



## A Constitutional Perspective on Environmental Law Developments in Namibia

Oliver Ruppel\*

### The Environmental Principle of State Policy

Today, that is, 20 years after Independence<sup>1</sup> and the promulgation of the Constitution of the Republic of Namibia,<sup>2</sup> the country still faces challenges when it comes to environmental law. Yet, Article 95(I) compels state organs to be directed by the environmental principle of state policy stipulating that –

[t]he State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

...

- (I) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; ... .

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\* Director of Human Rights and Documentation Centre (HRDC) (Windhoek); and Senior Lecturer, Faculty of Law, University of Namibia (email: [ruppel@mweb.com.na](mailto:ruppel@mweb.com.na) or [ocruppel@unam.na](mailto:ocruppel@unam.na)).

<sup>1</sup> Namibia became independent on 21 March 1990.

<sup>2</sup> No 1 of 1990.

Recent policy and legislative reforms have created a unique opportunity for Namibia to increase environmental sensitivity. Namibia's Vision 2030<sup>3</sup> was launched in June 2004. Chapter 5 of Vision 2030 states the following:<sup>4</sup>

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.

One of the long-term aims of Vision 2030 is the availability of clean, unpolluted water, and productive and healthy natural wetlands with rich biodiversity.<sup>5</sup> Vision 2030 regards the sequential five-year National Development Plans (NDPs) as the main vehicles for achieving its long-term objectives.

The NDP2,<sup>6</sup> which spanned the period 2001/2 to 2005/6, sought sustainable and equitable improvement in the quality of life of all of the country's inhabitants. The national development objectives inter alia aim at enhancing environmental and ecological sustainability.<sup>7</sup>

The NDP3 spans the five-year period 2007/8 to 2011/2.<sup>8</sup> The predominant theme of the NDP3 is defined as accelerated economic growth through

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<sup>3</sup> GRN/Government of the Republic of Namibia, Office of the President, *Namibia Vision 2030: Policy framework for long-term national development* (AIM Publications, Windhoek 2004) (available at <http://www.npc.gov.na/>).

<sup>4</sup> Ibid.

<sup>5</sup> For more detailed information on wetlands in Namibia, see: O. Ruppel and S. Bethune, *Review of Namibia's policy and legislative support to the sustainable use of wetlands in the Zambezi Basin* (Report for the World Conservation Union, Harare 2007) (available at [http://www.ramsar.org/wn/w.n.namibia\\_review.htm](http://www.ramsar.org/wn/w.n.namibia_review.htm)).

<sup>6</sup> GRN/Government of the Republic of Namibia *Second National Development Plan (NDP2)* (National Planning Commission, Windhoek 2002).

<sup>7</sup> Ruppel and Bethune (n. 5) at p.14.

<sup>8</sup> GRN/Government of the Republic of Namibia, *Guidelines for preparing the Third National Development Plan (NDP3): 2007/08–2011/12*. (National Planning Commission, Windhoek 2007) (available at <http://www.npc.gov.na/>).

deepening rural development,<sup>9</sup> while the productive utilisation of natural resources and environmental conservation are key result areas. Principal environmental concerns include water, land, marine, natural resources, biodiversity and ecosystems, drought and climate change. Waste management and pollution will grow in significance with increasing industrialisation.

The NDP3 recognises 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 sound management of these resources. The guidelines for preparing the NDP3 stipulate that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by 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 ensuring the protection of environmental concerns are the optimal and sustainable utilisation of renewable and non-renewable resources on the one hand, and environmental sustainability on the other.

Most recently the Namibian Government intended to come up with a Climate Change Policy, strategy and action plan,<sup>10</sup> which is still under discussion.

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<sup>9</sup> Ibid.

<sup>10</sup> J. Mfune, O. Ruppel and A. Mosimane, *Namibia Climate Change Policy Discussion Document* (Ministry of Environment and Tourism, Windhoek 2009); J. Mfune, O. Ruppel, N. Willemse and A. Mosimane, *Proposed Climate Change Strategy and Action Plan* (Ministry of Environment and Tourism, Windhoek 2009).

## **The Environmental Mandate of the Ombudsman**

Article 91(c) of the Constitution provides that the ombudsman has:

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

The ombudsman’s environmental mandate is a progressive and innovative step towards environmental protection. However, two major points must be made in this context. Firstly, to date, the office of the ombudsman has not dealt with many complaints under the environmental mandate – despite the fact that the office endeavours to raise public awareness of the institution and takes its function to the grass-roots level.<sup>11</sup> Indeed, the awareness of the potential of the ombudsman in environmental matters is very scant: many are completely unaware that the institution can be enlisted to deal with environmental matters. Secondly, the lack of sufficient, specifically trained staff, inadequate financial resources, and the heavy workload are further challenges to the ombudsman’s activities in environmental matters.

### **Sovereign Ownership of Natural Resources**

The land, the water, and the natural resources below and above the land, in the continental shelf and within the territorial waters as well as within the exclusive economic zone of Namibia belong to the state in terms of the Constitution, if not otherwise lawfully owned. To this extent, the Namibian Constitution establishes sovereign state ownership of natural resources not

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<sup>11</sup> Tours all over the country are taken by the Office of the Ombudsman from time to time to expose the Office to the population and to enhance publicity.

under the control of others.<sup>12</sup> As the international run for Namibia's natural resources continues Namibia has overtaken Russia as the fourth largest uranium supplier in the world, on track to meet its target of becoming the world's third largest supplier by 2015.<sup>13</sup> In regard to the state ownership of natural resources, this entails that the state should accordingly take environmentally related responsibility with a special focus on the principle of sustainability and respect for the rights of present and future generations.<sup>14</sup>

## **Regional and Local Government**

Following the inception of Chapter 12 in the Namibian Constitution, Parliament enacted the Regional Councils Act<sup>15</sup> and the Local Authorities Act.<sup>16</sup> Both laws introduced decentralisation and its administration. These enactments were subsequently followed by a Decentralisation Policy that was given legal force through a series of new laws, most notably the Decentralisation Enabling Act.<sup>17</sup> Decentralisation contributes to creating participatory democracy in which people at the grass roots can have a direct say in decisions that affect their lives, giving more powers to regional councils. Regional councillors, who have clear links to their constituents, can play an important role in this process.<sup>18</sup>

The Traditional Authorities Act<sup>19</sup> addresses traditional leadership and its functions. These functions include promoting welfare amongst the community

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<sup>12</sup> F. Watz, *Die Grundrechte in der Verfassung der Republik Namibia vom 21. März 1990* (Klaus Hess Publishers, Goettingen/Windhoek 2004), at pp.182-186.

<sup>13</sup> J. Duddy, 'Nam 4<sup>th</sup> biggest uranium producer' *The Namibian* (Windhoek 6 June 2009).

<sup>14</sup> O. Ruppel, 'Third-generation human rights and the protection of the environment in Namibia' in N. Horn and A. Bösl (eds), *Human rights and the rule of law in Namibia* (Macmillan Education Namibia, Windhoek 2008), at pp.101-120.

<sup>15</sup> No 22 of 1992.

<sup>16</sup> No 23 of 1992.

<sup>17</sup> No 33 of 2000.

<sup>18</sup> G. Hopwood, *Regional councils and decentralization at the crossroads* (Konrad Adenauer Foundation, Windhoek 2005).

<sup>19</sup> No 25 of 2000.

members who fall under a particular Traditional Authority, and supervising and ensuring the observance of customary law. According to section 3(2)(c) of the Traditional Authorities Act, traditional leaders have the:

‘... duty to ensure that the members of the respective communities use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.’

In addition, the Communal Land Reform Act<sup>20</sup> provides for the allocation and administration of all communal land. The aforementioned acts make it clear what an important role traditional leadership and local governance play in the context of environmental governance.

### **Sectoral Legislation**

The sectoral legislation relevant to the environment is wide-ranging. Namibia has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. Within its legislative framework, Namibia has provided extensively for safeguard measures to protect the environment. The implementation of this legislative framework is a mammoth task, however. Although this report is not the forum to introduce the said statutory instruments dealing with the environment in the country, one particular law worth mentioning is the Environmental Management Act.<sup>21</sup> The Environmental Management Act is expected to give effect to Article 95(l) of the Namibian Constitution by establishing general principles for the management of the environment and natural resources. It will promote the coordinated and integrated management of the environment and sets out responsibilities in this regard. Furthermore, it is intended to give statutory effect to Namibia’s Environmental Assessment Policy, and to enable the

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<sup>20</sup> No 5 of 2002.

<sup>21</sup> No 7 of 2007.

Minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions, and to provide for associated matters. However, the delayed promulgation and implementation of this important piece of legislation has hampered the development of environmental law in Namibia.

## Customary Law

After Independence, Namibia provided the necessary space for the recognition of customary law (Article 66 of the Constitution), if it is in line with the country's new constitutional dispensation. Customary law has been found to play an important role in the wider context of the environment, for the sustainable development and protection of natural resources and biological diversity.<sup>22</sup> Thus, customary law is the type of law that is closest to the very peculiarities of traditional knowledge.<sup>23</sup> Most customary rules are not written down but are transmitted orally from generation to generation. However, some exceptions exist in Namibia in terms of what have become known as the *self-stated*<sup>24</sup> laws of traditional communities.<sup>25</sup> The *Laws of Oukwanyama*<sup>26</sup> provide for the protection of trees – fruit trees in particular – and other plants and water. The *Laws of Ondonga*<sup>27</sup> provide for the protection of trees with specific reference to fruit trees, palm trees and the marula tree (section 8), and the use of fishing nets in the river is prohibited without permission from the Traditional Authority (section 19). The *Laws of Uukwambi* provide for the

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<sup>22</sup> M. Hinz and O. Ruppel (eds), *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia* (Namibia Scientific Society, Windhoek 2008).

<sup>23</sup> *Ibid.*

<sup>24</sup> As to the concept of *self-stating customary law*: see M. Hinz, 'Phase 1 of the Namibian Ascertainment of Customary Law Project to be completed soon' (2009) 2 *Namibia Law Journal* 109–120.

<sup>25</sup> The ascertainment of customary law is currently in progress within a project of the University of Namibia's Human Rights and Documentation Centre (HRDC). A first collection of self-stated customary laws will be published in 2010. For further information, see also: O. Ruppel, 'The Human Rights and Documentation Centre at UNAM' in N. Horn and A. Bösl (eds), *Human rights and the rule of law in Namibia* (Macmillan Education Namibia, Windhoek 2008) at pp.131–140; and Hinz (n. 24).

<sup>26</sup> *Eevetamango dhOukwanyama*; a copy of the laws can be inspected at the HRDC.

<sup>27</sup> *OoVeta (OoMpango) dhoShilongo shOndonga*.

protection of water (section 13), the protection of trees (section 14A), wild animals (section 14B), and grass (section 14C). The *Laws of Sambyu* provide for the protection of water: anyone who pollutes or contaminates water commits an offence (section 16). In the Caprivi Region, the *Laws of Masubiya* prohibit the cutting of fruit trees (section 37), causing veld fires (section 36), and the use of fishing nets to catch small fish (section 39). These are only some examples. Since the quoted self-stated laws are not a codification of the respective customary law, meaning that they reflect only certain principles of customary law while the body of unwritten law remains in force,<sup>28</sup> one can anticipate that, in addition to what has been referred to, there are many more unwritten environmental rules of importance.<sup>29</sup> In line with section 3(2)(g) of the Environmental Management Act these rules form part of the environmental law of the people of Namibia.

## **International Law**

Namibia is party to various international environmental covenants,<sup>30</sup> treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations. As to the application of international law, a new approach was formulated after Independence, as embodied in the Namibian Constitution. Article 144 therein provides that:

‘[u]nless 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.’

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<sup>28</sup> M. Hinz, *Without Chiefs there would be no game: Customary law and nature conservation* (Out of Africa Publishers, Windhoek 2003).

<sup>29</sup> See: Hinz and Ruppel (n. 22) at pp.58–59; and O. Ruppel, ‘Nature conservation in Namibia: Customary law to complement statutory environmental law?’ Unpublished conference paper, 2nd United Nations Environment Programme Symposium for Environmental Law Lecturers in Africa, Entebbe, Uganda, 27 September 2006.

<sup>30</sup> Hinz and Ruppel (n.22) at p.13ff.



A treaty will become binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met. Thus the African Charter, AU and SADC law automatically form part of Namibian law in so far as the relevant legal instruments have been adopted by the country.<sup>31</sup> Namibian courts are under the obligation to take judicial notice of these international instruments as a source of national law. In this spirit, it is hoped that, in the course of dealing with practical cases through an increase of environmental litigation, Namibian courts will gradually clarify the substance of this field of the law, drawing together approaches from international experience.

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<sup>31</sup> O. Ruppel, 'Third-generation human rights and the protection of the environment in Namibia' in N. Horn and A. Bösl (eds), *Human rights and the rule of law in Namibia* (Macmillan Education Namibia, Windhoek 2008) at pp.101–120.