans and integrated regional land-use plans and zoning schemes developed at the regional and local level, which will influence the development of the National Spatial Development Framework (NSDF).⁹⁸ The peremptory requirements of stakeholder and public participation in the formulation of the NSDF, regional structure plans, urban structure plans, zoning schemes, township development, rezoning and subdivision of land are yet commendable elements of the proposed approach to planning.

9.1.2 The Subdivision of Agricultural Land Act

The Subdivision of Agricultural Act No. 70 of 1970 as amended prohibits the subdivision of agricultural land without the consent of the Minister of Agriculture.⁹⁹ The purpose of the Act is:¹⁰⁰

- To prevent alienation of undivided portions of land;
- to prevent subdivision of agricultural land into uneconomic units;
- to prevent the use of uneconomic portions of agricultural land for any length of time; and
- to prevent encroachment on the use of agricultural land so as to threaten its viability as such.

9.1.3 The Flexible Land Tenure Act

The Flexible Land Tenure Act No. 4 of 2012 was enacted to fast-track land development for the poor. The implementation phase of this Act has commenced.¹⁰¹ In terms

96 The Town Planning Ordinance No. 18 of 1954 and the Townships and Division of Land Ordinance No. 11 of 1963.

97 That is regulation of land use at local government level that is in relation to municipalities, towns, villages and settlement areas.

98 Chapter 4 of URPA.

99 Section 3. Agriculture falls within the ambit of the merged Ministry of Agriculture, Water and Land Reform.

100 *Adlem v Arlow* (782/11) [2012] ZASCA 164.

101 *The Economist* of 11 June 2019.

of this Act, a local authority council or regional council, an owner of land or a group of persons, except juristic persons,¹⁰² may apply to the local authority concerned to establish a starter title scheme in respect of land in a local authority area.¹⁰³ Before such a scheme is established, the land concerned must be subdivided or consolidated so as to reflect as one piece of land so as to be registered as such. Although the formal requirements for township establishment need not be complied with, the outer boundaries of the land must be set out.¹⁰⁴ Once the required deposit or amount is paid and land and boundary measurements have been carried out, the starter title scheme will be established. Once the scheme is established, the registered member will be entitled to hold a starter title on a block erf in the land; this title entitles the holder to occupy the block erf, erect a structure on it, bequeath or transfer the title to it.¹⁰⁵ Starter title schemes can be converted to land hold title schemes, which entitle the holder to have all the rights in the plot concerned that an owner has in respect of his or her erf under the common law.¹⁰⁶ Starter title schemes or land hold title schemes in an approved township can be converted to full ownership,¹⁰⁷ but the owner of such scheme must comply with the formal provisions of town planning and township establishment legislation in that regard.

9.1.4 The Land Bill

The revised 2016 Land Bill consolidates and reforms the law on agricultural and commercial land and communal land in Namibia. One of the objectives of HPP II is the enactment of the revised Land Bill. The currently applicable Agricultural (Commercial) Land Reform Act provides for the acquisition of agricultural land by the State for purposes of land reform and for the allocation to Namibian citizens who do not own or otherwise have the use of any or adequate land and who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.¹⁰⁸ One of the ways through which this is done is the acquisition of agricultural land by the State in a commercial farming area. This land is subdivided into holdings,¹⁰⁹ which are surveyed and registered as separate farming units in the Deeds Office.¹¹⁰ The

102 Section 9(9).

103 Section 11(1).

104 Section 11(2).

105 Section 9.

106 Section 10(1).

107 Section 15.

108 Section 14.

109 Section 36.

110 Section 36.

registered units are allotted to successful qualifying applicants under 99-year lease agreements.¹¹¹

9.1.5 The Environmental Management Act No. 7 of 2007

One of the objects of Environmental Management Act No. 7 of 2007 (EMA) is to ensure that environmental impact assessments are undertaken of activities, which may have an impact on the environment.¹¹² The Act applies to physical activities and the definition of the term ‘activities’ appears to be wide enough to also include plans and policies.¹¹³ The Minister of Environment, Forestry and Tourism, by notice in the *Gazette*, lists activities that may not be undertaken without an environmental clearance certificate by the Environmental Commissioner.¹¹⁴ The consultative process for review of the EMA has been concluded.¹¹⁵

10 Land-Use Planning Institutions and Administration

In Namibia, the administration of land-use planning takes place at the national, regional and local Government level. These spheres of Government are distinct but interrelated. Land-use planning is a facet in all spheres of Government.

At the national level, planning is within the executive competence. Executive competence relates to the power to give effect to legal rules.¹¹⁶ At the national level, executive power is vested in the President and Cabinet, which consists of various Ministers.¹¹⁷ Insofar as land-use planning is concerned, the role of Cabinet as part of the executive is to develop and implement land-use policies, initiate land-use planning laws and facilitate the implementation and administration of land-use planning laws administered by the executive, and to direct, coordinate and supervise the activities of Ministries and Government departments including para-statal enterprises,¹¹⁸ which relate to land-use planning.

In 2020, H.E. the President introduced considerable institutional reforms which impact land-use planning in Namibia. A number of ministries were merged, and some functions consolidated; most notably, the Ministry of Agriculture merged with Land

111 Section 36.

112 Section 2.

113 Section 1.

114 Section 27.

115 GRN (2020c:63-64).

116 Van Wyk (2012:147); Currie / De Waal (2001:228).

117 Article 35(1) of the Constitution.

118 Article 40 of the Constitution.

Reform and administration of water affairs brought within the ambit of this Ministry. Forestry matters were brought within the ambit of the Ministry of Environment, Forestry and Tourism, previously known as the Ministry of Environment and Tourism.

10.1 The National Planning Commission

On the national level, the National Planning Commission (known as NPC) drives socio-economic developmental planning in the country. This office is part of the Office of the Presidency. The role of the NPC is to coordinate developmental planning on the national level.¹¹⁹ Some of the important functions of NPC as set out in Section 4 of the NPA Act No. 2 of 2013 are:

- Spearhead the identification of Namibia's socio-economic development priorities;
- formulate short-term, medium-term and long-term national development plans in consultation with regional councils;
- develop monitoring and evaluation mechanisms to ensure effective implementation of the national development plans;
- evaluate the effectiveness of Government socio-economic policies; and
- coordinate the development of government socio-economic policies to ensure consistency.

10.2 The Ministry of Agriculture, Water and Land Reform

Nationally, the primary responsibility for land resides with the Minister of Agriculture, Water and Land Reform. The Minister thus exercises authority over the agriculture and land reform programme, the deeds registry, the office of the surveyor general, the national spatial information framework and the administration of land held in trust by the Minister.

This responsibility is also evident from the 2017/2018 to-/2020/2022 Strategic Plan of the Ministry: "To manage, administer and ensure equitable access to Namibia's land resource." It is also clear that the Minister is the competent authority for land-use planning and management. This is evident from the Ministry's vision which states in its Strategic Plan: "To ensure that Namibia's land resource is equitably allocated, efficiently managed, administered and sustainably used for the benefit of all Namibians." In terms of the National Land Policy of 1998, the Ministry is the custodian and implementer of the policy. The policy states that:

119 Jones (2009).

The Ministry has the primary responsibility for the implementation of the National Land Policy. This duty will be performed in close consultation with other Ministries, including: the Ministry of Urban and Rural Development (MURD) (with reference, inter alia, to urban and regional planning, regional councils and local authority councils); and the Ministry of Trade and Industry (with reference, inter alia, to regional planning, investment incentives schemes, export processing zones and the relationship of credit to land rights).

The Land Reform Advisory Commission established under the Agricultural (Commercial) Land Reform Act No. 6 of 1995 advises the Minister of Land Reform on the acquisition and use of agricultural land. In terms of its 2017/2018 to -2021/2022 Strategic Plan, the Ministry promises to deliver on the following objectives, amongst others:

- Effective planning and coordination of land reform programs;
- ensure sustainable use of natural resources;
- ensure the security of tenure; and
- ensure equitable distribution and access to land.

Although the Minister of Agriculture, Water and Land Reform carries the core responsibility for the administration of land, other ministries, offices and agencies and institutions in Government also have legislative and institutional responsibilities in respect of land-use planning.

10.3 Ministry of Urban and Rural Development

The Ministry of Urban and Rural Development (MURD) is responsible for the administration of land earmarked for urban and regional development. Insofar as land-use planning is concerned, the Minister administers the URPA, the Local Authorities Act No. 23 of 1992, the Regional Councils Act No. 22 of 1992, the Town and Regional Planners Act No. 9 of 1996 and the Decentralisation Act No. 33 of 2000 amongst others.

10.4 Other Authorities, Organisations and Persons

Other ministers and institutions also have responsibilities for land-use planning arising from policy and legislative frameworks; aquaculture development, fisheries and marine resources fall under the responsibility of the Ministry of Fisheries and Marine Resources whilst environmental impact assessment, conservancy establishment, the establishment of natural parks, and protected areas fall under the responsibility of Ministry of Environment, Forestry and Tourism (MEFT).

At the regional level, land-use planning is carried out by regional councils and communal land boards, amongst others. On the local level, land-use planning is carried out by local authority councils and traditional authorities. Different organisations and non-

governmental organisations, and communities also play a role in the land-use planning process. The Legal Assistance Centre is active in raising awareness on matters relating to land-use planning through workshops and preparation and publication of documents on land-use planning.¹²⁰ Others include the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ) and the Namibia Institute for Democracy (NID), amongst others.

11 Spatial Planning

The enactment of URPA changes the landscape of land-use planning in Namibia, which currently is uncoordinated. Not only does it show government commitment toward an integrated approach to land-use planning, but it also serves as an acknowledgement of the importance of spatial planning as a tool for development. URPA creates an inclusive and adaptive spatial planning regime at a national, regional and local level. The repealed laws¹²¹ merely focused on land-use planning on a local government level with no binding national plan or regional plan formally guiding such planning. Spatial planning in the Namibian context involves:

- The integration of NSDF, regional structure plans and urban structure plans, as well as cascading those to zoning scheme, regulation of development and management of land with the primary purpose to facilitate the allocation of land to the uses that provide the greatest sustainable physical, economic and social benefits and well-being; and
- the participation of civil society and the public in the formulation of policies, laws and planning decisions affecting them.

The purpose of spatial planning is reflected in the definition of spatial planning and the principles of spatial planning in Section 1 of the URPA. Although the URPA begs for a developmental approach to land-use planning, the implementation of that Act is yet to be assessed.

The position remains that Namibia's current urban and regional planning system can be said to be both, control and development-oriented; the control element carries more weight. This can be seen in the prevailing spatial challenges and because market forces, such as demand for land and land prices, still carry more weight than the provision of land as a means to improve the well-being of the people. This situation has resulted in the rise of informal settlements and urbanisation, amongst others, in urban areas. The URPA aims to curb this situation as it introduces a system of decentralised planning, and coupled with that, re-engineering of the urban planning process in an

120 LAC (2005 and 2012).

121 Namely the Town planning Ordinance No. 18 of 1954, the Townships and Division of Land Ordinance No. 11 of 1963, and the Removal of Restrictions Ordinance No. 75 of 1975.

effort to speed up land delivery in urban areas and settlement areas geared for urban development.¹²²

11.1 National Spatial Development Framework

The URPA obliges the Minister of MURD to develop a National Spatial Development Framework (NSDF).¹²³ One of the primary aims of the NSDF is to facilitate the coordination, integration and alignment of national, urban and regional policies and plans relating to spatial planning; and on a developmental level to guide the integrated social and economic development and land-use patterns of Namibia. The preparation and adoption of the NSDF are participatory in nature as the law mandates the publication of the draft NSDF for comments and objections by government and private institutions, civil society and the general public. The prepared NSDF must be approved by Cabinet, and its approval be notified in the *Gazette*. The Executive Director of the MURD must at no cost give access to the NSDF as approved by Cabinet to any person on request.

11.2 Regional Structure Plans

The URPA obliges each of the 14 regional councils in Namibia to prepare regional structure plans (RSP) for their respective regions.¹²⁴ As per Section 26 of the URPA, regional structure plans must

- (a) give effect to the relevant national policies, plans and laws;
- (b) be aligned to the land use plans prepared by the regional council in consultation with the Ministry administering matters relating to land reform, if such plans have been prepared for the region concerned; and
- (c) provide guidelines for the integrated social and economic development and land-use patterns in the region concerned.

The preparation and adoption of the RSP are participatory in nature as the law mandates the publication of the draft RSP for comments and objections by government and private institutions, civil society and the general public. The regional council must send the RSP as adopted by the Urban and Regional Planning Board (URPB) for its consideration and recommendation to the Minister. The Minister responsible for urban and rural development approves the RSP and gives notice of its approval in two

122 Section 1 of Town Planning Ordinance No. 18 of 1954; also see !Owoses-/Goagos (2013:39-40).

123 Part 1 of Chapter 4 of URPA.

124 Part 2 of Chapter 4 of URPA.

newspapers and the *Gazette*. The regional council whose plan is approved by the Minister must at no cost give access to the approved RSP to any person on request.

11.3 Urban Structure Plans

URPA obliges each local authority council in Namibia to prepare an urban structure plan (USP) in respect of its local authority area.¹²⁵ In terms of Section 32 of URPA, USP must

- (a) give effect to the relevant national policies, plans and laws;
- (b) give effect to the relevant national policies, plans and laws;
- (c) be aligned to the national spatial development framework and the relevant regional structure plan, if a national spatial development framework and a regional structure plan have been approved in terms of this Act; and
- (d) provide guidelines for the integrated social and economic development and land-use patterns in the local authority area concerned.

The preparation and adoption of the USP are participatory in nature as the law mandates the publication of the draft USP for comments and objections by government and private institutions, civil society and the general public. The regional council must send the USP as adopted by the Urban and Regional Planning Board (URPB) for its consideration and recommendation to the Minister of MURD.

In terms of URPA, the NSDF, URP, and USP must be reviewed every ten years, but the functionaries mandated to prepare such frameworks and plans may, at their own initiative, review or amend the NSDF, URP and USP at any time.

11.4 Zoning Schemes

The URPA replaces the term town planning schemes with zoning schemes, in line with international local government planning practices. Zoning schemes (ZS) are one of the land-use planning tools used by local authority councils to control and regulate land use in their respective local authority areas. Preparation, approval, adoption and amendment of ZS are a statutory requirement and are governed by the URPA. In terms of Section 43(1) of URPA, local authority councils are not obliged but have the discretion to prepare and adopt zoning schemes for certain areas of land under their jurisdiction. Despite this discretion, in terms of Section 43(3) of URPA, the Minister of MURD may direct a local authority council to prepare a zoning scheme. In terms of Section 41 of URPA. The primary purpose of a zoning scheme is

- (a) to promote the orderly development of the area to which the zoning scheme applies;
- (b) to promote the health, safety and general well-being of the public; and

125 Part 3 of Chapter 4 of URPA.

- (c) to determine land-use rights and provide for control over land-use rights and over the use of land in the area to which the zoning scheme applies.¹²⁶

Central to a zoning scheme is zoning, which is concerned with the allocation of different uses to different areas. Through zoning, different areas are created in a local authority area, and different use activities are permitted or prohibited.¹²⁷ A ZS sets out different areas or use zones and permits or prohibits certain uses within such areas. For example, a property may be zoned for residential, business or industrial purposes. The ZS sets out primary uses, consent uses and prohibited uses in respect of each use zone. Primary uses are those uses for which buildings may be erected and/or used. Consent uses are those uses for which buildings may be erected and/or used only with the consent of the council. Prohibited uses are those uses for which buildings may not be erected and/or used. A ZS further sets different restrictions with regard to building, such as the building line, height and side spaces, as well as density, parking and the floor area applicable to different zones. A ZS also contains provisions relating to the building values of buildings to be in different zones. The ZS also contains provisions regulating the subdivision and consolidation of land to which the scheme applies. The ZS is supplemented by buildings regulations and advertising regulations of the local authority council concerned, which prepared and adopted the ZS concerned.

A ZS also contains provisions regulating changes to land uses. A ZS permits changes to certain land uses through rezoning application and applications for consent use. These applications have to be notified in a newspaper for objections by the public before the relevant local authority council makes any decision in terms of the ZS.

In terms of URPA, regional councils are also required to prepare zoning schemes in respect of settlement areas and thus carry out urban planning functions in respect of such areas. Settlement areas are areas outside local authority areas but within regional council areas but earmarked for development as local authority areas. Regional councils control and manage settlement areas as if it's a local authority council. A regional council may, in respect of settlement areas, exercise powers and functions set out in the Local Authorities Act No. 23 of 1992 as if they were village councils.¹²⁸ Note the emphasis on village council because there are certain limitations on powers and functions of a local authority council based on its status as a municipal council, town council or village council.¹²⁹ Since regional councils are regarded as local authorities for the purposes of managing and controlling a settlement area, in terms of URPA, regional councils have to prepare and adopt in respect of the certain areas of land within the settlement area.

126 Section 1 of Town Planning Ordinance No. 18 of 1954; also see !Owoses-/Goagos (2013:39-40).

127 Kidd (2011:212); Van Wyk (1999:21 and 39-40); !Owoses-/Goagos (2013:44-46).

128 Section 32(1) of the Regional Councils Act.

129 Sections 30(2) and (3) of the Local Authorities Act.

12 Authorised Planning Authorities

In an effort to decentralise spatial planning and to streamline the turnaround time for land delivery in Namibia, URPA introduces authorised planning authorities.¹³⁰ In terms of Section 16 of URPA and the regulations,¹³¹ to be declared as an authorised planning authority, an applying local authority must demonstrate to the Minister of MURD that it has structure plans approved in terms of URPA and have town and regional planners in its employment or on contractual basis. Authorised planning authorities will be granted some autonomy to deal with certain land-use applications on their own. This is an effort to cut bureaucracy and to reduce the turnaround time for land delivery. Township establishment is basically land development that parallels subdivision of land for residential development primarily. Township establishment is a component of urban and regional planning in terms of which the land within local authority areas is developed.¹³²

In terms of Section 1 of URPA, a township is a group of portions of land or of subdivisions of a portion of land, which are combined with public places and are used or intended to be used for residential, business, industrial or similar purposes. Township establishment is governed by the URPA. In terms of the URPA, environmental considerations are a key factor in the establishment of townships, rezoning of land, subdivision of land and removal of restrictions on land.¹³³

13 Regional Planning

Land-use planning at the regional level is supervised by the National Planning Commission, the Minister of Agriculture, Water and Land Reform, the Minister of Urban and Rural Development and the Minister of Environment and Tourism, and the Traditional Authorities and Communal Land Boards.

Regional councils are established in terms of the Regional Councils Act No. 22 of 1992. Currently, there are 14 regions in the country. The Minister of Urban and Rural Development administers the Regional Councils Act. The regional councils are tasked to undertake the planning of the development of the region for which it has been established.¹³⁴ In doing this, they must have due regard to powers and functions of the

130 Section 16.

131 Regulations Relating to Urban and Regional Planning published in GG No. 7327 of GN No. 223 of 3 September 2020.

132 von Dönges / Van Winsen (1953:596).

133 Sections 48, 57, 65, 89 and 95.

134 Section 28 of the Regional Councils Act No. 22 of 1992.

National Planning Commission¹³⁵ and other laws on planning such as the URPA and the Communal Land Reform Act, amongst others.

The principal means of planning the development of the regions is the preparation of integrated regional development plans (RDPs).¹³⁶ RDPs provide an overview of the region with a situational analysis and directions for future developments, the development plan framework for the different sectors and a programme summary with specific objectives, activities and projects.¹³⁷ A total of seven even Integrated Regional Land Use Plans (IRLUPs) were finalised and handed over. In terms of the 2020-2021 Annual plan of the Ministry, the formulation of IRLUPs for Oshana and Omusati were expected to be finalised.¹³⁸ The shortcomings identified in respect of IRLP are the non-implementation of these plans as well as the non-alignment of these plans to existing policies and legislation.¹³⁹

The National Planning Commission is responsible for the development of regional profiles for the different regions. Such profiles set out each of the regions' development potentials and weaknesses.¹⁴⁰ The National Planning Commission carried out an impact assessment of the Policy Brief on the implementation of the Regional Development and Development Policy of 1997.

14 Land-Use Planning in the Coastal Zone

Namibia has a coastline, which extends some 1,570 km, from the mouth of the Orange River on the South African border to the mouth of the Kunene River on the Angolan border.¹⁴¹ In the last decade, there has been a crescendo of residential, recreational, tourism and mining activities at the coastal zone in Namibia. The coastal zone is considered to be the most ecologically sensitive area in which sustainable land management is needed.¹⁴²

14.1 Policy, Legal and Institutional Frameworks

Namibia does not have an overarching national legislation that governs coastal zone management, but there are various legal provisions that deal with or affect land-use

135 Section 4 of the National Planning Commission Act No. 2 of 2013.

136 Mukwena / Drake (2000).

137 Ibid.

138 Hautb (2009).

139 Ibid.

140 Mukwena / Drake (2000).

141 GRN (2012f:7).

142 Kidd (2011:229).

planning in the coastal zone.¹⁴³ Above all is the Namibian Constitution of 1990, international agreements ratified or acceded to by Namibia, principles of public international law,¹⁴⁴ and various pieces of legislation that deal with or affect land use in the coastal zone, most notably the Marine Resources Act No. 27 of 2000, the Merchant Shipping Act No. 57 of 1951, the Wreck and Salvage Act No. 5 of 2004, the Exclusive Economic Zone Act No. 3 of 1990, the Nature Conservation Ordinance No. 4 of 1975; the Sea Shore Ordinance No. 37 of 1958; the Environmental Management Act 7 of 2007; the Minerals (Prospecting) and Mining Act No. 33 of 1992, the Petroleum Act and the URBA. Among the legislation and proposed legislation to be reviewed and harmonised during HPP II are the Wildlife and Protected Areas Management Bill, the Namibia Investment Promotion Act No. 9 of 2016 and the Tourism Bill.¹⁴⁵

There are also various policies and plans geared toward Integrated Coastal Management (ICM). Most notable is the 2012 National Policy on Coastal Management (hereafter referred to as NPCM). The Ministry of Environment, Forestry and Tourism is in the process of finalising the Integrated Coastal Management Bill, which is currently under review.¹⁴⁶

At the institutional level, the various institutions that play a role in the coastal zone management are the National Planning Commission, the Ministry of Environment and Tourism, the Ministry of Fisheries and Marine Resources, the Ministry of Agriculture, Water and Land Reform, the Ministry of Works and Transport, the Ministry of Urban and Rural Development, Regional Councils, and Local Authority Councils. The responsibilities of these institutions in respect of land-use planning are dictated by the various policy and legal frameworks. Other institutions and non-Government institutions also contribute to the coastal zone management, especially through awareness-raising and technical support. The Ministry of Environment, Forestry and Tourism reports that several management plans for certain national parks have been finalised and are being implemented.¹⁴⁷ Furthermore, guidelines for the zonation of National Parks were approved and are being implemented.¹⁴⁸

14.2 Status of Coastal Zone Management

In 2006 and 2008, strategic environmental assessment reports have been prepared for the coastal zones of the Erongo and Kunene regions and for the Karas and Hardap

143 NACOMA (2007).

144 Article 144.

145 GRN (2021b:34).

146 *The Namibian* (2020).

147 GRN (2020c:29).

148 *Ibid.*

regions.¹⁴⁹ The purpose of the reports was to be used as decision support tools by political and technical decision-makers at local, regional and national levels in order to assist them in taking decisions on biodiversity conservation, land-use planning, and social and economic development planning in the four coastal regions.¹⁵⁰

Namibia's coastal zone management has been described as weak.¹⁵¹ The 2010 Strategic Environmental Assessment (SEA) Report¹⁵² identifies the following challenges in coastal zone management:

- The lack of institutional capacity, or unclear, over-centralised, confused and/or overlapping legal or institutional mandates, notably in the public sector agencies involved;¹⁵³ and
- the inability by stakeholders to find common understandings and a shared strategic perspective on the economic, social and environmental interactions involved in coastal development and of the adjustments compromises and trade-offs that need to be made to assure better coastal planning and management.¹⁵⁴

14.3 The National Policy on Coastal Management

The NPCM is the result of the 2006 and 2008 strategic environmental assessment (known as SEA) reports, the 2010 SEA report, the 2009 Green Paper and the 2010 White Paper developed under the Namibian Coast Conservation and Management (NACOMA) project under the auspices of National Planning Commission. The policy will be evaluated, monitored and implemented by the Ministry of Environment and Tourism. The overarching goal of the NPCM is to ensure a coordinated and integrated approach to coastal governance in Namibia. The NPCM aims to provide a framework to strengthen governance of Namibia's coastal areas to realise long-term national goals defined in Vision 2030 and the more specific targets of National Development Plans, namely sustainable economic growth, employment creation, and reduced inequalities in income.

149 Skov *et al.* (2010).

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

14.4 Defining the Coastal Zone

There is no national definition of the term coastal zone, but the geographical boundary of the coastal zone is commonly known to refer to the interface between the land and sea.¹⁵⁵ Due to the interdependence between land and sea ecosystems, integrated coastal management (ICM) becomes important as an approach to managing and protecting the coastal zone. Furthermore, the plethora of activities taking place at the coastal zone, such as fisheries, mining, transport and tourism, begs for ICM. Although NPCM does not define the coastal zone for the purpose of Namibia, it acknowledges the importance of defining the coastal zone:¹⁵⁶

Delineating the extent of the coastal zone is necessary for administrative purposes and to clarify areas and issues of responsibility of coastal stakeholders. It is useful for developing appropriate management systems to reduce the impact of our activities on the coast. It is also useful to be able to identify and maximise potential opportunities offered by the offshore and inland areas of our coast and ensure that any benefits are shared equitably.

The policy proposes a twofold approach toward defining the coastal zone, namely a broad national definition and a specific definition that considers specific regional and local circumstances which will be undertaken by regional bodies. The policy further states that:¹⁵⁷

Delineating the boundaries of coastal management should therefore consider...terrestrial systems that significantly affect the sea, or are affected by their proximity to the sea, and those marine systems affected by their proximity to the land. This implies boundaries that (a) include those areas and activities within watersheds that significantly affect the coast and (b) may, in certain cases, extend seaward to the edge of the continental shelf or the Exclusive Economic Zone (EEZ).

Defining the coastal zone is important to determine the scope of coastal zone management.

14.4.1 NPCM Land-Use Planning Objectives and Implementation Strategies

Strategies for implementing the NPCM have been identified as follows:

- To ensure meaningful public involvement and participation;
- to improve multiple-use planning and zoning by balance current and multiple future uses of coastal ecosystems and resources so that competing and complementary uses occur in appropriate geographic locations and are harmonised through zoning and planning;
- to ensure that all development and utilisation contribute to environmental sustainability and fall within the acceptable limits of land and resource use.

155 See <http://www.fao.org/3/w8440e/W8440e02.htm>, accessed 18 June 2021.

156 GRN (2012f:9).

157 *Ibid.*, quoting from GESAMP (1996).

Integrate efforts to maintain, and restore the health and productivity of coastal ecosystems and the services they provide;

- to clearly define, justify and communicate the demarcation of areas of ecological importance to the public;
- to establish a central authority for coastal management. This includes the creation of a Coastal Management Authority (CMA), assignment of coastal areas management to an existing planning, budget or coordinating office (such as the National Planning Commission); and
- the designation of an existing line ministry to act as the lead Ministry, and the creation of strategic alliances with a national lead agency.

The steady pace of implementation of the NDG's and other short term action plans requires a continuous and participatory dialogue between Government, stakeholders, public and civil society to identify workable and realistic solutions to address the prevailing spatial challenges.

15 Concluding Remarks and Recommendations

The piecemeal adoption and enactment of policy and legislation relating to land-use planning results in land-use planning policies and legislation which are not harmonised, uncoordinated and conflicting. Coordination is further hampered by the fact that various functionaries administer and implement various policies and legislation relating to land-use planning and the environment; moreover, institutional changes are introduced almost every five years. There is an urgent need for a parallel and coordinated review of existing land-use planning policies and legislation, and a central hub, one-stop centre or an integrated national database that

- informs decision-makers, stakeholders, and the public of formulation of plans and policies impacting environment and land;
- informs decision-makers, stakeholders and the public of development applications and the status of such applications and decisions taken on such applications;
- allows for sharing of information on data submitted in respect of development applications to guide decision-makers to avoid duplication and promote coordination and reduce turnaround time for service delivery; and
- allows timely public access to information that impacts land and the environment.

Chapter 17: Forestry Related Law and Policy

Clemens C.C. von Doderer, Jonathan M. Kamwi and Oliver C. Ruppel

1 Introduction

Namibia's surface area is 824,268 km² with three major categories of land tenure: the so-called commercial farmland with freehold tenure (approximately 44% of the country situated predominantly in the south and centre of Namibia), communal areas which are situated mainly in contiguous blocks in the northern Namibia (approximately 41% of the country), and the state land including conservation areas (approximately 15% of the country).

Namibia is one of the driest countries in sub-Saharan Africa with a mean annual rainfall of approximately 270 mm with wide regional and seasonal variation. Against the backdrop of variation in climate and aridity in the country, it is explainable that the vegetation cover in Namibia is generally low. The main groups of soils in the country are unconsolidated sand (arenosols) and shallow and weakly developed soils on bed-rock (lithosols, xerosols, regosols and yermosols).¹ Owing to very low contents of clay in the soil, the water holding capacity is generally very low. Nonetheless, Namibia has a broad variety of vegetation types including deserts, savannahs (dwarf shrub savannah, various acacia-based tree and shrub savannah associations and the mopane savannah) and dry woodlands. Moreover, Namibia has an abundant dense and diverse mammalian fauna.

To quite some extent, Namibia faces environmental problems that are similar to those experienced in many parts of Africa, including climate change,² water stress, land degradation and soil erosion, and deforestation. Forests provide a wide variety of ecosystem services, which are not only critical for the local environment, but also for the global context. Forests play a critical role in the context of climate change since they are one of the biggest reservoirs of carbon, helping to maintain the carbon cycle and other natural processes. They are key to reducing climate change.

Recent figures assessing global forest resources reveal that in the period from 2010 to 2020, Africa had the highest net loss of forest area.³ Respective figures pertaining to Namibia confirm this assessment. In 2000, more than eight million hectares of Namibia was covered by forests (down from 8.7 million hectares in 1990).⁴ By 2020, the

1 Sweet / Burke (2006).
2 Cf. Niang and Ruppel *et al.* (2014).
3 Cf. FAO (2020a:125).
4 Cf. MAWF (2014b:10).

total forest area has decreased to only 6.6 million ha.⁵ While in 1990, the forest area was at 10.6% of the total land area, it was at only 8.2 in 2018.⁶

Forest resources in Namibia are of essential importance as woodlands stabilise fragile soils and prevent soil erosion, especially in the flood-prone areas along the river streams in the northern part of the country. Moreover, forest areas are the home of parts of Namibia’s rich biological diversity. And forests also play a vital role from a socio-economic perspective, especially in the rural areas of Namibia, as many are directly or indirectly dependent on the availability of forest resources for browsing, building material for homesteads, fuel wood for cooking, light and heating, and medicines amongst others. Forest resources in Namibia are exploited for various uses, including charcoal production and the production of fire blocks from crushed bush for energy production. Moreover, woodlands harbour fruit and nut-bearing tree species such as *Sclerocarya birrea* (marula), *Berchemia discolor* (bird plum), and *Strychnos cocculoides* (monkey orange) are gaining commercial importance, just as medicinal plants such as *Harpagophytum procumbens* (devil’s claw).⁷ Figure 1 shows the trend in forest cover and other wooded land in Namibia, from 1990 to 2020.

Figure 1: Trends in Forest Cover and Other Wooded Land

FRA categories	Area (1000 ha)								
	1990	2000	2010	2015	2016	2017	2018	2019	2020
Forest	8 769.17	8 059.08	7 348.99	6 993.95	6 922.94	6 851.93	6 780.92	6 709.91	6 638.90
Other wooded land	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98

Source: FAO (2020b) noting that the data on forest area is old and not very reliable, but due to lack of more recent and better data it is being used despite other datasets (Hansen, Africover, etc) indicate substantially less area covered by trees.

Official estimates from Namibia’s Directorate of Forestry reported to the FAO⁸ reveal that in 2020, the forest area was 6,638,900 ha (down from 8,769,170 million hectares in 1990) of Namibia (8.06% of the total land surface area). More than 2.5% of the forest area has disappeared since 1990.

Major threats to forests in Namibia include the expansion of land for agriculture; the cutting of wood for fuel and for domestic use; clearing for infrastructure development; uncontrolled wildfires; selective logging through timber concessions, legal and illegal timber harvesting for exporting as logs to international markets and unlicensed

5 Cf. FAO (2020b:9).

6 See World Bank data at <https://data.worldbank.org/indicator/AG.LND.FRST.ZS?locations=NA>, accessed 21 June 2021.

7 Cf. Annexure 2 to the 2015 Forest Regulations: Forest Act, 2001, GG No. 5801, Notice No. 170.

8 See FAO (2020b).

curio carving; climate change and habitat destruction by elephants. As the total land area is fixed, increases in population will control the person to land ratio. The increase of population goes hand in hand with an increase in unsustainable use of timber for fuel, housing, fencing, fire, and poses a severe strain on the environment as deforestation not only leads to the loss of resources used for human activities, it also results in desertification and severe degradation of land.⁹ A Forest Research Strategy for Namibia (2011–15)¹⁰ addressed issues associated with sustainable forest management and the issue of value addition to forest products. The strategy identified forest research areas, including a vegetation (forest and rangeland) monitoring programme; forest products (value added) research; ecological studies; growth and yield studies; silvicultural research; economic, policy and sociological research; and management of information. However, the degree to which these research areas were achieved remains largely unknown.

With its ambitious aim laid down in the INDC¹¹ to achieve “a reduction of about 91% of its GHG emissions at the 2030 time horizon compared to the BAU [Business as Usual] scenario” forest related law and policy moves to the centre of Namibia’s mitigation strategies predominantly in the agriculture, forest and other land use (AFOLU) and the energy sectors. The reduction of the deforestation rate by 75%, reforestation and restoration of grassland will demand a more progressive and effective implementation of existing forest-related law and policy based on the pillars of Namibia’s Constitution. Within the updated NDC submitted to the UNFCCC in 2021, Namibia has identified ambitious measures contributing to climate change mitigation including to reduce the deforestation rate by 75%; to reforest 20,000 ha per year; to plant 10,000 ha of trees per year under agroforestry; to plant 5,000 ha of trees under urban forestry; to restore 15.5 million hectares of grassland; and to increase the share of renewables in electricity production from 33% to 70%.

2 Constitutional Provisions Relevant to Forests

According to Article 1(6) of the Namibian Constitution, the latter is the law above all laws. 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 three key environmental clauses relevant to sustainable use of natural resources.

9 MET (2006:13).

10 MAWF (2011).

11 Available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Namibia%20First/Namibia%27s%20Updated%20NDC_%20FINAL%2025%20July%202021.pdf, last accessed 11 January 2022.

Article 100 of the Constitution vests all natural resources in the state, unless otherwise legally owned. Thus, unless legal ownership of natural resources in a specific locality is proven, such natural resources are owned by the state; the provision implies thus that natural resources can be legally owned as private property.

Article 95(l) stipulates that the state shall actively promote and maintain the welfare of the people by adopting policies, which include “the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians (...)”. Through this particular Article, Namibia is obliged to protect its environment and to promote a sustainable use of its natural resources.

Furthermore, Article 91(c) stipulates that one of the functions of the Ombudsman is “the duty to investigate complaints concerning the over utilisation 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.” Further to these environmental key provisions, Article 144 must be pointed out as the constitutional link to international environmental law applicable in Namibia.¹²

3 Relevant Regional Frameworks, Statutory Law and Policy

A sound legal framework protecting Namibia’s forests is of utmost importance. Namibia, since Independence, has placed a strong emphasis on integrating environmental concerns into the post-colonial legal framework. Many legislative steps have been taken, in order to comply with obligations under international law and to ensure the conservation of natural resources by legislative means. A wide number of enactments are pertinent – directly or indirectly – to environmental issues. Environmental framework legislation of cross-sectoral nature such as the Environmental Management Act¹³ or the Nature Conservation Ordinance¹⁴ are rather broad in scope, while sectoral legislation such as the Forest Act No. 12 of 2001 cover specific environmental issues. The main law and policy instruments pertinent to forests in Namibia are the following:

- The 2002 SADC Protocol on Forestry on the regional level;
- the Forest Policy of 1992;
- the Development Forestry Policy for Namibia of 2001;
- the Forest Act No. 12 of 2001 as amended by the Forest Amendment Act No. 13 of 2005;¹⁵

12 Article 144 reads as follows: “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.”

13 No. 7 of 2007.

14 No. 4 of 1975.

15 Hereinafter referred to as the Forest Act.

- the Community Forestry Guidelines of 2005;
- the 2015 Forest Regulations to the Forest Act;
- the customary law of traditional communities; and
- the Environmental Management Act No. 7 of 2007.

A variety of provisions within the aforementioned legal instruments deal with the management of forests. The Directorate of Forestry within the Ministry of Environment, Forestry and Tourism (MEFT) is the primary institution responsible for all issues related to forests in Namibia, as one of its functions is to develop, manage and facilitate the economic and sustainable utilisation of forest resources.

3.1 The SADC Protocol on Forestry and the Forestry Strategy

Regional approaches for policy harmonisation and trans-boundary forest conservation and sustainable use concepts are essential mechanisms for the protection and conservation of the environment and its biodiversity, and ultimately, to poverty alleviation. Recognising the essential role which forests play with regard to maintaining the earth's climate, controlling floods and erosion, and as sources of food, wood and other forest products, the 2002 Protocol on Forestry of the Southern African Development Community (SADC), which came into force in 2009, aims to promote the development, conservation, sustainable management and utilisation of all types of forests and forest products in order to alleviate poverty and generate economic opportunities. This overarching framework for forestry collaboration in the SADC region is binding on Namibia and contains a set of rules or principles agreed upon by the SADC member states on how to integrate and cooperate among them in order to commonly conserve and manage the SADC forests and woodlands for the benefit of the SADC people. To this end, the Protocol *inter alia* addresses issues of common concern including deforestation, genetic erosion, climate change, forest fires, pests, diseases, invasive alien species, and law enforcement. States are called upon to facilitate the gathering and monitoring of information, and the sharing and dissemination of information, expertise and technology concerning forests; and to harmonise approaches to sustainable forest management, forest policy, legislation and enforcement, and issues of international concern. The Protocol emphasises that traditional forest-related knowledge must be protected and requires mechanisms to ensure the equitable sharing of benefits from forest resources.

The Protocol recognises the transboundary nature of these forests, the importance of trans-boundary management strategies, the vital role of forests in protecting water catchments particularly of shared water courses and understands that potential harm to these forests is not limited by national boundaries. One of the objectives of the protocol is the effective protection of the environment and the ways listed to achieve the objectives include “harmonising approaches to sustainable forest management, forest

policy, legislation and enforcement (...).¹⁶ The guiding principles include the obligation of member states to “facilitate, promote and continually improve policy and legal frameworks that promote sustainable forest management”.¹⁷ The Protocol provides a definition of “forest” relevant for Namibia, defining forest as “any ecosystem containing trees and which is so defined by national policy or legislation and includes the concepts of ‘forest land’, ‘forest product’, ‘forest resource’ and ‘forest genetic resource’.”¹⁸ The Protocol thus indicates that it is necessary to consult Namibian policy and legislation for a definition of ‘forest’. The SADC Forestry Strategy of 2010¹⁹ aims to revive the forest sector and to identify areas in forestry development of strategic importance to the region. It contains eight strategic programme areas including climate change mitigation and adaptation, the protection of key catchment forests, energy supply and poverty reduction.

3.2 The Forest Policy of 1992

The first post-independence forestry relevant instrument approved by cabinet was the Forest Policy of 1992. This Policy builds the foundation for forest law and policy in Namibia today and provides that existing forest lands be conserved and protected, their productivity increased and new areas to be brought under forests. The policy states that the goal should be to have a minimum of one tenth of the national land area under forest or tree cover. Management of state forests; afforestation; social and farm forestry; rights and concessions; diversion of forest land to non-forest purposes; wildlife conservation; rural communities and forests; damage to forests from fires and grazing; forest-based industries; forest extension; forest education and research; personnel management; forest survey and data base; and legal support and infrastructure are subsections under the 1992 Forest Policy.

3.3 Namibia’s Forestry Strategic Plan of 1996

The 1996 Forestry Strategic Plan²⁰ identifies main national issues in sustainable forestry development with a specific view to production, protection and participation. The issue of ‘production’ focuses on the management of natural forests, the supply of environmental benefits, and the processing of forest products. Protection measures are

16 Article 3(1)(f) of the Protocol.

17 Article 4(4) of the Protocol.

18 Article 1 of the Protocol.

19 Available at https://www.sadc.int/files/4815/9125/6651/SADC_Forestry_Strategy_2010-2020-English.pdf, accessed 18 January 2021.

20 GRN (1996).

put in context with population pressure, forest fires, and deforestation, whereas participation deals with the societal aspiration to have a greater say in how forest resources are managed and how the benefits of a managed forest resource are shared equitably.

3.4 2001 Development Forestry Policy for Namibia

The 2001 Development Forestry Policy for Namibia²¹ 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. The Policy acknowledges shortcomings in Namibia's framework for forest management, by concluding that the implementation of effective property rights, a more supportive regulatory framework, and the strengthening of extension services and the promotion of community forest management is critical for sustainable forest management in Namibia. To some extent, the implementation of the Forest Act No. 12 of 2001 and an increased uptake of community forests have contributed to change this situation.

3.5 *De Lege Lata*: The Forest Act No. 12 of 2001

3.5.1 Overall Scope

Forest management and exploitation in Namibia is primarily governed by the Forest Act No. 12 of 2001. The Forest Act consolidates the laws relating to the use and management of forests and forest produce; it provides for the control of forest fires and creates a Forestry Council. Protection of the environment is found in part IV of the Act. This part of the Act deals with protected areas, protection of natural vegetation and control over afforestation and deforestation.

The Forest Act replaces the Preservation of Trees and Forests Ordinance²² and the 1968 Forest Act.²³ It establishes a regime for authorisation of the harvesting of trees²⁴ in order to combat deforestation and thereby preventing the exacerbation of related

21 GRN (2001d).

22 No. 37 of 1952.

23 No. 72 of 1968.

24 Article 27 of the Forest Act No. 12 of 2001.

natural hazards. The Act is formulated around the tenets of sustainable management of forests, and the purpose for which forest resources are managed and developed. This also includes the planting of trees where necessary, as well as soil conservation, safe-keeping of water resources, maintenance of biological diversity, and the use of “forest produce in a way which is compatible with the forest’s primary role as the protector and enhancer of the natural environment”.²⁵

3.5.2 Definition of the Term ‘Forest’

It should be noted that no single, for Namibia generally applicable explicit definition of ‘forest’ exists. No explicit definition is contained in the Forest Act. Neither exists a distinction among native forest and planted forest, or between managed and unmanaged forests. Neither does the Forest Act draw a distinction between specific sub-definitions of other legal terms like, e.g. ‘open forest’, ‘closed forest’, ‘forest land’, ‘forested area’, ‘woodland’, ‘wooded area’, ‘timberland’, ‘secondary vegetations’, or ‘agroforest area’. However, the Act in its definition section²⁶ contains various definitions closely related to forests. The most relevant definition contained in the Forest Act is probably the definition on, ‘forest produce’, which is defined in very broad terms as anything that “grows or is naturally found in a forest”. The definition on forest produce furthermore specifies that “any living organism or product of it; and any inanimate object of mineral, historical, anthropological or cultural value” are also considered as forest produce.

Further definitions are provided for the following: ‘classified forest’, ‘community forest’, ‘forest management area’, ‘forest reserve’, ‘regional forest reserve’, and ‘state forest reserve’. The Forest Act does not explicitly distinguish between forest and woodland, however, the Directorate of Forestry has identified as one of its core functions to “establish, manage, utilise and conserve forests, including *woodlands*, for human benefit”.²⁷ It is thus evident that the Directorate of Forestry *de facto* draws specific distinctions with regards to forest and woodlands. A report drafted for the MAWF in 2005²⁸ by referring to the FAO definition of forests²⁹ states that the definition of woodlands is much broader than that of a forest and includes “landscapes, which are not forests but where reasonably tall trees are conspicuous.”

25 Section 10 of the Forest Act.

26 Section 1 of the Forest Act.

27 MAWF (2014a), emphasis added.

28 See Mendelsohn / el Obeid (2005).

29 Defining forests as land covered by trees with a canopy cover of more than 10% and higher than five metres. A forest should extend over more than half a hectare, and includes plantations and stands of young indigenous trees that are expected to develop into taller groves, see Food and Agricultural Organization (1998).

Because so far, no explicit definition of ‘forest’ in Namibian statutory law exists, it can be stated that the terminology regarding forests is of rather relative nature. By no means has the legislator once and for all established an absolute definition of ‘forest’ applying equally to all fields of law. The Forest Act does not *de iure* exclude certain categories of forest or forested areas from its scope of application. The type of legal definition of ‘forest’ in Namibia is of a mixed nature. From the perspective of the 2001 Forest Act, one would most probably classify the type of nature as regulation-based (forests are classified on the basis of different legal protection regimes to which the forests are subjected), as the Forest Act provides for a system of classified forests, namely forest reserves, community forests or forest management areas. However, this regulation-based definition is combined with elements of quantity-based definitions³⁰ and list-based definitions.³¹ Elements of list-based definitions are contained in Annexure 2 to the Forest Regulations of 2015 relating to Section 22 of the Forest Act and Regulation 13 of the Forest Regulations of 2015, which lists eighty specific protected plant species and the reasons, why these species have to be protected. In practice, elements of quantity-based definitions play an important role, when it comes to inventory questions as can for example be observed with regard to the National Forest Inventory and also the national classifications as used in Namibia’s Country Report to the 2015 FAO Global Forest Resource Assessment.³² In this assessment, Namibia has applied definitions as summarised in Table 1 below.

Table 1: National Classifications and Definitions Used in the Namibian Country Report for the FAO Global Forest Resources Assessment 2015

National Class	Definition
Dense Forest	70% crown cover, tree height >5m" /> >70% crown cover, tree height >5m
Dense Savannah	70% shrub cover, <2m" /> > 70% shrub cover, <2m
Medium Forest	5m" /> Crown cover 40-70%, tree height > 5m
Medium Savannah	40-70% bush cover, 2-5m
Medium Savannah	< 2m" /> 40-70% shrub cover, < 2m
Open Forest	5m" /> Crown cover 10-40% , tree height >5m
Open Savannah	10-40% bush cover, 2-5m
Open Savannah	<2m" /> 10-40% shrub cover, <2m
Very open Forest	5m" /> Crown cover 2-10%, tree height >5m

Source: MAWF (2014b:7).

30 E.g. spatially based on land cover – that is the physical cover of the earth’s surface observable from aerial or satellite views – expressed in hectares, tree height in meters, percentage of tree canopy cover, etc.; or based on an annual yield capacity per hectare expressed in cubic meters of wood including bark, etc.

31 E.g. by providing lists of tree species given in an annex to the national forestry legislation, or lists of vegetated areas, etc.

32 See MAWF (2014b).

In its *Country Report for the Global Forest Resources Assessment (FRA) of 2020*,³³ Namibia has applied the FRA 2020 categories and definitions,³⁴ providing, among others, definitions on ‘forests’³⁵ and ‘other woodland’.³⁶ For forest inventory purposes, Namibia has applied national classifications. Based on the Namibian National Forest Inventory³⁷ the following rough estimates have been summarised in 2005:³⁸

- Approximately 10% of all plant species in Namibia are trees (woody plants that usually grow to one metre or more in height).
- Less than 10% of the country is covered by trees with a canopy cover of more than 10% and higher than five metres.
- Around 50% of the country are areas of woodland and 40% are desert or shrub land.

Namibian case law has, so far, not played a role in interpreting the term ‘forest’ as stipulated in statutory law. To date, Namibian Courts have not been tasked to deal with interpreting the definition of ‘forest’. Legal doctrine has so far played a minor role in interpreting the term ‘forest’. Where such discussion exists in outline, a flexible approach is preferred.³⁹ However, recent discussions around the lack of a clear definition of the term ‘forest’ have, among other issues, resulted in efforts dealing with a revision of the Forest Act and the Forest Regulations. Highlighting that the Forest Act fails to define the term ‘forest’, an *Alignment Report for the Revision of the Forest Act and Forest Regulations* submitted by the Southern African Institute for Environmental Assessment in 2020⁴⁰ lists as one of the primary objectives of suggested revisions that “[t]he term ‘forest resources’ includes all timber products, all woody biomass products (e.g. bush encroachment products), and non-timber products of plants (e.g. fruits, resin, leaves).” However, for the time being, the Forest Act in its current version remains applicable.

33 See FAO (2020b).

34 See FAO (2020d).

35 “Land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of more than 10 percent or trees able to reach these thresholds in situ. It does not include land that is predominantly under agricultural or urban land use.” See FAO (2020d:4).

36 “Land not classified as ‘Forest’ spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of 5-10 percent or trees able to reach these thresholds; or with a combined cover of shrubs bushes and trees above 10 percent. It does not include land that is predominantly under agricultural or urban land use.” See FAO (2020d:4).

37 The Forest Act in its Section 11 provides that the Director of Forestry has the duty to compile and maintain a national forest inventory. The compilation of such inventory has started in 1999 and resulted in a collection of datasets, maps and reports managed by the Directorate of Forestry in Windhoek, Namibia. The National Forest Inventory organised by regions is an ongoing collection of information about forests countrywide. For more information and selected inventory reports see <http://www.mawf.gov.na/de/inventory-reports> accessed 18 January 2021.

38 See Mendelsohn / el Obeid (2005:21).

39 Ibid:10.

40 SAIEA (2020).

3.5.3 Classifications of Forests

The Forest Act, in part III deals with four different classifications of forests: state forest reserves (Section 13); regional forest reserves (Section 14); community forests (Section 15); and forest management areas (Section 16).

Community forests, related to the most dominant form of forest management in Namibia, are forests where the local community plays a significant role in forest management and land use decision-making. Community forests can be declared on communal land, with the agreement of the Chief or Traditional Authority. An organisation representing the people who traditionally use the community forest is appointed as the forest management authority. The aforementioned authority has the legal rights to use the forest resources and graze animals there, or to rent out these rights to others. The management authority has to look after the forest according to a management plan; to ensure that all community members have equal access to the resources in their forest; and to reinvest the income accrued from the forest to keep protecting the forest, and equitably share what is left over between the community members. As of 2019, Namibia had 43 registered community forests. State forest reserves can be created on state land that is not communal land. A management authority is appointed to manage the state forest reserve in accordance with a management plan. State forest reserves are declared by respective notice in the Government Gazette. In contrast to state forest reserves, regional forest reserves are created on communal land at the request of the Regional Council, which negotiates with the Chief or Traditional Authority and others whose rights are affected and makes recommendations to the Minister. Regional forest reserves can be created provided that the communal land needs to be managed as a classified forest and that effective management cannot be achieved through management of the communal land as a community forest.

Forest management areas can be created by agreement between the owners or legal occupiers of land that is not part of a classified forest and the Minister. Part of such agreement is a management plan, which may set out details for the planting of trees, the management of natural forest and harvesting practices. Furthermore, technical or other assistance from the Ministry may be subject to such agreement.

3.5.4 Protected Areas and Fire Control

The 2001 Forest Act makes provision for any land area to be declared a protected area if it is necessary to “protect the soil, water resources, protected plants and other

elements of biological diversity".⁴¹ For such area, the various stakeholders involved⁴² must reach an agreement on various issues, including the obligations to maintain and protect the forest resources of the protected area. In terms of protection of natural vegetation, the Forest Act provides that all trees and plants within 100 metres of a river, stream or watercourse are protected and may not be cut or destroyed without a licence.⁴³ The same protection is awarded to vegetation growing in dunes or drifting sands or on a gully. The Forest Act furthermore makes provision to declare as a fire management area areas contiguous to or situated near a classified forest.⁴⁴ A fire management plan for such area contains among other things provisions with regard to circumstances in which burning of things may be allowed and on how veld and forest fires are to be prevented, controlled and extinguished. Furthermore, any area can temporarily be declared a fire hazard area under the Forest Act⁴⁵ if this is necessary.

3.5.5 Use of Forests and Forest Produce

As per Section 24(1) of the Forest Act:

Forests and forest produce shall, in Namibia, subject to the permission of the owner of the land or the management authority of a classified forest and to the terms of a licence issued under this Act, be used in accordance with an applicable management plan.

In classified forests, vegetation or harvest forest produce may not be destroyed or damaged, no activity may be carried out for the purpose of mining minerals, no road, building or structure may be built, soil may not be removed or disturbed and no agricultural activities may be carried out, neither may animals be grazed, unless such activity is authorised by a management plan, a forest management agreement or a licence issued under the Forest Act. Section 24 (3) stipulates that owners or legal occupiers of land may harvest without a licence, however, within the limits of the management plan, if applicable. Furthermore, people living near a forest reserve or community forest may harvest forest produce for use as household fuel or for the construction of personal or livestock shelter, subject to a management plan, if applicable. Specific provisions for licensing are contained in Sections 27 to 30 and Section 34 of the Forest Act.

41 Section 21 of the Forest Act.

42 Namely the Minister of Lands, Resettlement and Rehabilitation, the Minister of Agriculture, Water and Rural Development, 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.

43 Section 22 of the Forest Act.

44 Section 36 of the Forest Act.

45 Section 39 of the Forest Act.

3.5.6 Offences

Examples of offences under the Forest Act (see Section 45 for a catalogue of offences) relate to damage or destruction of vegetation in a protected area or the destruction or removal of living trees, bushes or shrubs growing within 100 metres of a river, stream or watercourse. Groups of cases in the Forest Act requiring the involvement of courts are primarily those related to offences and penalties⁴⁶ and those related to the payment of compensation. Cases related to forests heard by community courts within traditional communities particularly deal with the felling of trees without permits and the use of forest resources as only local residents are allowed to use forest resources for domestic use.⁴⁷

3.6 *De Lege Ferenda*

Recent discussions around the lack of a clear definition of the term ‘forest’ have, among other issues, resulted in efforts dealing with a revision of the Forest Act and the Forest Regulations. Highlighting that the Forest Act fails to define the term ‘forest’, the above-mentioned *Alignment Report for the Revision of the Forest Act and Forest Regulations* by the Southern African Institute for Environmental Assessment in 2020⁴⁸ lists as some of the primary objectives of suggested revisions to simplify the Forest Act and to improve existing governance structures:

- The revised legislation should address current and future demands on forest resources. The term ‘forest resources’ should include all timber products, all woody biomass products (e.g. bush encroachment products), and non-timber products of plants (e.g. fruits, resin, leaves).
- The revision should close existing loopholes and ambiguities, so that the laws cannot be interpreted in ways that allow offenders to ‘get off the hook’.
- The resulting Act and Regulations should be free of unnecessary complications so that they are easily understood by government officials and the general public. The revision shall improve control over the unsustainable use of forest resources through robust and user-friendly mechanisms.

46 See e.g. *Tsamkxao Oma v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2018-00093) [2020] NAHCMD 162 (7 May 2020).

47 See Falk (2008:92). With regards to the Mbunza for example, Falk summarises as follows: “According to customary law, cases are first heard by the headman or headwoman, but defendants can appeal to the Homba. Those who are unable to pay their fines are supposed to work for the community under the Homba. Confiscated wood is sold and the proceeds as well as fines are transferred to the account of the Mbunza.”

48 SAIEA (2020).

Adding to the SAIEA's Alignment Report, a benchmarking of the Forest Act against existing regional and international policy and legislative frameworks relevant to forest conservation and management has been conducted in 2020.⁴⁹ Overall, the benchmarking report concluded, that the Forest Act is based on a top-down approach, placing forest authorities and administrative structures at the centre rather than the forests ecosystems themselves. In an environment of a framework with unclear definitions and criteria, a system of prohibitions and licences in combination of a control mechanism is being applied, resulting in exuberant red tape, high risk of mismanagement, a system of dependence and minimised responsibility of stakeholders outside of protected areas.⁵⁰ Albeit the Directorate of Forestry's mission statement,⁵¹ which is "to promote a well organised forestry sector that is socially, environmentally and economically sustainable, while creating significant and equitable wealth and opportunities", current provisions hardly consider and promote sustainable forest management as a mechanism to reveal the benefits of multi-functionality of forests to society, economy and the environment. Less administrative barriers, freedom in decision-making processes within given legislation and regulations, as well as free access to markets are key to implement sustainable forest management, whilst ensuring forest ecosystem protection.

Taking international forest policy and legislative standards and principles into consideration, any alterations *de lege ferenda* should be based on responsibilities and expectations of all stakeholders along the entire value chain, balanced with prohibition and monitoring as steering tools. This should include a strong focus on enabling rights-based land use for communities, private and institutional ownership. However, for the time being, the Forest Act in its current version remains applicable (*de lege lata*).

3.7 The 2015 Forest Regulations to the Forest Act

Illegal harvesting is a major problem throughout Namibia, especially in the north-eastern regions where the forest cover is relatively thicker. The Forest Regulations of 2015⁵² provide a detailed legal framework for the prevention of illegal harvesting. The Regulations expand on the foundations laid out by the 2001 Forest Act and regulate matters including the marking of forest produce; measures to be taken for forest protection; and permitting, licencing and other documents required for the harvesting,

49 Klein von Wisenberg (2021).

50 Ibid.

51 Available at <https://www.met.gov.na/about-meft/forestry/273/>, accessed 12 January 2022.

52 Forest Regulations: Forest Act 2001, Government Notice number 170 on the Forest Regulations: Forest Act 2001, Government Gazette number 5801 of 2015.

transportation, processing, sale, importation, transit, and exportation of forest produce. The Regulations also set out a detailed list of protected plant species.⁵³

The Regulations, together with the provisions of the Forest Act, provide that a person is not authorised to harvest, transport, sell, market, transit, export or import forest produce without a licence for harvesting or permit for transport, marketing, transit, export or import. The Regulations refer to prescribed application forms (e.g. for harvesting licenses) and specify documentation to accompany applications such as a written permission from the landowner.

3.8 The Community Forestry Guidelines of 2005

Much effort has been made since the preparation of the 1992 Forest Policy to establish a forestry related effective institutional, legal and policy framework. One focus has been on community-based management to preserve indigenous forests and to ensure a sustainable use of woodland resources for the benefit of local communities. In 2005, the Ministry of Agriculture, Water and Forestry's Directorate of Forestry introduced the Community Forestry Guidelines.⁵⁴ The main objective of these guidelines is to provide all stakeholders with a standard for establishing and managing community forests, by describing the legal procedures involved in setting up a community forest; describing the organisational arrangements and administrative procedures necessary for the sustainable management of community forests; and by specifying the respective roles of Government forestry officials, communities and other stakeholders involved.⁵⁵

3.9 The Customary Law of Traditional Communities

Before the arrival of colonists, indigenous populations have lived for generations according to their own distinctive laws and despite the legal influence of colonial and post-colonial powers, a large number of Namibians still live under customary law.

Article 66 of the Namibian Constitution lays the foundation for the constitutional recognition of customary law. It states that both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent that such customary or common law does not conflict with the Constitution or any other statutory law. Section 3 of the Traditional Authorities Act⁵⁶ gives certain powers, duties and functions to traditional authorities and members thereof. It is the overall

53 See Annexure 2 of the Forest Regulations: Forest Act 2001, Government Notice number 170 on the Forest Regulations: Forest Act 2001, Government Gazette number 5801 of 2015.

54 GRN (2005a).

55 Ibid.

56 No. 25 of 2000.

responsibility of traditional authorities to supervise and ensure the observance of the customary law of that community by its members. As to nature conservation it is one of the duties of a traditional authority to ensure that members of the traditional community use the natural resources at their disposal on a sustainable basis and in a manner that keeps the environment and maintains the ecosystem for the benefit of all Namibians. Customary law plays an important role in the sustainable development of natural resources and the protection of biological diversity as it incorporates a broad knowledge of ecosystems relationships.⁵⁷ This is particularly true for the protection and management of forest resources.⁵⁸ Many of the customary laws contain specific provisions for the protection of plants, trees and forests. One example⁵⁹ is Section 12 of the Laws of Ombalantu on the protection of forests, providing that “forests shall be protected and shall not be cut down, because this can lead to deforestation (...). No one shall cut down a tree, which bears fruit. The fine for this is a payment of two heads of cattle”.

3.10 The Environmental Management Act No. 7 of 2007

The Environmental Management Act (EMA) consolidates the laws relating to the management of the environment by promoting the sustainable management of the environment and the use of natural resources through the establishment of principles for decision making on matters affecting the environment; to establish the Sustainable Development Advisory Council; to provide for the appointment of the Environmental Commissioner and environmental officers; to provide for a process of assessment and control of activities which may have significant effects on the environment; and to provide for incidental matters.

As per Section 27 of the EMA, the Minister may list, by notice in the Government Gazette, activities which may not be undertaken without an environmental clearance. To this end the Minister has published a list of activities that may not be undertaken without environmental clearance,⁶⁰ including energy generation, transmission and storage activities, mining and quarrying, forestry activities, tourism development, agriculture and aquaculture activities, water resource development, infrastructure, hazardous substance treatment and land use and development activities. With regard to forests, it is specified that an environmental clearance is required for the “clearance of

57 Hinz / Ruppel (2008a:57).

58 Muhongo (2008); on the ownership of forests see also Mapaure (2012).

59 Further relevant customary law provisions are contained for example in Section 5.2 of the Laws of Ombadja, Section 16 of the Laws of Ongandjera; Section 8.1 of the Laws of Uukwaluudhi; Section 16.1 of the Laws of Uukwambi; the Sections on Deforestation and Gathering of Firewood of the Laws of the Mashi; or Section 10.3 of the Laws of the Mayeyi.

60 Government Gazette No. 4878, Government Notice No. 29.

forest areas, deforestation, afforestation, timber harvesting or any other related activity that requires authorisation in term of the Forest Act, 2001 (Act No. 12 of 2001) or any other law”.

4 Concluding Remarks

Namibia has a relatively young history of forest management under the Forest Act No. 12 of 2001 with its system of classified forests under which the community forests have been gazetted. However, it is generally acknowledged that it is important to preserve existing and develop new forest resources, aimed at combating climate change and at maintaining ecosystem services. This includes protecting biological diversity and ensuring that socio-economic values of forests are maintained for the benefit of the people living in Namibia, especially those in rural areas who are directly or indirectly dependent on the availability of forest resources.

The fact that existing statutory law in Namibia lacks a clear definition of ‘forests’ can be seen as a deficiency, which in practice is compensated on the one hand by referring to the terminology as used under the system of the FAO and on the other by providing specific definitions on forest-related terms such as on ‘forest produce’. A further point of reference is the system of classified forests, namely forest reserves, community forests and forest management areas. The body of cases giving practical meaning to the Forest Act by courts is still relatively limited.

Given that until about 2015 forest resources were used predominately within the borders of Namibia, meeting the domestic demand, it was commonly accepted, that in general terms, a solid legal and policy framework existed in Namibia to protect forests from threats like deforestation to obtain land for agriculture; the cutting of wood for fuel and for domestic use; clearing for infrastructure development; uncontrolled wild fires; selective logging through timber concessions and unlicensed curio carving; and habitat destruction by elephants.

However, the dynamic development of the forest sector in Namibia due to an increased bush encroachment on traditionally open, semi-dry savannah land, a growing economic subsector for bush-based biomass products as well as a national concern of possible overexploitation of forests in the north-eastern region of the country has disclosed loopholes and ambiguities of the current legislative framework. This prompted efforts dealing with a revision of the Forest Act and the Forest Regulations.

Addressing the current and future demands on forest resources, revised legislation should provide a clear definition of a number of key terms (e.g. forest) and processes and should close existing loopholes and ambiguities. Revealing the benefits of multi-functionality of forests to society, economy and the environment, the revision should also be based on the globally accepted principle of sustainable forest management,

placing the active management, utilisation and protection of the forest ecosystem as well as the responsibilities and expectations of all stakeholders at the centre.

However, any good intentions to revise the forestry legislation will be futile, if they are not accompanied by efforts to strengthen the executive and the judiciary in terms of technical, financial and human resources, as well as know-how, aimed at ensuring that the principles anchored within the field of Namibian law on forests are implemented in due consideration of all aspects of good governance, including transparency, reliability, accountability, predictability and the rule of law.⁶¹

61 Ruppel (2008d); Ruppel / Ambunda (2011).