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Environmental Law and Policy in Namibia

Towards Making Africa the Tree of Life

4th Edition

[africa]



Nomos



Chapter 4: Environmental Law in Namibia – an Overview

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1 Introduction

The objective of this chapter is to give a broad overview of the general foundations and sources of national environmental law.¹ It should be noted that the subsequent chapters will then provide a more in-depth legal analysis of specific topics.

The root causes for environmental degradation as experienced worldwide also apply to Namibia. Environmental degradation is closely related to human actions, economies and policies. The direct causes for environmental degradation include overexploitation, over-consumption, pollution and a wide range of activities that have a direct impact on the environment. The major threats to the Namibian environment include unsustainable harvesting of wild plants and wildlife, soil erosion and water pollution, climate change but also alien invasive organisms that threaten the survival of indigenous species.

The aim of environmental protection can be achieved by different means. Traditional legal methods include the establishment of protected areas, the regulation of harvesting and trade in certain species, the management of habitats and ecosystems, and the prohibition of alien and invasive species. Pollution control and the management of hazardous substances are other effective ways to contribute to the preservation of the environment.

The success of Namibia's efforts to sustainably use, control, manage and safeguard its natural resources depends to quite some extent on the different legal instruments that are available and on an interdisciplinary approach to develop a target-oriented environmental legislative framework as knowledge from other disciplines – biology, chemistry, medical science, ecology, sociology and economy is a *conditio sine qua non* for the creation of environmental institutions and sound legislation.

2 The Namibian Constitution

The Namibian Constitution,² or the Mother of All Laws, as Namibians have come to call this legal instrument, is indivisibly linked to the founding of the Namibian state.

1 For the sources of Namibian law in general see Amoo (2008a:53ff.).

2 It should be noted that according to Article 148 of the Namibian Constitution, “[T]his Constitution shall be called the Namibian Constitution.” Differing citations such as *the Namibian*

The adoption of the Constitution on 9 February 1990 came about after a three-decade-long struggle for Independence³ and many more decades of colonial and military rule.⁴ On 21 March 1990, Namibia became politically independent, with a basic legal framework drafted by the Constituent Assembly of Namibia. The liberation process was supported by the international community, particularly the United Nations Security Council Resolution 435 of 1978, setting out the governing code for the decolonisation process. Resolution 435 could be implemented due to a tripartite agreement between South Africa, Cuba and Angola under the supervision of the UN.⁵ In 1982, the United Nations General Assembly requested the United Nations Institute for Namibia, which was established in 1976 by the United Nations Council for Namibia, to prepare, in cooperation with the South West Africa People's Organisation (SWAPO), the Office of the United Nations Commissioner for Namibia and the United Nations Development Programme, a comprehensive document on all aspects of socio-economic reconstruction and development planning for an independent Namibia.⁶ The first democratic and internationally recognised elections took place in November 1989 and a Constituent Assembly consisting of individuals from various political parties drafted the fundamental legal framework for the Republic of Namibia. The Constitution, which came into force on Independence Day 21 March 1990, was thus a result of joint efforts of and debates between the political parties represented in the Constituent Assembly, South Africa, the United Nations and the South West Africa People's Organisation (SWAPO).⁷

The Namibian Constitution has been hailed as one of the most democratic and liberal constitutions in the world.⁸ It shows a strong commitment to the rule of law, democratic Government and respect for fundamental human rights and freedoms such as the protection of life, liberty, human dignity, equality, education, freedom from slavery, forced labour, and discrimination, to name only a few rights enshrined in the Constitution. Furthermore, the Constitution contains mechanisms with regard to checks and balances between the three branches of Government – the executive, legislative branches, and the judiciary. Principles of state policy, which guide the Government's legislative processes are provided in Chapter 11 of the Constitution. That the protection

Constitution Act, 1990, the Constitution of Namibia Act 1 of 1990 or the Constitution of the Republic of Namibia, 1990 (Act No. 1 of 1990) are strictly speaking incorrect, although these citations do occur in court processes, judgments, academic syllabi and academic publications.

3 On the struggle for liberation see Katjavivi (1988).

4 For a detailed analysis of the background and origin of the Namibian Constitution see Diescho (1994:8ff.) and Erasmus (2002).

5 Diescho (1994:17f.).

6 UNIN (1986).

7 Diescho (1994:8f.).

8 Schmidt-Jortzig (1991:71ff.); Schmidt-Jortzig (1994:309ff.); Van Wyk (1991:341ff.).

of the environment is not only a concern but a constitutional issue in Namibia will be outlined in the following paragraphs.⁹

According to Article 1(6) of the 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 the sustainable use of natural resources.

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(1) stipulates that the state shall actively promote and maintain the welfare of the people by adopting policies that 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 again be pointed out as the constitutional link to international environmental law applicable in Namibia.¹⁰

3 Development Framework

3.1 Namibia’s Green Plan

Namibia’s Green Plan aims at securing – for present and future generations – a safe and healthy environment and a prosperous economy. It was compiled by the (then) Ministry of Wildlife, Conservation and Tourism in consultation with various governmental and non-governmental organisations and first presented at the Rio Conference in 1992.¹¹ With the Green Plan, Namibia created a national common vision around its environmental issues, priorities and future actions. The Green Plan outlines needed policy and legislation, and strategies and recommendations for key areas such as the

9 See also Ruppel / Ruppel-Schlichting (2017a).

10 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.”

11 Brown (1992).

sustainable management of wildlife, tourism and fisheries as well as environmental education for sustainable development and links environment to socio-economic development. Thus, the Green Plan has laid the basis for a number of processes to conserve and manage resources for development.¹² Some substantive outputs of Namibia's Green Plan have been the Environmental Management Act (EMA), which provides the legal foundation for environmental protection in the country through Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs); Integrated Regional Land Use Plans; Community-based Natural Resource Management (CBNRM) including Namibia's world-renowned communal conservancies, community forests and community-based management of water resources and fisheries; a thriving nature-based tourism sector supported by a progressive policy framework on tourism, and tourism and wildlife concessions on state land; water demand management initiatives including water recycling, desalination and the establishment of basin management committees and transboundary basin commissions; a variety of renewable energy and energy efficiency initiatives; cleaner production and waste management; and natural resource accounting. One further outcome of Namibia's Green Plan was the establishment of the Environmental Investment Fund (EIF) of Namibia.

The Green Plan recognises that "the health of individuals, society and the economy are inextricably linked to the health of the environment. A healthy environment provides the opportunity of realising the full developmental potential of a region and country."¹³ Accordingly, the objective is to manage its natural resources for present use without jeopardising the future accessibility of these resources. Namibia's Green Plan is divided into Chapters as follows:

- Life's three essentials – clean air, water and land;
- sustaining our renewable resources;
- our special spaces and species;
- Namibia's unique stewardship: The Namib Desert;
- the importance of wetlands management in arid regions;
- the threat of desertification;
- global environmental security; and
- environmentally responsible decision-making.

Namibia's Green Plan cautions that environmental policies must be based on the precautionary principle and that all major construction projects, especially in the water sector, should always be preceded by an Environmental Impact Assessment (EIA) in order to prevent or minimise the potential negative effects on the environment. Further to this, the plan makes provision for the protection of the country's genetic resources; also its rich biodiversity must be maintained.

12 GRN (2012g:27).

13 Brown (1992:1).

Namibia's Green Plan has identified a multitude of actions needed to achieve sustainable development. These actions include helping to ensure that Namibia has clean air, water and land; supporting the sustainable use of natural resources; protecting Namibia's special spaces and species; highlighting the importance of wetlands in arid regions; promoting global environmental security; and encouraging environmentally responsible decision-making at all levels of society. The plan furthermore acknowledges that environmental as well as social requirements such as poverty reduction, education, public participation and a high level of primary health care must be addressed in order to achieve the interrelated objectives of wise environmental management and sustainable development.¹⁴

Namibia's Green Plan, at a very early stage of Namibian nationhood, set out an ambitious national programme for achieving environmental protection in the country. The topics set out in the plan are still, or even more of concern in the country. Thus, Namibia's Green Plan remains a relevant basic document with regard to sustainable development and environmental protection in Namibia.

3.2 Vision 2030 and the National Development Plans

Namibia's Vision 2030 was launched in June 2004 by the Founding President, Dr. Sam Nujoma.¹⁵ The vision's rationale is to provide long-term policy scenarios on the future course of development in the country at different points in time up until the target year of 2030. Vision 2030 regards the sequential five-year National Development Plans (NDPs) as the main vehicles for achieving its long-term objectives. Chapter 5 of Vision 2030 states the following:¹⁶

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

Thus, one of the long-term aims of Vision 2030 is the availability of clean water and productive and healthy natural wetlands with rich biodiversity.¹⁷

The successive NDPs will contain the goals and intermediate targets (milestones) that will eventually lead to the realisation of Vision 2030. NDP2,¹⁸ which spanned the period 2001/2– 2005/6, sought sustainable and equitable improvement in the quality

14 Brown (1992:172ff.).

15 GRN (2004a).

16 Ibid:167.

17 For more detailed information on wetlands in Namibia, cf. Ruppel / Bethune (2007:14).

18 GRN (2002a).

of life of all of the country's inhabitants. The national development objectives were to¹⁹

- reduce poverty;
- create employment;
- promote economic empowerment;
- stimulate and sustain economic growth;
- reduce inequalities in income distribution and regional development;
- promote gender equality and equity;
- enhance environmental and ecological sustainability; and
- combat the further spread of HIV/AIDS.

NDP3 spans the five-year period 2007/8 to 2011/2.²⁰ The draft guidelines for the formulation of NDP3 were prepared in the latter part of 2006 and approved by Cabinet in December of that year.²¹ The predominant theme of NDP3 was the accelerated economic growth through intensified rural development,²² while the productive utilisation of natural resources and environmental conservation are key result areas. Principal environmental concerns included water, land, marine, natural resources, biodiversity and ecosystems, drought, and climate change. It was stated that waste management and pollution will grow significantly with increasing industrialisation. NDP3 recognised that with the country's scarce and fragile natural resource base, the risk of overexploitation is considerable and that sustained growth is highly dependent on the sound management of these resources. The guidelines for preparing NDP3 stipulated that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by reinvesting benefits into natural resources by way of diversifying the economy away from resource-intensive primary sector activities and by increasing productivity per unit of natural resource input. Two NDP3 goals to ensure the protection of environmental concerns have been identified, namely the optimal and sustainable utilisation of renewable and non-renewable resources on the one hand and environmental sustainability on the other.

Namibia's Fourth National Development Plan²³ was released in July 2012 and spanned the period from 2012/2012 to 2016/2017. NDP4 differs essentially from its predecessors. NDP4 is more focused in that fewer goals and target values have been adopted. However, from an environmental perspective, NDP4 has sustained some losses. While the optimal and sustainable utilisation of renewable and non-renewable resources and environmental sustainability had been set forth as goals within NDP3, the three overarching goals of NDP4 are high and sustained economic growth,

19 Ruppel / Bethune (2007:14).

20 GRN (2007a).

21 Ibid.

22 Ibid.

23 GRN (2012a).

increased income equality, and employment creation. Four sectors, which will enjoy priority status are logistics, tourism, manufacturing, and agriculture.

Environment and climate change are, however, recognised under the category of values and principles,²⁴ which Namibia cherishes as a nation:

Our environment is clean, and we will continue to keep it so. We expect all elements of society, and businesses in particular, to support a precautionary approach to environmental challenges and alterations of the natural world contributing to climate change, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environment-friendly technologies.

Furthermore, NDP4 recognises that

environmental management is both an enabler and driver of economic development. The issue of environmental management is firmly anchored in Namibian laws and policies whose roots are in the Namibian Constitution and has earned the country an excellent reputation internationally for prudent environmental management based on innovative and progressive legislative framework.

In order to achieve one of the desired outcomes of NDP4, namely, to become the most competitive economy in the SADC region according to the standards set by the World Economic Forum by the year 2017, the environmental strategy during NDP4 and beyond includes:

- The implementation and enforcement of the EMA of 2007, particularly the use of strategic environmental assessments to guide development decision-making, the development of an integrated (including spatial) planning;
- the implementation of the CBNRM programme;
- improving and implementation policy and legislative frameworks;
- increase public access to environmental information;
- strengthen inter-ministerial, non-governmental, donor coordination and harmonisation;
- adopt public-private-community-partnerships; and
- develop new initiatives such as a Natural Resources and Environmental Governance Programme.

The strategy identified to address Namibia's vulnerability to climate change is to make use of strategic environmental assessments to guide development decision-making.

Namibia's Fifth National Development Plan (NDP5)²⁵ was launched in 2017 and spans the period from 2017/18 to 2021/22. Environmental protection takes a prominent role within this latest development plan as environmental sustainability is one of the four pillars of NDP5, alongside economic progression, social transformation and good governance all of which aim to support relevant global and continental development

24 The other values and principles which are contained in NDP4 are: National sovereignty and human dignity; upholding the Constitution and good governance; partnership; capacity enhancement; comparative advantage; people-centred economic development; gender equality and the empowerment of women; sustainable development; and peace and security.

25 GRN (2017a).

frameworks, including Agenda 2030, the Sustainable Development Goals, the Paris Agreement, the African Union Agenda 2063 and SADC Regional Indicative Strategic Development Plan. Against the background that more than 30% of the workforce is employed in natural resources related sectors, that 70% of the population is dependant on natural resources for a living and that 44% of Namibia's landmass is under conservation, ensuring a sustainable environment and enhancing resilience have become a top priority within Namibia's developmental policy framework. The indicators identified to measure desired outcomes regarding conservation and the sustainable management of natural resources relate to the annual revenue generated from protected areas and community based natural resources management (CBNRM) programmes, the percentage of reduction in cases of poaching as well as to the reduction of the total area burned by veld fires.²⁶ Strategies identified to achieve the targets include achieving land degradation neutrality and increasing land productivity, improving the management of protected areas and implementing measures to combat poaching and illegal trade of natural resources, and sustaining environmental awareness campaigns. Indicators identified to measure desired outcomes regarding environmental management and climate change relate to the reduction of greenhouse gas emissions, the number of approved waste disposal sites, the percentage of adherence to environmental management plans and to the revenue generated from environmental levies for reinvestment in environmental protection.²⁷

4 Policy Framework

A policy is a deliberate plan of action to guide decisions and achieve rational outcomes. Policies differ from rules or law. While the law can compel or prohibit behaviours (e.g. a law requiring permits for specific actions) policy merely guides actions to achieve a desired outcome.

Environmental policy determines the objectives guiding, and the strategies to be used in order to strengthen the respect for environmental values, taking into account the existing social, cultural and economic situation. The foundation for the Namibian environmental policy framework is Article 95(1) of the Constitution. It 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 benefits of all Namibians."

26 (GRN 2017:83).

27 *Ibid*:85.

Although many policies have at least an indirect impact on the environment, only those considered to be most relevant are listed in the table below. A brief introduction to some of the policies listed forms part of the subsequent paragraphs.

Table 1: Selected Environmental Policies in Namibia

Environment and Wildlife	Land
Namibia’s Environmental Assessment Policy	Land-use Planning: Towards Sustainable Development
Policy for Prospecting and Mining in Protected Areas and National Monuments	The National Land Use Planning Policy
National Policy on Human Wildlife Conflict Management	The National Land Policy
Water and Fisheries	The National Resettlement Policy
Water Supply and Sanitation Policy	The National Land Tenure Policy
The National Water Policy	The National CBNRM Policy
Namibia’s Draft Wetland Policy	Climate Change & Energy
Namibia’s Aquaculture Policy – towards responsible development of aquaculture	Namibia’s Climate Change Policy
Agriculture	National Energy Policy
The National Agricultural Policy	Tourism
The National Drought Policy and Strategy	The Tourism White Paper
The Regional Planning and Development Policy	The National Policy on Tourism
The National Seed Policy	The Community-Based Tourism Policy
Forestry	Biotechnology
Namibia Forestry Strategic Plan	Enabling the Safe Use of Biotechnology Policy
Development Forestry Policy	Education
	National Environmental Education and Education for Sustainable Development Policy

Source: Table compiled by the author.

4.1 Policies on Environment, Wildlife and Biotechnology

The Environmental Assessment Policy²⁸ approved by Cabinet in 1994, obliges Namibia to place a high priority on maintaining ecosystems and related ecological processes, and to uphold maximum biological diversity. The Policy recognises that environmental assessments are a key tool towards implementing integrated environmental management. The Policy has also gained legislative support by the EMA.

The 1999 **Policy for Prospecting and Mining in Protected Areas and National Monuments** was drafted to sensitise about the importance of conservation and

28 GRN (1995b).

tourism. The Policy envisages environmentally responsible mining and recognises the right of the State to issue prospecting and mining licences in protected areas. The Ministry of Mines and Energy is urged MME not to encourage the exploitation of low-value minerals and dimension stone in parks. The Policy emphasised the need for inter-sectoral collaboration where prospecting and mining is allowed in parks.

Recognising that with increased wildlife populations and expanded ranges into communal and freehold farming areas results in conflicts between people and wild animals, elephants and predators in particular, which cause livestock and crop losses and damage to water installations and sometimes also in the loss of human lives, the (then) Ministry of Environment and Tourism adopted the **National Policy on Human Wildlife Conflict Management** in 2009 to provide a framework for addressing human-wildlife conflict efficiently to protect biodiversity and to promote human development. To this end, the Policy has identified five major objectives, namely, to develop a future human-wildlife conflict management legislative framework; a standardised monitoring system for human-wildlife conflict management; innovative ways to reduce the level of human-wildlife conflict; to establish best practice mitigation measures for human-wildlife conflict management; and to provide clarity on the question of compensation in respect of damages caused by wildlife.

The **National Policy on Enabling the Safe Use of Biotechnology**²⁹ was prepared by the Namibian Biotechnology Alliance and the Ministry of Higher Education, Vocational Training, Science and Technology in October 1999. The Policy has two main objectives: The first is to guide the judicious use of modern biotechnology in Namibia for sustainable development in ways that do not in any way jeopardise human and environmental health, including Namibia's biodiversity and genetic resources. A second objective is to ensure the effective control of transboundary movements of genetically modified organisms or products thereof resulting from modern biotechnology, inter alia, through the exchange of information. The Policy recognises that, in addition to a competent lead authority, cooperation from several other ministries is essential to ensure regulation. Several institutions will be involved in conducting risk assessments, advising on permit issues, and ensuring effective control and law enforcement.

4.2 Policies on Land and Agriculture

The Land Use Planning Policy Document³⁰ drafted by the Ministry of Environment and Tourism in 1994 defines five physiographic landforms, namely communal state land, privately owned commercial farmland, proclaimed state land, urban areas, and

29 GRN (1999a).

30 GRN (1994b).

wetland systems, including their catchments. The Policy emphasises the sustainability of natural resources, biodiversity and essential ecological processes.

In 1998, the Ministry of Lands and Resettlement issued the **National Land Policy**,³¹ which is based on constitutional principles and on the national commitment to redress the social and economic injustices inherited from Namibia's colonial past. The Policy calls for the establishment and proclamation of urban areas and strives to promote decentralisation and community involvement. The Policy proposes financial and tax incentives for the protection and rehabilitation of natural environments, e.g. planting of indigenous trees and using alternative energy to reduce rates of deforestation and pollution. In accordance with Article 95(1) of the Constitution, it promotes environmentally sustainable land use, stating that failure to demonstrate environmental sustainability may be grounds for the denying or termination of a title. One of the aims of this Policy is to establish a Land Use and Environmental Board to promote environmental protection and contribute towards coordinated planning and management at national and regional levels. This Board is obliged to ensure that environmental protection is promoted in order to guarantee environmental, social and economic sustainability.

The **National Land Use Planning Policy**³² was drafted by the Ministry of Lands and Resettlement in 2002. It provides a framework for the implementation of regionally integrated land use plans.

The 1997 **National Resettlement Policy**³³ regulates that resettlement must be institutionally, socially, economically and environmentally sustainable, to enable the beneficiaries to become self-supporting.³⁴

The 2003 **National Land Tenure Policy**³⁵ covers all land tenure systems in urban, communal, commercial (freehold) and resettlement areas, and is intended to guide all land tenure rights in Namibia. The Policy promotes the sustainable utilisation of land and other resources. By regulating different land tenure rights, it provides secure tenure for informal urban settlers, farmworkers and occupiers (those who have been employed less than ten years on a single farm and do not have secure tenure elsewhere). Furthermore, it provides guidelines on compensation for occupiers of expropriated land. In line with the 1995 National Agricultural Policy,³⁶ the National Land Tenure Policy recognises the environmental limitations of the country. Some 22% of Namibia's land surface area is desert, receiving less than 100 mm of rainfall a year. Another 33% of the land is classified as arid, with an annual rainfall of between 100 to 300 mm. Some 37% of the land is semi-arid, meaning it receives between 300 and

31 GRN (1998b).

32 GRN (2002b).

33 GRN (2001c).

34 Woeller (2005:141).

35 GRN (2002c).

36 GRN (1995c).

500 mm rainfall a year, leaving only 8% classified as semi-humid and sub-tropical, i.e. with 500 to 700 mm annual rainfall.³⁷

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

The **Regional Planning and Development Policy** was drafted by the National Planning Commission in 1997.³⁸ The Policy acknowledges the trend of the increasing degradation of pastures, rangelands and woodland, with special attention to soil, water and forest management as development tools. The Policy promotes strategies such as soil conservation and controlled grazing cycles, which are important to agriculture.

Namibia's Drought Policy and Strategy was drafted in 1997 and is concerned with developing an efficient, even-handed and sustainable approach to drought management. In line with Namibia's National Agricultural Policy, the Drought Policy recognises that aridity and highly variable rainfall are normal phenomena. Farmers must also take into account the risks associated with variable input and output prices, exchange and interest rates, in addition to weather conditions. The Policy aims to shift responsibility for managing drought risk from Government to the farmer, with financial assistance and food security interventions only being considered in the event of an extreme or disaster drought. The objectives of the Policy are inter alia to ensure that household food security is not compromised by drought; to encourage and support farmers to adopt self-reliant approaches to the risk of drought; to minimise the degradation of the natural resource base during droughts; to preserve adequate reproductive capacity in livestock herds in affected areas during drought periods; and to ensure the continuous supply of potable water to communities, and particularly to their livestock, schools and clinics.

The **National Policy on Community Based Natural Resource Management of 2013**³⁹ aims to provide a framework that promotes the sustainable use of Namibia's natural resources and the promotion of integrated land and "natural resource planning and decision making that considers the most appropriate land uses based on land capability, optimum economic return, environmental and human needs."⁴⁰ The rationale is to develop and implement a framework that provides rural communities with the appropriate incentives and economic benefits to manage natural resources sustainably.

37 See World Bank (2007:100ff.).

38 GRN (1997c).

39 GRN (2013).

40 Ibid:2.

The Policy includes objectives such as the conservation of biodiversity based on traditional knowledge, the protection of intellectual property rights of communities with regard to the management, use and commercialisation of their natural resources, and moreover to provide appropriate and effective support to rural communities so that they can manage their natural resources in a sustainable manner.

4.3 Policies on Water

The following policy documents are the most relevant to water and wetland resources in Namibia:⁴¹

The 1993 **Water Supply and Sanitation Policy** deals with water supply and sanitation issues. It aims to improve sustainable food self-sufficiency and security and provides a foundation for the equitable and efficient development of water supply in Namibia.⁴² The Policy promotes the supply of water, as well as improved sanitation at an affordable cost to all Namibians. The objective here is to subject these developments to Environmental Impact Assessments to guarantee their sustainability. The Policy states that improved provision of sanitation can contribute to improved health, ensure a hygienic environment, protect water sources from pollution, promote water conservation, and stimulate economic development. The Policy laid the foundations for the establishment of a Directorate of Rural Water Supply, the community-based management of rural water supplies, and over 200 Water Point Committees countrywide. The Policy grants communities the right, with due regard for environmental needs, to plan, maintain and manage their own water supply and choose their own solutions and levels of service. Yet, the Policy makes it clear that this right is subject to the obligation that beneficiaries should contribute towards the cost of the water provision services. Furthermore, the Policy stresses the environmentally sustainable development and utilisation of water resources. The Water Point Committees are obliged to raise concerns about any developments or alterations that may pose a threat to the water supply and their water resources. They are also responsible for implementing specific management measures, such as the strict allocation of an ecological water reserve and water demand management measures. With these provisions, the Policy places a strong emphasis on community involvement, participation and responsibility.

In 2002, Cabinet approved the **National Water Policy White Paper**,⁴³ which formed the foundation of the Water Resources Management Act.⁴⁴ The Policy provides a framework for equitable, efficient and sustainable water resources management and

41 Heyns (2005:89-106, at 95f. and 105).

42 Ibid:95.

43 GRN (2000a).

44 No. 24 of 2004.

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

The vision of the 2004 **Draft Wetland Policy**⁴⁵ is to manage national and shared wetlands wisely by protecting their vital ecological functions and life-support systems for the current and future benefit of people's welfare, livelihoods and socio-economic development.⁴⁶ The objectives of the Policy are to protect and conserve wetland diversity and ecosystem functioning to support basic human needs, to provide a framework for sustainable use of wetland resources, to promote the integration of wetland management into other sectoral policies, and to recognise and fulfil Namibia's international and regional commitments concerning shared wetlands and wetlands of international importance. The basic principles of the Policy are intended to provide a framework for the development of all water-related policies. In terms of ecosystem values and sustainability, the Policy follows the Ramsar Convention on Wetlands' definitions and guidelines regarding the wise use of wetlands.⁴⁷

Namibia's 2001 **Aquaculture Policy**⁴⁸ deals with the responsible and sustainable development of farming aquatic plants, fish, molluscs and crustaceans. It advocates responsible aquaculture developments. This Policy deals directly with the potential impact of alien and other invasive species and seeks to minimise their often destructive influence on aquatic ecosystems. Issues specifically mentioned include the release of introduced species and genetically modified organisms, the mixing of farmed and wild stock (genetic pollution), and the risk of disease transfer. The Policy aims to ensure the protection of the living resources of national and international waters.

45 GRN (2004c).

46 On wetlands in Namibia, cf. Ruppel / Bethune (2007).

47 The text of the Ramsar Convention is available at <http://www.ramsar.org>.

48 GRN (2001b).

4.4 Policy on Forests

Biodiversity conservation is central to the 2001 **Development Forestry Policy for Namibia**,⁴⁹ which aims to reconcile rural development with biodiversity conservation by empowering farmers and local communities to manage forest resources on a sustainable basis. The Policy identifies effective property rights; a supportive regulatory framework; good extension services; community forestry; and forest research, education and training as instruments essential to the successful implementation of sustainable forestry management in Namibia. The Policy also paves the way for the establishment of community forests and their custodianship by the people most dependent on such resources. In 2005, the Ministry of Agriculture, Water and Forestry's Directorate of Forestry introduced the Community Forestry Guidelines.⁵⁰ 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.⁵¹

4.5 Policies on Tourism

The 1994 **Tourism White Paper**⁵² commits the Government to, *inter alia*, develop the tourism industry without threatening Namibia's biodiversity. It requires part of the income derived from tourism be reinvested in the conservation of natural resources, including those associated with wetlands. The Policy identifies ecotourism for foreign visitors as the primary product and assigns the Ministry of Environment and Tourism the lead role in coordinating inter-ministerial activities relevant to tourism and in cooperating with the private sector to create a national tourism identity.⁵³

In 1995, the (then) Ministry of Environment and Tourism developed the **Community-based Tourism Policy**⁵⁴ to recognise the fact that tourism could bring significant social and economic benefits to previously disadvantaged people, whilst also promoting biodiversity conservation. Under the terms of the Policy, the Ministry of Environment and Tourism is obliged to ensure that development of the community-based tourism sector is environmentally sustainable, and that no development takes place without

49 GRN (2001d).

50 GRN (2005a).

51 Ibid.

52 GRN (1994a).

53 Section 3.13 of the 1994 Tourism Policy.

54 GRN (1995a).

the participation of the people affected. This objective is geared to emphasise environmental sustainability, biodiversity conservation and community participation in tourism.

Finally, in 2008, the Ministry of Environment and Tourism issued the **National Policy on Tourism for Namibia**.⁵⁵ This Policy stresses that “government will encourage tourism that is environmentally, socially and economically sustainable”. While aiming to provide a framework for the mobilisation of tourism resources to realise economic growth, employment creation and reduced inequalities, the Tourism Policy acknowledges that sustainability is linked to the protection of the natural resource base and thus suggests adhering to the principle of sustainable tourism, which implies that “tourism activities should be planned in such a way that visitor satisfaction is achieved, the industry is profitable, the fragile environment is protected and natural resources are used sparingly for the benefit of current and future generations.”⁵⁶

4.6 Climate Change and Energy

In recognition of environmental constraints and vulnerability, the **National Policy on Climate Change for Namibia**⁵⁷ was launched in 2011. The Policy seeks to outline a coherent, transparent and inclusive framework on climate risk management in accordance with Namibia’s national development agenda, and the relevant legal framework. The general aim of the Policy is to contribute to the attainment of sustainable development in line with Namibia’s Vision 2030 through strengthening of national capacities to reduce climate change risk and build resilience for any climate change shocks. This is specified in the following objectives:

- To develop and implement appropriate adaptation strategies and actions that will lower the vulnerability of Namibians and various sectors to the impacts of climate change;
- to develop action and strategies for climate change mitigation;
- to integrate climate change effectively into policies, institutional and development frameworks in recognition of the cross-cutting nature of climate change;
- to enhance capacities and synergies at local, regional and national levels and at individual, institutional and systemic levels to ensure successful implementation of climate change response activities; and
- to provide secure and adequate funding resources for effective adaptation and mitigation investments on climate change and associated activities.

55 GRN (2008c).

56 Ibid:6.

57 GRN (2011b).

The Ministry of Mines and Energy issued the **National Energy Policy**⁵⁸ in 2017 aiming to ensure the security of all relevant energy supplies, to create cost-effective, affordable, reliable and equitable access to energy, to promote the efficient use of all forms of energy, and to incentivise the discovery, development and productive use of Namibia’s diverse energy resources. The Policy envisages that all energy-related activities ensure that the environment is protected, and resources are used in a sustainable manner. Policy issues and associated Policy statements refer to the electricity sector, the upstream oil and gas sector, the downstream liquid fuels sector, the downstream gas sector and the thermal energy sector.

4.7 Environmental Education

In 2019, the **National Environmental Education and Education for Sustainable Development Policy**⁵⁹ was launched by the Ministry of Environment, Forestry and Tourism with the mission to “reorient, integrate and upscale quality environmental education and education for sustainable development in environmental awareness, education and training systems, research and innovation systems, policies, programmes and action for sustainable development.”⁶⁰ The Policy *inter alia* intends to establish and implement education and training systems, improve synergies and partnerships, improve research and innovation outputs, and to mobilise increased funding and resource allocations in the field of environmental education and education for sustainable development.

5 Selected Strategies and Action Plans

5.1 National Biodiversity Strategy and Action Plan

Namibia has taken up the challenge of conserving species and ecosystems to limit the increasing rate of loss of biological diversity by drafting the National Biodiversity Strategy and Action Plan (NBSAP). The first NBSAP was implemented from 2001 to 2010 with the aim to protect ecosystems, biological diversity and ecological processes through conservation and sustainable use, thereby supporting the livelihoods, self-reliance and quality of life of Namibians.⁶¹ The Action Plan intends to provide overall strategic guidance for the implementation of Article 95(1) of the Constitution, and

58 GRN (2017b).

59 GRN (2019c).

60 Ibid:10.

61 Barnard *et al.* (2000).

detailed, practical activities through which sustainable development can be achieved. Further to this, the Action Plan attempts to provide a national strategic framework for natural resource management activities involving biological resource management, also including trade and economic incentives. It aims to prioritise activities and measures needed to implement this strategy effectively for the next decade.

The Action Plan also advocates the facilitation of sustainable natural resource management throughout Namibia as a fundamental theme for development planning; this it proposes to do through appropriate ecosystem management and land-use practices, and the selective, sustainable harvesting of species. Government is urged to develop monitoring and incentive systems for sustainable natural resource use. It is proposed that the users themselves become the monitoring agents, practising adoptive management, since they are the custodians of resources. Incentive systems should be aimed at making the sustainable management of natural resources profitable.⁶²

The second NBSAP⁶³ was published in 2014 to continue the work done under NBSAP 1 and spans the period from 2013 to 2022. In line with the strategic goals of the Convention on Biological Diversity Strategic Plan and the Aichi Targets, NBSAP 2 aims to address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society; to reduce direct pressures on biodiversity and promote the sustainable use of biological resources; to improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity; to enhance the benefits to all from biodiversity and ecosystem services; and to enhance the implementation of NBSAP2 through participatory planning, knowledge management and capacity building.⁶⁴

5.2 National Strategy on Wildlife Protection and Law Enforcement

Rising wildlife crime has prompted Government to take action in this regard. To this end, the Ministry of Environment Forestry and Tourism has issued the National Strategy on Wildlife Protection and Law Enforcement for the period from 2021 to 2025,⁶⁵ which recognises that “the illegal killing of wildlife in Namibia has implications for the environment, economy, social aspects as well as animal welfare”. The strategy reveals current crime statistics and trends that serve as a baseline for measuring impacts and outlines key requirements for protecting valuable and endangered species. While recognising that illegal trade in all natural resources, including timber, rare succulent plants, reptiles and birds needs to be addressed, the strategy strongly focuses on

62 Sub-strategic aim 2.2 of the First National Biodiversity Strategy and Action Plan.

63 GRN (2014h).

64 Ibid:v.

65 GRN (2020b).

the high-value species most targeted by criminals, namely elephant, rhinos and pangolin. The strategy emphasises that wildlife must be protected within and outside state-protected areas. Therefore, one of the overall strategic principles is to effectively enforce national legislation and the rule of law. One long-term goal is to stop poaching rather than to perpetually catch poachers. Furthermore, the strategy lists as strategic objectives, among others, to build capacity for conservation, wildlife protection and law enforcement; to enhance community-based resource management to improve wildlife protection; to raise awareness regarding wildlife protection and communicate matters related to wildlife crime; and to strengthen law enforcement amongst all agencies to effectively counter wildlife crime.

5.3 Namibia's Climate Change Strategy and Action Plan

Namibia's Climate Change Strategy and Action Plan 2013 to 2020 provides a background to climate change impacts predicted globally, regionally and nationally.⁶⁶ It highlights how vulnerable Namibia is in this regard and argues the need for climate change adaptation and mitigation. Guiding principles are proposed in the strategy to guide the planning, development, implementation and monitoring and evaluation of climate change response activities. The three main responses to climate change, namely adaptation, mitigation and tackling cross-cutting issues through adaptation and mitigation are highlighted from a Namibian perspective. Adaptation focuses on food security and a sustainable resource base, on sustainable water resources, on human health and well-being and infrastructure. Climate change mitigation is addressed through two themes, namely sustainable energy provision and low-carbon development and transport. Cross-cutting issues particularly refer to capacity building, training and institutional strengthening, research and information needs, public awareness, participation and access to information, disaster reduction and risk management, financial resource mobilisation and management, international cooperation and networking, technology development and transfer, and legislative development. The Action Plan outlines in detail specifically proposed activities to address each strategic aim through adaptation or mitigation.

5.4 Aquaculture Strategic Plan

Namibia's 2004 Aquaculture Strategic Plan⁶⁷ was developed to provide guidance on the regulatory framework, business climate, public acceptability, also on strategies to

66 GRN (2014b).

67 GRN (2004b).

ensure training, research, marketing and infrastructure development for aquaculture. The plan outlines targets for employment creation, investment, training and the value of production. Diverse needs call for sustainable economies in rural areas, both inland and coastal; improved viability of non-productive areas; poverty reduction; and pollution prevention supporting renewable natural resource-based food production. With regard to environmental considerations, the plan emphasises the importance of site selection prior to developing any aquaculture facility, and the permanent assessment of good water quality as the most important prerequisites for successful aquaculture.

5.5 Strategic Action Plan for the Implementation of Renewable Energy Policies

An important aspect of the meaningful and large-scale introduction of renewable energy technologies is to ensure sustainable development by promoting broad economic empowerment, socio-economic development and environmental protection. To this end, the 2006 Strategic Action Plan provides that the Renewable Energy and Energy Efficiency Institute should co-ordinate institutional cooperation on gender-based energy issues and promote regionally based broad economic empowerment. Environmental considerations should also form part of its responsibilities. The plan emphasises that increased population pressure results in increased pressure on natural resources as rural households often have no choice, but to rely heavily on wood for energy and shelter; this often happens at the expense of environmental sustainability. For this reason, it is proposed that the Renewable Energy and Energy Efficiency Institute assists in the establishment of environmental impact assessments that consider energy needs within a socio-economic framework. The institute intends to expand the scope of environmental impact assessments to consider the impact of, for instance, power stations' emissions to greenhouse gas development, respiratory diseases from household smoke, etc. within a national, sub-regional, regional and global perspective.

5.6 Forestry Strategic Plan

The Forestry Strategic Plan was issued by the Ministry of Environment and Tourism in 1996.⁶⁸ It is the major instrument for implementing the 2001 Development Forestry Policy. The plan aims to promote development of community level natural forest management, which includes the community management of riparian forests and woodlands.

68 GRN (1996).

6 Statutory Law

The development of Namibian environmental law is closely linked to the history of environmental law in South Africa due to Namibia's history. Article 140 of the Namibian Constitution provides that all law in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament. Thus, South African legislation plays a significant role even after Namibia's Independence. Some of the environmental laws valid in Namibia are inherited from the South African legal system. South Africa had enacted a variety of environmental legislation regarding the conservation of natural resources.⁶⁹ The Water Act,⁷⁰ the Soil Conservation Act,⁷¹ the Mountain Catchment Areas Act,⁷² the Hazardous Substances Ordinance⁷³ the Nature Conservation Ordinance,⁷⁴ and the Atmospheric Pollution Prevention Ordinance⁷⁵ are only some examples for South African legislation relevant for environmental conservation which passed on to Namibia, and which has been applicable way beyond Independence. However, Namibia, since Independence, has put a strong emphasis on integrating environmental concerns into the post-colonial legal framework. Many legislative steps have been taken, in order to comply with its obligations under international law and to ensure the conservation of natural resources by legislative means.

The Constitution provides the framework, and Independence created the opportunity to revise a wide range of national policies and laws. This, together with the emphasis placed on environmental concerns at the Rio Summit in 1992 and increased awareness triggered widespread legislative reform, particularly in terms of natural resource management.

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 Act⁷⁶ or the Nature Conservation Ordinance⁷⁷ are rather broad in scope, while sectoral legislation such as the Forest Act⁷⁸ or the Water Management Act⁷⁹ cover specific environmental issues. The following list, which raises no claim to completeness, shows the rich body of environmental legislation in Namibia. The substantial number of enactments emphasises the relevance of environmental concerns in Namibia on the one hand, on the other, it reflects the fragmentation of

69 Kidd (2011:12f.).

70 No. 36 of 1998.

71 No. 76 of 1969.

72 No. 63 of 1970.

73 No. 14 of 1974.

74 No. 4 of 1975.

75 No. 11 of 1976.

76 No. 7 of 2007.

77 No. 4 of 1975.

78 No. 12 of 2001.

79 No. 11 of 2013.

environmental law, which is one of the major challenges of environmental law with a view to administration and enforcement. Only some of the listed statutory laws can be introduced briefly, many of these statutory laws will be discussed in detail in subsequent chapters.

Table 2: Selected Legislation Relevant for Environmental Conservation

<ul style="list-style-type: none">• Access to Biological and Genetic Resources and Associated Traditional Knowledge Act No. 2 of 2017• Agricultural (Commercial) Land Reform Act No. 6 of 1995• Agricultural Pests Act No. 3 of 1973• Aquaculture Act No. 18 of 2002• Animals Protection Act No. 71 of 1962• Atmospheric Pollution Prevention Ordinance No. 11 of 1976• Atomic Energy and Radiation Protection Act No. 5 of 2005• Biosafety Act No. 7 of 2006• Communal Land Reform Act No. 5 of 2002• Controlled Wildlife Products and Trade Act No. 9 of 2008• Diamond Act No. 13 of 1999• Electricity Act No. 4 of 2007• Environmental Management Act No. 7 of 2007• Environment Investment Fund of Namibia Act No. 13 of 2001• Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act No. 36 of 1947• Forest Act No. 12 of 2001• Game Products Trust Fund Act No. 7 of 1997• Hazardous Substances Ordinance No. 14 of 1974	<ul style="list-style-type: none">• Inland Fisheries Resources Act No. 1 of 2003• Livestock Improvement Act No. 25 of 1977• Marine Resources Act No. 27 of 2000• Minerals (Prospecting and Mining) Act No. 3 of 1992• Mountain Catchment Areas Act No. 63 of 1970• Namibia Wildlife Resorts Company Act No. 3 of 1998• National Fishing Corporation of Namibia Act No. 28 of 1991• National Heritage Act No. 27 of 2004• Nature Conservation Ordinance No. 4 of 1975• Nature Conservation Amendment Act No. 3 of 2017• Petroleum (Exploitation and Production) Act No. 2 of 1991• Petroleum Products and Energy Act No. 13 of 1990• Plant Quarantine Act No. 7 of 2008• Prevention and Combating of Pollution of the Sea by Oil Act No. 6 of 1981• Public and Environmental Health Act No. 1 of 2015• Soil Conservation Act No. 76 of 1969• Water Act No. 54 of 1956• Water Resources Management Act No. 11 of 2013
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Source: Table compiled by the author.

6.1 Environmental Framework Legislation

As environmental framework legislation, the **Environmental Management Act No. 7 of 2007** (EMA) is an important tool in terms of environmental protection. On

6 February 2012, Government gazetted several notices related to the EMA.⁸⁰ It has *inter alia* been determined that with publication in the Gazette, the EMA becomes operational.⁸¹ The Act requires adherence to the principle of optimal sustainable yield in the exploitation of all natural resources. The Act gives effect to Article 95(1) of the Constitution by establishing general principles for the management of the environment and natural resources. It promotes the coordinated and integrated management of the environment and sets out responsibilities in this regard. Furthermore, it intends to give statutory effect to Namibia's Environmental Assessment Policy; it enables the Minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions; and provides for associated matters. In order to promote the sustainable management of the environment and the use of natural resources, the EMA states its objective in Section 2 and has established a bundle of principles for decision-making on matters affecting the environment in Section 3. The EMA promotes inter-generational equity in the utilisation of all natural resources. Environmental impact assessments and consultations with communities and relevant regional and local authorities are provided for to monitor the development of projects that potentially have an impact on the environment.

According to the EMA, Namibia's cultural and natural heritage is required to be protected and respected for the benefit of present and future generations. The Act provides for a Sustainable Development Advisory Council to be established⁸² to advise the Minister on issues that promote cooperation and coordination between organs of state, non-governmental organisations, community-based organisations, the private sector and funding agencies, on environmental issues relating to sustainable development. An Environmental Commissioner advises government bodies on the preparation of environment plans, receives and records all applications for environmental clearance certificates, determines whether a particular listed activity requires an environmental assessment, reviews environmental assessment reports, issues environmental clearance certificates and conducts inspections to monitor compliance with the EMA.

The Act provides for administrative mechanisms such as the necessity of environmental clearance certificates and environmental assessments. The impact of activities on the environment has to be considered and interested or affected parties have to be given an opportunity to participate in environmental assessment when government institutions or private persons are intending or planning anything likely to have a

80 Government Gazette No. 4878 (2012), Government Notices 28-30.

81 Government Gazette No. 4878 (2012), Government Notice No. 28, Commencement of the Environmental Management Act, 2007.

82 In February 2012, the Government of Namibia gazetted the Regulation for the implementation of Environmental Management Act No. 7 of 2007. Subsequently, the Ministry of Environment and Tourism invited nominations for appropriate persons from the public, organisations, associations or institutions to sit on the Sustainable Development Advisory Council. The Sustainable Development Advisory Council has been inaugurated in January 2013. For further information see the <https://sdacnamibia.org>, accessed 20 April 2021.

significant effect on the environment. With regard to such activities, environmental assessments have to be conducted before any decisions are made. For specific activities or projects having an environmental impact, an environmental clearance certificate is required.

All activities which need an environmental clearance certificate must follow the Regulations for Environmental Impact Assessments,⁸³ which have been made according to Section 56 of the EMA.

The **Public and Environmental Health Act No. 1 of 2015** aims to promote public health and wellbeing; prevent injuries, diseases and disabilities; protect individuals and communities from public health risks; encourage community participation in order to create a healthy environment; and to provide for early detection of diseases and public health risks. To this end, the Act contains several provisions relevant for environmental protection. With a view to water and food safety, the Act in Part 7 formulates a duty of local authorities to provide and maintain as far as may be reasonably possible, a sufficient supply of potable water for drinking and domestic purposes. Furthermore, the Act addresses integrated waste management in Part 9 and stipulates among others that in order to prevent environmental pollution and public health risks, local authorities must ensure that all waste generated is collected, disposed of and recycled in accordance with the requirements of all laws governing the management of the different waste streams. Part 11 deals with public and environmental health planning and reporting and contains an option to request a public and environmental health plan from a local authority in respect of a specific issue or geographic area. The Act came into operation in 2020.⁸⁴

6.2 Nature Conservation, Wildlife and Traditional Knowledge

One of the major biodiversity related laws in Namibia is the legislation governing the conservation of wildlife, and protected areas, the **Nature Conservation Ordinance No. 4 of 1975**. The Ordinance was enacted to consolidate the laws relating to the conservation of nature to establish game parks and nature reserves and to control problem animals. Various amendments to the Ordinance have become effective since its commencement in 1975. With the introduction of communal conservancies for example, amendments to the ordinance and its regulations were made and came into effect in

83 Government Gazette No. 4878 (2012) Government Notice No. 30, Environmental Impact Assessment Regulations: Environmental Management Act, 2007.

84 Part 3 of the Act was brought into force temporarily by the State of Emergency - COVID-19 Regulations, Proclamation 9 of 2020 (GG 7159) issued pursuant to Article 26(5) of the Namibian Constitution, subsequent to the declaration of a state of emergency in the whole of Namibia, following the worldwide outbreak of the disease. In September 2020, the Act came into operation, see *Government Gazette* No. 7338, Government Notice No. 230.

1996. The amendments were made to take into account the establishment of conservancies and Wildlife Councils. In terms of the amendment, rural communities have to form a conservancy in order to be able to acquire the use-right over wildlife. Wildlife conservancies are gaining importance granting communities custodianship of their natural resources, particularly wildlife and fish.

The **Nature Conservation Amendment Act No. 3 of 2017** is the most recent amendment to the Nature Conservation Ordinance providing for an administrative, legal and procedural framework for tourism concessions in protected areas and other State land and for the control of import and export of live game or animal. The 2017 Act also increases the penalties for offences under the Ordinance.

The Ordinance, which is still one of the most comprehensive environment-related legal instruments in Namibia, is arranged as follows: Chapter I establishes the Nature Conservation Board. Chapter II deals with game parks and reserves, and in particular, its Section 13 is about the Etosha National Park. The Ordinance provides for a restriction of the right to enter game parks and nature reserves under specific conditions and prohibition of certain acts therein. One of the most important provisions with regard to the protection of game is Section 20, which prohibits hunting in game parks and nature reserves. With regard to plant protection, Section 24 prohibits the picking of indigenous plants in private nature reserves. Chapter III of the Ordinance on wild animals inter alia regulates hunting of specifically protected and protected game and of huntable game, game birds, exotic game and other wild animals. Provision is also made for the lease of hunting rights in Section 35. An own Chapter of the Ordinance is on problem animals, which are wild animals, declared as problem animals by the Executive Committee by respective notice in the Government Gazette. The provisions of Chapter V on the protection of fish in inland waters have been repealed by the Inland Fisheries Resources Act. Chapter VI aims at the protection of indigenous plants. The Minister of Environment and Tourism, who is responsible for the preservation of wild animals, exotic game, fish and plants may destroy, decrease or eliminate any species that is detrimental to any other species, undertake research and surveys on any species, take the measure for the control of aquatic vegetation and issue regulations with regard to the import, cultivation and control of any plant, indigenous or not detrimental to, any wild animal, fish or indigenous plant. Chapter VII of the Ordinance contains several general provisions of more procedural and administrative nature, and focuses on permits, licences, registrations, approvals, permissions, exemptions and criminal implications and consequences for those who trespass specific provisions of the Ordinance. The Schedules of the Ordinance amongst others, list specially protected game, protected game, huntable game, huntable game birds, and protected plants. The Ordinance is considered to be the most important environmental law in Namibia with

regard to case law.⁸⁵ Unfortunately, this legal instrument is not equipped with adequate enforcement mechanisms, and the penalties attached to the offences hardly have a deterring effect.

The **Controlled Wildlife Products and Trade Act No. 9 of 2008**, which came into force in 2012, provides for the implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Among others, the Act establishes a technical committee that performs duties and has certain powers as per CITES; furthermore, the Act defines certain offences and penalties related to wildlife crimes. As per Section 9 of the Act, Regulations⁸⁶ came into force in 2011, which deal with a system of permits and procedures required for import, export, re-export or re-import of any species listed in the Appendices of CITES, including live specimens as well as parts and derivatives.

The first Access to Biological Resources and Associated Traditional Knowledge Bill was drafted in 1998 and has since then undergone several changes. **The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act No. 2 of 2017** has been passed by Parliament but still has to come into force on a date set by the Minister. The objective of this piece of legislation is to regulate access to genetic resources and associated traditional knowledge and innovation, practices and technology associated with biological and genetic resources and traditional knowledge. Furthermore, the Act strives to protect the rights of local communities over biological resources and associated traditional knowledge. Moreover, the Act provides for a mechanism for fair and equitable benefit sharing. The Act applies to biological and genetic resources, the derivatives of biological or genetic resources, associated traditional knowledge, benefits arising from the use of biological and genetic resources, their derivatives and associated traditional knowledge, and the discovery or commercialisation phase of bioprospecting. The responsibility of ensuring fair and equitable sharing of the benefits arising from the utilisation of genetic resources and associated traditional knowledge vests in the State. Access to biological and genetic resources is subject to an access permit issued by the Ministry and to written prior informed consent of the concerned right holders. The Act also recognises general rights of local communities and provides for the protection of community intellectual property rights. Non-registration of any traditional knowledge does not render it unprotected as community intellectual property rights.

85 See for example *S v Ngombe* 1990 NR 165 (HC); *S v Machinga* 1990 NR 157 (HC); *Skeleton Coast Safaris v Namibia Tender Board & Others* 1993 NR 288 (HC); *S v Makwele* 1994 NR 53 (HC); *S v Koortzen* 1994 NR 356 (HC); *S v Kau & Others* 1995 NR 1 (SC); *S v Vorster* 1996 NR 177 (HC); *S v Seibeb & Another*; *S v Eixab* 1997 NR 254 (HC); *S v Maritz* 2004 NR 22 (HC); *S v Aukemeb* 2009 (1) NR 19 (HC); *Van Rensburg & Another v Government of the Republic of Namibia* 2009 (2) NR 431 (HC); *Uffindell t/a Aloe Hunting Safaris v Government of Namibia & Others* 2009 (2) NR 670 (HC).

86 See Government Gazette No. 4773 (2011) Government Notice 144.

6.3 Legislation on Water

The Water Act No. 54 of 1956 remains in force until the new Water Resources Management Act comes into force upon signature by the Minister. Although the new Water Resources Management Act No. 11 of 2013 has been passed by Parliament, signed by the President and published in terms of the Namibian Constitution,⁸⁷ it has not yet come into operation as the Minister has not yet determined a date for the Act to come into operation as required by Section 134 of the Act. Once in operation, the Act repeals both, the Water Resources Management Act No. 24 of 2004 (which had de facto never come into force) and the Water Act No. 54 of 1956 as a whole.

Thus, the Water Act of 1956 is generally referred to as the old Water Act and often in the past tense, although strictly speaking, it remains applicable until it is officially repealed. This Act gives the Minister the power to, amongst others, investigate water resources, plan water supply infrastructure, develop water schemes, control water pollution, protect, allocate and conserve water resources, inspect water works, levy water tariffs and advise on all matters related to the water environment in general. It basically makes the Department of Water Affairs responsible for the use, allocation, control, and conservation of Namibia's surface and groundwater resources. It makes provision for the protection of river catchments, drilling of boreholes and making of wells, it controls effluent discharge into rivers and weather modifications such as cloud seeding and outlines regulations that govern the optimal use of water resources. It clearly defines the interests of the state in protecting water resources.

The **Water Resources Management Act No. 24 of 2004** has been approved and published in the Government Gazette. However, it has not come into force as a date for commencement of the Act as prescribed by Section 138(1)(b) of the same Act has not yet been determined by the Minister. The 2004 Act was based on the National Water Policy and provided for the management, development, protection, conservation, and use of water resources; and it established the Water Advisory Council, the Water Regulatory Board and the Water Tribunal. The objective of this Act was defined to ensure that Namibia's water resources are managed, developed, protected, conserved and used in a sustainable manner for the benefit of every Namibian.

The **Water Resources Management Act No. 11 of 2013** was enacted to provide for the management, protection, development, use and conservation of water resources; for the regulation and monitoring of water services and for incidental matters. The aim of this Act includes to ensure that Namibia's water resources are managed, developed, used, conserved and protected in a manner consistent with, or conducive to, specific fundamental principles including, among others, equitable access to safe and sufficient drinking water; the maintenance of the water resource quality for ecosystems; and the promotion of the sustainable development of water resources based

87 See Government Gazette No. 5367 (2013) Government Notice No. 332.

on an integrated water resources management plan which incorporates social, technical, economic, and environmental issues. The Act provides for the establishment of a Water Advisory Council to advise the Minister on issues such as water policy development and review; water resources management; and water abstraction and use. Furthermore, a Water Regulator is to be established under the Act, to determine the tariffs of fees and charges that may be levied by a water services provider or that are payable by licence holders for the abstraction of water or the discharge of effluent or the supply or re-use of effluent. The Water Regulator also performs other functions with regard to water service providers, which have to be licenced under the Act. Basin Management Committees are further institutions that may be established under the Act to further the Government's objective in achieving integrated management of water resources.

6.4 Legislation on Fisheries and Marine Resources

The **Marine Resources Act No. 27 of 2000** provides for the conservation of the marine ecosystem and the responsible utilisation, conservation, protection and promotion of marine resources on a sustainable basis. For that purpose, it provides for the exercise of control over marine resources and for matters connected therewith. It replaces the Sea Fisheries Act 29 of 1992, which in turn replaced the Sea Fisheries Act 58 of 1973.

The **Aquaculture Act No. 18 of 2002** regulates and controls aquaculture activities and the sustainable development of aquaculture resources. It allows the Minister to formulate policies based on social, economic and environmental factors, as well as the best scientific information and advice from the advisory council to promote sustainable aquaculture and manage, protect and conserve aquatic ecosystems.

The **Inland Fisheries Resources Act No. 1 of 2003** deals with the conservation and utilisation of inland fisheries resources and allows for the updating and development of new policies for the conservation and sustainable utilisation of Namibia's inland fisheries. It encourages cooperation with neighbouring countries regarding the management and conservation of shared waterways. No fishing is allowed in parks nor by net within 100m from a bridge, culvert or spillway or in a manner obstructing more than half the width of any watercourse. Furthermore, it prohibits the use of destructive fishing methods such as the use of poisons, explosives and night lights and the introduction and/or transfer of non-indigenous fish species. Fines or imprisonment are prescribed for destructive fishing and the use of nets where they are banned.

The **Prevention and Combating of Pollution at Sea by Oil Act No. 6 of 1981** prohibits the discharge of oil from ships, tankers or off-shore installations and gives the state certain powers to prevent such pollution and to deal with the removal of oil spills. Whereas this Act is applicable to coastal waters, inland water pollution is covered by the Water Act.

6.5 Legislation on Land and Agricultural Production

The **Communal Land Reform Act No. 5 of 2002** provides for the allocation and administration of all communal land and makes provision for the prevention of land degradation and for mitigating the impact of mining, prospecting, road works and water provision on the natural environment. The Act gives certain rights to communal farmers and traditional authorities, and states that future regulations will address issues pertinent to the conservation and sustainable management of water and watercourses, of woods and to the combating and prevention of soil erosion, the protection of pastoral resources, such as the grazing of stock, and any other matter as the Minister may consider necessary or expedient.

The **Agricultural Pests Act No. 3 of 1973** has been repealed by the **Plant Quarantine Act No. 7 of 2008**. The Agricultural Pests Act dealt with the registration of nurseries, the control and eradication of plants, insects and diseases at nurseries, the control and eradication of exotic (vertebrate) animals (excluding farm animals) and plants infected by insects or plant diseases, control of plant, insect and plant disease imports, honey bees, honey and exotic animals, the eradication of plant diseases, insects and locusts as well as defining the powers of inspectors.

The **Plant Quarantine Act No. 7 of 2008** provides for the preventing, monitoring, controlling and eradication of plant pests. The Act deals with the movement of plants, plant products and other regulated articles within and into or out of Namibia and provides for the certification of the phytosanitary standards of plants and plant products exported from Namibia. The Act makes provision with respect to the prevention and control of pests affecting plants. To this end, quarantine control measures and places restrictions on the importation of plant and plant material are introduced. The Minister may appoint plant protection officers and may declare areas or pests for purposes of quarantine control. The Ministry, or such other authority as the Minister by Notice in the Gazette may designate, has the authority and responsibility to function as the official national plant protection organisation of Namibia for the purposes of the International Plant Protection Convention. In June 2012, the Ministry of Agriculture, Water and Forestry has made and gazetted regulations⁸⁸ relating to issuing of import permits, examination of imported plants, diseases or insects and lodging of appeals.

The **Soil Conservation Act No. 76 of 1969** makes provision for the prevention and control of soil erosion and the protection, improvement and conservation of soil, vegetation and water supply sources and resources. The **Second Soil Conservation Amendment Act No. 38 of 1971** applies the Soil Conservation Act to Namibia and deals mainly with soil conservation, soil stabilisation and fire protection. This Act is being revised by the Ministry of Agriculture, Water and Forestry as part of the Conservation of Agricultural Resources Bill.

88 See Government Gazette No. 4975 (2012) Government Notice No. 158.

6.6 Legislation on Forestry

The **Forest Act No. 12 of 2001** 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. It replaces the **Preservation of Trees and Forests Ordinance No. 37 of 1952** and the **Forest Act No. 72 of 1968**. The 2001 Forest Act defines forest produce in very broad terms as anything that grows or is naturally found in a forest. 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, the safekeeping of water resources and the maintenance of biological diversity.

6.7 Legislation on Energy and Mining

The **Minerals Prospecting and Mining Act No. 33 of 1992** makes it illegal for any person to prospect and mine without a licence, as such may have a negative impact on the environment. Section 122 stipulates that the Minister may, for the protection of the environment or the natural resources of Namibia or the prevention of pollution or damage, declare that certain explorative and mining processes may not be carried out or only with special permission.

The **Petroleum (Exploration and Production) Act No. 2 of 1991** was enacted to provide for the reconnaissance, exploration, production and disposal of, and the exercise of control over, petroleum. Production licences must be obtained to carry on reconnaissance operations and according to Section 71, rights-holders are held responsible for the pollution of the environment or other damages or losses caused.

The **Diamond Act No. 13 of 1999** contains several provisions aimed at protecting the environment. Section 55 is of specific importance as it prohibits the removal of sand, soil, clay, gravel, stone and rock from restricted areas unless specific permission is obtained. Section 56 prohibits the exportation of such items.

The **Electricity Act No. 4 of 2007** establishes a general system of licensing for all types of undertakings related to the generation, trading, transmission, supply, distribution, importation or export of electricity. Certain undertakings may be exempted from the requirement of obtaining a licence; this, however, applies only provided that the requirements of any other law, in particular laws relating to health, safety and environmental standards are duly complied with.⁸⁹ An application for an exemption can be granted, but conditions can be imposed, such as those relating to public health, public safety or the protection of the environment. As per Section 21 of the Electricity Act, environmental concerns are important criteria for consideration of an application for

89 Section 18(4)(b).

the issue, renewal, amendment or transfer of a licence and the applicant can be requested to submit an environmental impact assessment study indicating the potential damage to or pollution of the environment.

7 Roman-Dutch and Common Law

Roman-Dutch law is based on Roman law as it was applied by the courts of Holland and other provinces in the Netherlands; it was developed by writers such as Hugo de Groot and Simon van Leeuwen in the 17th and 18th centuries.⁹⁰ Roman-Dutch law came to the Cape of Good Hope, when the Dutch East India Company under its local governor Jan van Riebeeck established a refreshment post – today’s Cape Town in 1652. Roman-Dutch Law in South Africa was subject to further developments under the influence of particularly English law.⁹¹ With the effect of Proclamation 21 of 1919, the Roman-Dutch law developed by the South African courts became the common law of the territory, binding on the Namibian courts until Independence.⁹² This position was affirmed by Article 66(1) of the Namibian Constitution of 1990, which provides that

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

Common law⁹³ refers to law and the corresponding legal system developed through court decisions and similar tribunals, rather than through statutory enactment. Common law is created and refined by judges: a decision in the case currently pending depends on decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law, judges have the authority and duty to make law by creating precedent. According to Article 66 of the Namibian Constitution, the common law in force on the date of Independence remains valid to the extent that the same is not in conflict with the Constitution or any other statutory law.

Several common law doctrines are relevant in terms of environmental protection.⁹⁴ For example, the common law rule of delict can be applied with regards to wrongful acts or omission; fault, either intended or through negligence; or harm to person or property (patrimonial loss).⁹⁵ The law of nuisance, including public and private nuisance is equally applied in cases with environmental impact and the neighbour legal principle of *sic utere tuo ut alienum non laedas* (use your property in a way which does

90 Du Plessis (1999b:40ff.).

91 Ibid.

92 See Amoo (2008a:60ff.).

93 For further details on the common law in Namibia see Amoo (2008a:62ff.).

94 Under Roman law, several provisions have been applied for the protection of natural resources. See Wacke (2002); Van den Bergh (1999:495ff.).

95 Kidd (2011:145).

not harm another) is considered to be one of the roots of environmental protection. The remedies available under the common law are self-help, an abatement order, action for damages and an interdict. The principal remedies for preventing or restraining an environmental nuisance or delictual conduct are an interdict and, where harm has already been caused, a claim for damages in terms of Aquilian action.⁹⁶

Especially from a common law perspective, environmental litigation is an important facet for the vital development of environmental law. Judicial intervention related to environment-related issues arises when persons resort to court action to seek redress for a grievance. Court action can be either of civil or of criminal nature. While civil action is typically resorted to by private parties, criminal action is generally the preserve of public authorities. Judicial decisions in environment-related decisions are scarce in Namibia, which is no surprise given the novelty of environmental law and Namibia's tender age.⁹⁷ However, being a plural legal system with substantive common law elements, Namibia can greatly benefit from the experience with environment related cases in other countries.⁹⁸

Overall, it can be concluded that the common law rules complement environmental statutory enactments; this is also true, when it comes to their application and interpretation. It is this gradual convergence of conventionally disparate legal families that leads towards a system that recognises the complementary roles of legislation and judicial precedents as sources of law. In this context, the role of judges in the development of the common law and – at the same time – the judicial interpretation of statutes should not be underestimated. However, where pollution is, for example, expressly prohibited by means of legislation, it is usually the state that has the responsibility “to take the necessary steps to put a stop to the action or to prosecute the offender”, whereas under common law the plaintiff needs to take up the matter and therefore has to carry the “burden of expense, time and other pressures”.⁹⁹

96 For further literature and South African case law references on the common law and other remedies in environmental law, cf. Paterson / Kotzé (2009).

97 Environment-related cases in Namibia are mostly of criminal nature and fall under the scope of the Nature Conservation Ordinance No. 4 of 1975. The cases include but are not limited to the following: *S v Ngombe* 1990 NR 165 (HC); *S v Machinga* 1990 NR 157 (HC); *Skeleton Coast Safaris v Namibia Tender Board and Others* 1993 NR 288 (HC); *S v Makwele* 1994 NR 53 (HC); *S v Koortzen* 1994 NR 356 (HC); *S v Kau and Others* 1995 NR 1 (SC); *S v Vorster* 1996 NR 177 (HC); *S v Seibeb and Another*; *S v Eixab* 1997 NR 254 (HC); *S v Maritz* 2004 NR 22 (HC); *S v Aukemeb* 2009 (1) NR 19 (HC); *Van Rensburg and Another v Government of the Republic of Namibia* 2009 (2) NR 431 (HC); *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others* 2009 (2) NR 670 (HC).

98 For a collection of environmental decisions see UNEP (2001 and 2005a). This Compendium has not been updated since.

99 Kidd (2011:149).

8 Customary Law

Despite the legal influence of the ex-colonial powers, a large number of Namibians still live under indigenous customary law.¹⁰⁰ This makes the Namibian legal system an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists. Legal pluralism prevails; hence two or more types of law or legal traditions operate simultaneously.¹⁰¹

Before the arrival of the colonists, the indigenous populations have lived for generations according to their own distinctive laws. Customary law was passed on orally from generation to generation. 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 Act¹⁰² gives certain powers, duties and functions to traditional authorities and members thereof. It is the overall 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.¹⁰³ 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.¹⁰⁴ Still, while most of the customary rules have been transmitted orally from generation to generation, the process of ascertaining customary law in Namibia is ongoing.¹⁰⁵

9 Criminal Aspects of Environmental Law

Environmental crimes include violations of environmental laws attracting criminal sanctions. An environmental crime can be defined as an act or omission that damages or endangers the environment. Examples of environmental crimes are *inter alia* the illegal emission of hazardous substances into air, water or soil; illegal harvesting or hunting; dumping of waste and illegal trade in endangered species. Environmental crimes may be committed by enterprises in the widest sense or individuals.

100 Hinz (2002a); Sippel (2003:69ff.).

101 Griffiths (1986:1ff.).

102 No. 25 of 2000.

103 See Hinz (2003:8ff.).

104 Hinz / Ruppel (2008b:57f.).

105 For more details see the Chapter 23.

Enforcement efforts in terms of environmental duties are partially inadequate as compared with the magnitude of environmental and economic losses imposed by national and trans-national environmental crimes. Therefore, national and international enforcement programmes are necessary, and adequate resources need to be available to enable them to succeed. Penal law within environmental law aims to protect the environment by deterring detected violators from violating again or deterring other potential violators from violating by sending a message that they too may experience adverse consequences for non-compliance.¹⁰⁶ Many of the environment-related national enactments cited in this publication contain criminal clauses in terms of environmental crimes. Such makes the Nature Conservation Ordinance No. 4 of 1975 *inter alia* provision for illegal

- hunting, catching or capturing protected game;
- placing, releasing or angling any fish in inland waters; and
- picking, selling, donating, exporting and removing of protected plants.

The Communal Land Reform Act¹⁰⁷ may serve as one further example of legislation with the character of a criminal law for it contains criminal implications relating to illegal grazing and fencing. Despite the possibility of withdrawal of grazing rights, the respective penalties include fines or imprisonment or both.

Sanctions can range from fines for petty offences to imprisonment for serious offences. Despite these sanctions, it may be appropriate to impose specific penalties in addition to the principal punishment. In some cases, provisions are made for the forfeiture either of items used for an offence or for items resulting from an offence. Another appropriate measure might be the cancellation or at least suspension of permits or licences that have been granted. In some cases, it might even be prescribed that permits or licences might not be renewed in future due to committed offences. Another additional penalty may be the confiscation of property used for the offence and some provisions also contain regulation as to specific compensation or reimbursement of expenses incurred as a result of the offence. Yet, the overall aim of criminal sanctions is deterrence rather than retribution. Deterrence can, however, also be achieved by measures not including criminal sanctions. These are, to name but a few, administrative measures (directives and withdrawal of authorisation), civil measures (e.g. interdict), and economic or market-based instruments etc.¹⁰⁸

106 Some relevant Namibian cases include the following: *S v Maritz* 2004 NR 22 (HC); *S v Kau and Others* 1995 NR 1 (SC); *Van Rensburg and Another v the Government of the Republic of Namibia* 2009 (2) NR 431 (HC); *S v Maseka* 1991 NR 249 (HC); *S v Eiseb and Another* 1990 NR 142 (HC); *S v Nangombe* 1990 NR 165 (HC); *S v Makwele* 1994 NR 53 (HC).

107 No. 5 of 2002.

108 Cf. Kidd (2011:268).