

WORKING DRAFT

Guide to the Environmental Rights of all Namibians

Third Draft

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To date this is a joint initiative between NCE, LAC, ELNN and Office of the Ombudsman.

Other potentially interested organisations are Resource Africa and MEFT.



Table of Contents

Acknowledgments.....	4
List of Acronyms and Abbreviations	5
1. Introduction	6
2. Rights, human rights and privileges.....	6
2.1 What is a “right”?.....	6
2.2 What do we mean by Human rights?	7
2.3 How is a “privilege” different to a “right”?.....	8
3. Overview of Environmental Rights	8
3.1 Environmental rights and Human rights.....	8
3.2 Different types of environmental rights	11
3.2.1 Substantive rights and Procedural rights.....	11
3.2.2 Earth jurisprudence.....	12
3.3 Environmental Justice	13
3.4 Sustainable Development Goals	14
4. The Environmental Rights of all Namibians	15
4.1 Right to a healthy environment	15
4.2 The right to Water and Sanitation	16
4.3 Human Rights linked to environmental rights.....	17
4.4 The right to adequate public services and social support	19
4.5 Rights of Indigenous Peoples	19
4.6 Public Consultation and freedom of information	20
4.7 Land and Natural Resource User rights in Namibia under Sectoral Legislation	23
4.7.1 Land rights.....	23
4.7.2 Wildlife user rights	25
4.7.3 Forestry use rights.....	26
4.7.4 Inland Fisheries	27
4.7.5 Biocultural rights.....	27
4.6 Rights regarding Science and Research	29
5. What can Namibians do to ensure their environmental rights are upheld?.....	30
5.1 Participation.....	30
5.2 Applications to the courts.....	31
5.3 Complaints to the Ombudsman.....	31
5.4 Appeals under the Environmental Management Act	32

5.5 Prospecting and mineral licences in Conservancies	32
5.6 Human rights and Conservation NGOs	33
6. What more needs to be done in Namibia?	34
Resources	36
Annex 1. Activities that may not be undertaken without an Environmental Clearance Certificate	39
Annex 2. Directive for Prospectors and Geologists who wish to enter a communal conservancy in Namibia	Error! Bookmark not defined.
Annex 3: Template agreement between prospectors/geologists with an Exclusive Prospecting License operating in conservancies	Error! Bookmark not defined.

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List of Acronyms and Abbreviations

CBNRM	Community-based Natural Resource Management
CIHR	Conservation initiative on Human Rights
CLRA	Communal land Reform Act
ECC	Environmental Clearance Certificate
EIA	Environmental Impact Assessment
EMA	Environmental Management Act
EMP	Environmental Management Plan
EPL	Exclusive Prospecting Licence
GDP	Gross Domestic Product
MOA	Memorandum of Agreement
NACSO	Namibian Association of CBNRM Support Organisations
NCE	Namibian Chamber of Environment
NGO	Non-governmental Organisation
SDG	Sustainable Development Goal
UN	United Nations
UNEP	United Nations Environment Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

1. Introduction

Many Namibians are not aware of their basic human rights. Far fewer know their environmental rights. They are therefore not able to safeguard these rights, nor are they able to engage with confidence when they need to stand up for their environmental rights.

At the same time, the environmental rights of Namibians are slowly being eroded. This erosion is driven by various factors:

- Developers of major projects who fail to adequately engage with impacted communities and Namibian society in general, and who disregard the environmental rights of those impacted in favour of pushing ahead with their developments;
- Government-driven developments, which fail to follow principles of transparency, consultation and due process;
- Local, regional and national government agencies and officials aligning themselves with and favouring the needs and requests of investors and project developers without regard to appropriate safeguards; and
- Some regulators not being able to perform their duties properly due to lacking political will, competencies, capacity, or inadequate environmental laws, or by being too closely aligned to the interests of the investors and developers.

This Guide aims to provide the general public with information about the environmental rights of Namibians and how these rights may be applied. The Guide provides a fully referenced and sound legal foundation for understanding the environmental rights of Namibians and where these rights come from. It is (will be) accompanied by a set of Information Briefs which summarise the environmental rights of Namibians and key issues regarding their application.

The Guide first considers what is meant by rights, human rights and privileges, considers the link between human rights and environmental rights, explains how environmental rights have become more important internationally, and why these are also important for every Namibian. The guide also identifies where there are gaps in the provision of environmental rights for Namibians and makes recommendations for filling these gaps.

2. Rights, human rights and privileges

2.1 What is a “right”?

A **right** can be defined as a moral or legal entitlement to have or do something – in other words, something which is allowed of a person or owed to a person according to a particular legal system. A **legal right** is an entitlement protected by law. If someone wants to take away or limit another person’s legal right, the protection of the legal right can be secured through court action introduced by the person whose right is so infringed or threatened to be infringed¹.

¹ <https://www.merriam-webster.com/dictionary/legal%20right>

A **rights-holder** is an individual or social group who or which is entitled to exercise or hold a legal right, and other people recognise that entitlement².

A **duty (or an obligation)** is a moral or legal obligation or responsibility to take a certain action.

A **duty bearer**, in the context of rights, is a natural or legal person with an obligation or responsibility to ensure that one or more rights of third parties are recognised and upheld. A duty bearer must respect, protect, fulfil and uphold the rights in question, and who is further required to abstain from violating these rights. The term is most commonly used to refer to government agencies and the courts, but others can also be considered duty-bearers. For example, an employer has a duty to ensure that the legal rights of workers (specifically relating to health and safety at the work place) are recognised and implemented in the work place³.

Conditional user rights are where laws give people or groups the right to use land and natural resources, provided the users meet certain conditions. The rights are protected because they are entrenched in the law. A good example in Namibia is where a local community forms a conservancy and receives user rights over wildlife and tourism as long as the community meets certain conditions contained in the relevant legislation.

2.2 What do we mean by Human rights?

Human rights are the basic **rights** and **freedoms** that belong to every person in the world, from birth until death, because they are human. These basic **rights** are based on shared values like dignity, fairness, equality, respect and independence. These values are defined and protected by international law and by the laws of many countries, and are considered universal, inalienable, indivisible, interrelated and interdependent⁴.

On 10 December 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights, which enshrines the fundamental freedoms and **universal human rights** of all human beings⁵. Although the declaration is not binding, the contents of it have been adopted and incorporated into subsequent international treaties, regional human rights instruments and national constitutions, and many of its provisions are generally accepted to form part of customary international law. All human beings are **rights-holders** under the Universal Declaration of Human Rights, with the aim to guarantee the rights of every individual everywhere. Some provisions of the Namibian Constitution are based on the Universal Declaration of Human Rights, such as the right to life, liberty and the security of person.

² <https://www.right-to-education.org/monitoring/content/glossary-rights-holders>

³ <https://www.right-to-education.org/monitoring/content/glossary-duty-bearers>

⁴ <https://www.un.org/en/global-issues/human-rights>; <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁵ https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf

2.3 How is a “privilege” different to a “right”?

There is a difference between a **right** and a **privilege**. While a right is an inherent, irrevocable entitlement held by all human beings, a **privilege** is a special right or advantage that belongs to a specified group of persons, and to which not all human beings are entitled. Privileges are given to some and withheld from others, and they are always conditional, subject to change or outright removal by those in authority controlling them⁶.

Understanding the difference between rights and privileges is critical for citizens living subject to the law in a free society. It is further important to understand the different remedies which apply in circumstances where a right or privilege is taken away or infringed. Whereas a right is usually protected by international law and/or national law, and accordingly it is justiciable and legal protection can be sought in the courts in the event of an infringement, a privilege is not guaranteed and can be taken away by the authority granting the particular privilege.

For a privilege there is no legally defined duty-bearer, but there may be a person, legal entity or administrative body who or which is responsible for enabling people to receive and utilise the privilege. The infringement of a privilege can however be challenged in terms of administrative law, where an administrative body failed to abide by the principles of administrative law, such as procedural fairness.

Driving is an example of a **privilege**. Those granted the privilege have met certain conditions, such as being a citizen of a certain age, obtaining a driving licence, and agreeing to obey the rules of the road. In this case the *conditions* for obtaining the privilege may be contained in national law, but it is no-one’s inherent right to drive a car.

Another example of a privilege is when a supermarket decides to give pensioners a discount on items bought at the supermarket. The supermarket can decide at any time to stop giving such discount and there is nothing an aggrieved pensioner can do about this decision, as such person had no inherent right to receive such discount.

3. Overview of Environmental Rights

3.1 Environmental rights and Human rights

According to the United Nations Environment Programme (UNEP)⁷, environmental rights are “any proclamation of a human right to environmental conditions of a specified quality” that falls within a range of classifications: safe, healthy, ecologically sound, adequate for development, sound, etc.”.

UNEP notes that as all human beings depend on the environment, human rights and the environment are intertwined. This is because the enjoyment of many human rights depends upon the environment.

⁶ http://www.therepublic.com/2020/01/30/theres_a_difference_between_a_right_and_a_privilege/

⁷ UNEP. 2019. Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. P. 140.

Without clean air and water, food, and other natural resources, human life itself would not be possible as the environment itself provides food, water, and other necessities for life⁸. The Declaration of the United Nations Conference on the Human Environment made at the UN Conference on the Human environment in Stockholm, 1972 is the legal foundation of international environment protection⁹. Part 1 proclaims that “the protection of the human environment is a major issue which affects “peoples” well-being and economic development through the world.” The Declaration recognises that the natural elements and man-made things are essential to human well-being and to the full enjoyment of human rights including the right to life¹⁰.

In other words protecting human rights helps to protect the environment and protecting the environment helps to protect human rights.

Internationally, environmental rights are recognised in different ways. The UN has yet to formally recognise the specific right to a healthy environment. However, the right to water and sanitation as an independent human right was recognised by UN General Assembly Resolution ([64/292](#)) in July 2010.

Further the Office of the High Commissioner for Human Rights at the United Nations has developed a set of principles on human rights and the environment. The principles set out the basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment¹¹:

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.
3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.
4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.
5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.
6. States should provide for education and public awareness on environmental matters.

⁸ Ibid. P.142-143.

⁹ <https://undocs.org/en/A/CONF.48/14/Rev.1>

¹⁰ Declaration of the United Nations Conference on the Human Environment, Stockholm 1972. <https://undocs.org/en/A/CONF.48/14/Rev.1>

¹¹ Knox, J. 2018. Framework principles on human rights and the environment: The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. United Nations Environment Programme. Nairobi.

7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.
8. To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.
10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
12. States should ensure the effective enforcement of their environmental standards against public and private actors.
13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.
15. States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities,
16. States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development

While the right to a healthy environment has not yet been recognized formally by the United Nations, it has been recognized in regional legal binding agreements and in the laws of some nations. The right to a healthy environment has been interpreted by courts to mean the right to clean air, safe drinking water, and adequate sanitation; the right to live, work, and play in a nontoxic environment; the right to flourishing biodiversity; and the right to a safe climate to ensure healthy populations¹².

Namibia has also not formally recognised the right to a healthy environment, but has adopted other mechanisms that provide for environmental protection and environmental rights. These mechanisms include recognition in the national Constitution of human rights linked to environmental health and

¹² Boyd, D. R. 2012. "The Constitutional Right to a Healthy Environment." *Environment: Science and Policy for Sustainable Development* 54 (4): 3–15, cited in Moses, E. and Excell, C. 2020. *A Community Action Toolkit: A Roadmap for Using Environmental Rights to Fight Pollution*. World Resources Institute. <https://files.wri.org/d8/s3fs-public/community-action-toolkit.pdf>

provision in the Constitution for the appointment of an Ombudsman whose role includes addressing complaints from citizens and others regarding negative effects on environmental health. These mechanisms are considered in more detail in Chapter 4.

Further, Article 144 of the Namibian constitution states that the general rules of international law and international agreements binding upon Namibia form part of the law of Namibia, to the extent that such international laws and agreements have been adopted and ratified by the Government of Namibia and are consistent with the Namibian Constitution and any statutes passed by the Parliament of Namibia. This means that the Namibian courts must take notice of international laws and agreements and apply them in Namibia as if they were national laws.

Chapter 11 of the Namibian Constitution contains a set of principles for guiding State Policy. One of these principles contained in Article 95(l) specifically refers to the Environment:

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

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, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

This clause in the constitution does not provide environmental rights that can be protected by the courts because Article 101 of the Constitution states that the principles of state policy are not legally enforceable. However the principles of state policy must be employed in the interpretation of Namibian law by the Courts and to guide the State in its decision-making processes, particularly in making and applying laws¹³.

3.2 Different types of environmental rights

3.2.1 Substantive rights and Procedural rights

Environmental rights are made up of substantive rights (fundamental rights) and procedural rights (tools used to achieve substantive rights)¹⁴.

Substantive Rights

Substantive rights are rights (e.g. of life, liberty or property) held to exist for its own sake and to constitute part of the normal legal order of society. In the context of environmental rights, substantive rights are those in respect of which the environment has a direct effect on the existence or the enjoyment of the right itself. Substantive rights in this respect include the right to a healthy

¹³ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumbonde Press. Windhoek.

¹⁴ UNEP. 2019. Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. Pp 142-144.

environment and the right to clean water, as well as the rights to life, freedom of association and freedom from discrimination, and rights to health, food and an adequate standard of living¹⁵.

Procedural Rights

Procedural rights prescribe formal steps to be taken in enforcing substantive rights. Procedural rights which impact environmental rights include¹⁶:

- Broad **access to information** concerning the environment which is held by the Government or governmental institutions. The right of access to information is crucial for enabling participation in decision-making and for holding governments and other agencies accountable
- **Public participation**, which entails realistic and meaningful opportunities to participate in decision-making processes related to the environment. It is important for affected individuals and communities to understand their right to participate in such decision-making processes.
- **Access to justice**, constituting effective access to judicial and administrative proceedings.

Such procedural rights are partly based on Principle 10 of the Rio Declaration on Environment and Development of 1992 which states¹⁷:

At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.

The United Nations Environment Programme (UNEP) says these procedural rights have a critical role to play in the implementation and enforcement of environmental laws and regulations. Where they exist in national legislation, these rights are enforceable before the courts. According to UNEP, Professor John Knox, the former UN Special Rapporteur on Human Rights and the Environment, has described the relationship between substantive and procedural human rights and the environment as a “virtuous circle” whereby “strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy.”¹⁸

3.2.2 Earth jurisprudence

Internationally there is an increasing focus on what is called “Earth Jurisprudence” – framing how the environment itself has its own rights. This approach recognises that the environment and other beings

¹⁵ https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what?_ga=2.180903975.1683110379.1623226102-956585199.1623226102

¹⁶ [Ibid.](#)

¹⁷ https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

¹⁸ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. P. 143

have values and importance beyond their use or benefit to humans and have intrinsic rights of their own¹⁹.

For example, Ecuador's 2008 Constitution explicitly recognizes that nature, or Pacha Mama (Mother Earth) has legal enforceable rights that every Ecuadorian person must respect and that the state has a legal duty to uphold. Under this constitutional provision, an Ecuadorian court ruled in 2011 that a river's right to flow had been violated by road development and ordered the river restored to health²⁰.

In 2010, the Universal Declaration of the Rights of Mother Earth was adopted by 35,000 persons from over 100 countries attending the World People's Conference on Climate Change and the Rights of Mother Earth convened in Cochabamba, Bolivia. Article 1.6 of the Declaration states that²¹:

Just as human beings have human rights, other beings may also have additional rights, freedoms and duties that are specific to their species or kind and appropriate for their role and function within the communities within which they exist.

If adopted by the United Nations, the Universal Declaration of the Rights of Mother Earth could play a similar role in recognition of the intrinsic rights of the environment as the Universal Declaration of Human Rights played in the recognition of human rights in 1948²².

In New Zealand, a former national park, Te Urewera, has been declared a legal entity, with the rights, powers, duties, and liabilities of a legal person, the Whanganui River has been given similar status and a court in India has accorded legal personhood to the Ganges and Yamuna Rivers, and other natural systems²³.

3.3 Environmental Justice

Environmental justice promotes the fair treatment of all people with respect to the development and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no-one should be forced to experience a disproportionate share of exposure to environmental damage such as pollution²⁴.

The concept of environmental justice embraces two objectives²⁵. The first objective is to ensure that rights and responsibilities regarding the utilisation of environmental resources are distributed with

¹⁹ Ibid. P. 141.

²⁰ Ibid. P.142

²¹ <http://www.austlii.edu.au/au/journals/SCULawRw/2011/14.pdf>

²² Busch, S. 20201. The Road to Recognition of Earth Rights: A brief introduction to Earth Jurisprudence and Wild Law. PowerPoint presentation. ENSafricaNAM100 initiative. Windhoek

²³ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. P. 143

²⁴ Moses, E. and Excell, C. 2020. A Community Action Toolkit: A Roadmap for Using Environmental Rights to Fight Pollution. World Resources Institute. <https://files.wri.org/d8/s3fs-public/community-action-toolkit.pdf>

²⁵ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek.

greater fairness among communities, both globally and domestically. This entails ensuring that poor and marginalised communities do not suffer a disproportionate burden of the costs associated with the development of resources, while not enjoying equivalent benefits from their utilisation. The second objective is to reduce the overall amount of environmental damage, again globally and domestically.

3.4 Sustainable Development Goals

The 17 Sustainable Development Goals (SDGs), were adopted by the United Nations in 2015 as a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity²⁶. The following SDGS can be linked to the implementation of human and environmental rights:

Goal 1. End poverty in all its forms everywhere;

Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture;

Goal 3. Ensure healthy lives and promote well-being for all at all ages;

Goal 5. Achieve gender equality and empower all women and girls;

Goal 6. Ensure availability and sustainable management of water and sanitation for all;

Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all;

Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;

Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation;

Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable;

Goal 12. Ensure sustainable consumption and production patterns;

Goal 13. Take urgent action to combat climate change and its impacts;

Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development;

Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss;

²⁶ <https://www.undp.org/sustainable-development-goals>

Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels;

The SDGs do not create legal rights enforceable by the courts, and they are time bound until 2030 by when they may be revised. However, they do place obligations on governments which must report on implementation progress and courts will be guided them as principles which can help influence case law. In implementing the Sustainable Development Goals, nations have the opportunity to protect human rights that are integrally related to environmental protection²⁷.

4. The Environmental Rights of all Namibians

The Namibian Constitution, relevant national laws and international laws contain provisions that provide Namibians with different types of environmental rights. This Chapter sets out and explains the environmental rights applicable to Namibia and their importance for Namibians. The relevant components of the Constitution, national law and international law which provide for each specific right are indicated.

4.1 *Right to a healthy environment*

Although the specific right to a healthy environment has not yet been recognised formally by the UN or by the Namibian Government, *the right of all peoples to a general satisfactory environment favourable to their development* is contained in article 24 of the **African (Banjul) Charter on Human and Peoples' Rights of 1981** (the "**Banjul Charter**"), which is an international human rights instrument which intends to promote and protect human rights and basic freedoms on the African continent.

In addition, Article 16 of the Banjul Charter protects the right of peoples *to the best attainable state of physical and mental health*.

Oversight and interpretation of the Banjul Charter is the task of the African Commission on Human and Peoples' Rights, which has stated that the *right to a satisfactory environment* places governments under an obligation – (i) to take reasonable measures to prevent pollution and ecological degradation; (ii) to promote conservation and ensure ecological sustainable development and the use of natural resources and (iii) to undertake environmental and social impact assessments prior to any industrial development²⁸.

Namibia has formally recognised the Charter in accordance with the Namibian Constitution and has become a state party to the Charter. The provisions of the Charter are therefore binding on Namibia, and form part of Namibian law in terms of the Constitution, to the extent that the Banjul Charter is consistent with the Namibian Constitution and any statutes passed by the Parliament of Namibia.

²⁷ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. P. 152.

²⁸ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. 2013. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumonde Press. Windhoek. P.417.

In addition, Article 25.1 of the Universal Declaration of Human Rights states that *everyone has the right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing, housing and medical care and necessary social services and social security*. A standard of living adequate for health and well-being will also be dependent on a healthy urban environment which would include the right to housing (or at least land for housing), sanitation, energy for lighting and cooking, street lights for safety and decent places for children to play.

More recently in March 2021, the Human Rights Council of the UN called upon all States to:

conserve, protect and restore healthy ecosystems and biodiversity and to ensure their sustainable management and use by applying a human rights-based approach that emphasizes participation, inclusion, transparency and accountability in natural resource management; and

to consider adopting and implementing national measures that respect and protect the rights of those who are particularly vulnerable to the loss of healthy ecosystems and biodiversity²⁹.

4.2 The right to Water and Sanitation

Namibia has not specifically recognised the right to water and sanitation as a basic human right in its Constitution, but the Article 3. of the *Water Resources Management Act 2013* recognises the following fundamental principles³⁰:

(a) *equitable access for all people to safe drinking water is an essential basic human right to support a healthy productive life;*

(b) *access by all people to a sufficient quantity of safe water within a reasonable distance from their place of abode to maintain life and productive activities;*

Unfortunately the Act, although passed by the National Assembly, has not been brought into force.

The UN General Assembly and the UN Human Rights Council recognised the *right to safe and clean drinking water* as part of binding international law in 2010. Resolution 64/292 recognizes the *right to safe and clean drinking water and sanitation* as a human right that is essential for the full enjoyment of life and all human rights³¹.

This position was strengthened by a further Resolution adopted by the UN General Assembly on 17 December 2015. The resolution recognised³²:

²⁹ Human Rights Council of the United Nations. Forty-sixth session 22 February–23 March 2021 Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

³⁰ Republic of Namibia. Government Gazette No. 5367. Water Resources Management Act No. 11 of 2013.

³¹ Sixty-fourth session of the UN General Assembly. Agenda item 48. Resolution adopted by the General Assembly on 28 July 2010 64/292. The human right to water and sanitation.

³² https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/169

- a) That the *human right to safe drinking water* entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and
- b) That the *human right to sanitation* entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity.

4.3 Human Rights linked to environmental rights

The Right to Life

Article 6 of the Namibian Constitution states that *the right to life shall be respected and protected*.

The Universal Declaration of Human Rights states that *everyone has the right to life, liberty and the security of person*.

It can be argued that human life depends strongly on the state of the environment (both rural and urban), including water, air, natural resources, plant and animal life, and environmental degradation and a lack of basic services that threaten people's lives and livelihoods must therefore be avoided³³. A growing number of international and regional bodies have interpreted the right to life to address environmental harms and risks and under constitutional and international law the overwhelming majority of judicial decisions holds that the right to life extends beyond the right to not be arbitrarily killed³⁴.

The Right to Human Dignity

The right to human dignity is protected by Article 8 of the Namibian Constitution which also includes protection from torture or cruel, inhuman or degrading treatment or punishment.

The Universal Declaration of Human Rights states that *all human beings are born free and equal in dignity and rights*.

Access to clean and sufficient water, sanitation services and waste disposal are environmental aspects relevant to human dignity³⁵.

Equality and Freedom from discrimination

³³ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. 2013. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumbonde Press. Windhoek. P.407.

³⁴ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. PP. 163.

³⁵ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. 2013. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumbonde Press. Windhoek. P.408.

Article 10 of the Constitution provides *that all persons shall be equal before the law and that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.*

The Universal Declaration of Human Rights states that *all are equal before the law and are entitled without any discrimination to equal protection of the law.*

This statement accordingly means equal treatment for all in ensuring a healthy environment and access to clean water and safe sanitation and to ensure benefits and costs from the environment are distributed fairly to the greatest possible extent. For example, when considering the impacts of climate change there is a need to protect those who might be most vulnerable due to factors such as poverty, gender, age, minority status, and disability³⁶.

The right to be equal before the law and to be free from discrimination requires governments to apply environmental law in a manner that does not disadvantage those who rely on natural resources most heavily and can give legal recourse to disadvantaged populations who may be subject to disproportionate pollution and resource extraction³⁷.

The Right to Culture

Article 19 of the Namibian Constitution states that every person shall be *entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion.* The International Covenant on Economic, Social and Cultural Rights recognises the *rights to an adequate standard of living to the enjoyment of the highest attainable standard of physical and mental health and to take part in cultural life.* In terms of article 19 of the Covenant, the Namibian government is required to take administrative and legal actions to ensure fulfilment of the right to culture³⁸. The right to Culture is important in the environmental context where the traditional knowledge of biodiversity is part of the culture of rural and indigenous communities.

The right to Administrative Justice

According to Article 5 of the Namibian Constitution *the fundamental human rights and freedoms contained in the constitution must be respected and upheld by all parts of the government, and, where applicable, by all natural and legal persons in Namibia and must be enforced by the Courts.*

Article 18 states *that government agencies and officials must act fairly and reasonably and comply with the laws of the land. Any person who believes that government agencies or officials are not acting in such a way has the right to take the matter to Court.*

³⁶ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. 2013. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumbonde Press. Windhoek. PP.410-411.

³⁷ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi. PP. 161-162.

³⁸ Ruppel O. C. 2013. Human Rights and the Environment. In: Ruppel, O. C., and Ruppel-Schlichting, K. 2013. (eds.). *Environmental Law and Policy in Namibia: Towards making Africa the Tree of Life*. Second Edition. Orumbonde Press. Windhoek. P.412.

Article 25(2) of the Constitution provides that aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened *shall be entitled to approach a competent Court to enforce or protect such a right or freedom*. The Article also states that aggrieved persons may approach the Ombudsman to provide them with such legal assistance or advice as they require (see section 5.3 below for a discussion on the environmental role of the Ombudsman).

Further, in terms of the Universal Declaration of Human Rights:

- ✓ *Everyone has the right to recognition everywhere as a person before the law.*
- ✓ *All are equal before the law and are entitled without any discrimination to equal protection of the law.*
- ✓ *Everyone has the right to an effective remedy by the courts for acts violating the fundamental rights granted by national constitutions or laws.*

These articles are important for promoting one of the components of environmental justice – namely effective access to judicial and administrative proceedings to ensure compliance with environmental laws.

4.4 The right to adequate public services and social support

Article 21 of the Universal Declaration of Human Rights states that "Everyone has the right of equal access to public services in his country"; and Article 25 states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

These clauses have implications particularly for the urban environment - housing, sanitation, energy, health and safety.

4.5 Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 is a non-binding agreement but the human rights standards contained within the document refer to other mechanisms that Namibia has ratified. Hence, the UNDRIP presents standards that should be observed in the development and implementation of policy regarding improved outcomes for indigenous peoples³⁹.

The UN does not define "indigenous peoples" as it considers it problematic to capture the diversity of indigenous peoples around the world, and principally relies on the term "group self-identification"⁴⁰.

³⁹ Begbie-Clench, B. and Jones, B. T. B. 2019. Analysis of the effects of national laws, policies and institutions on territories and areas conserved by indigenous peoples and local communities (ICCAs) in Namibia. Natural Justice. Bangalore.P. 34.

⁴⁰ Ibid. P. 2.

The UN has described characteristics that can be used to validate and understand such communities. These include: historical continuity with pre-colonial or pre-settler societies; a special relationship with ancestral lands, which often forms the basis of cultural distinctiveness; distinct social, economic or political systems, as well as distinct languages, cultures and beliefs; and, formation of non-dominant groups of society. In addition, the self-identification as being indigenous is regarded as a fundamental criterion for determining indigenous peoples.

The African Commission on Human and Peoples' Rights has explained the meaning of "indigenous peoples" in the African context stating that it does not necessarily mean the first inhabitants of a given land or country in exclusion of other African communities or people who migrated afterwards. The Namibian government considers all Namibians of African descent to be indigenous, which implies that the provisions of the UNDRIP apply to most Namibian ethnic groups and not just to the San and Nama as first inhabitants⁴¹.

Rights of Indigenous Peoples linked to the Environment in the UNDRIP are the following⁴²:

- ✓ *the right to maintain and strengthen their distinctive spiritual relationship with their lands, territories, waters and coastal seas and other resources.*
- ✓ *the right to own, use, develop and control the lands, territories and resources that they possess and States shall give legal recognition and protection to these lands, territories and resources*
- ✓ *the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources and States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*
- ✓ *states shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.*

4.6 Public Consultation and freedom of information

As indicated previously under section 3.2.1, broad access to information concerning the environment that is held by governments is an important procedural environmental right.

Article 21 of the Namibian Constitution sets out a number of Fundamental Freedoms of which the first is that:

All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.

According to the United Nations, freedom of information is an integral part of the fundamental right of freedom of expression, as recognized by resolution 59 of the UN General Assembly adopted in 1946, as well as by Article 19 of the Universal Declaration of Human Rights (1948), which states that the

⁴¹ Ibid. P. 2.

⁴² Resolution adopted by the United Nations General Assembly 61/295. United Nations Declaration on the Rights of Indigenous Peoples. 107th plenary meeting 13 September 2007.

fundamental right of freedom of expression encompasses the freedom to “to seek, receive and impart information and ideas through any media and regardless of frontiers”⁴³.

Public access to information and the need for public consultation is provided for in the *Environmental Management Act 2007* and its accompanying regulations which may offer the best opportunity for persons and communities to assert their environmental rights before a project is initiated and developed. The legislation sets out development activities which require an Environmental Clearance Certificate to be issued by the Environmental Commissioner before such activities may proceed (see Annex 1).

In order to obtain a clearance certificate there must be a process to identify possible negative social and environmental impacts of the proposed activity. The Regulations accompanying the Act set out this process⁴⁴. In terms of Regulation 7(1), the applicant must:

- a) carry out a public consultation;
- b) open and maintain a register of all interested and affected parties in respect of the application; and
- c) consider all objections and representations received from interested and affected parties following the public consultation process.
- d) prepare a scoping report; and
- e) give all registered interested and affected parties an opportunity to comment on the scoping report.

Regulation 21(2) sets out the means that must be used to give public notice of the application which to all potential interested and affected parties. The notice must include an indication of where further information on the application or activity can be obtained and the manner in which and the person to whom representations in respect of the application may be made.

In terms of Regulation 21(6) information containing all relevant facts in respect of the application must be made available to potential interested and affected parties who must be provided with a reasonable opportunity to comment on the application. In practice, extra effort is needed to reach interested and affected parties in rural areas where people are unlikely to have access to the printed media.

Public meetings held in terms of the Act serve two main purposes (i) to share information on the project and (ii) to invite interested and affected parties to raise issues that might have been overlooked by the environmental practitioner. All documents prepared for an application for a clearance certificate and conducting an Environmental Impact Assessment, including scoping reports, specialist studies, EIA reports and environmental management plans must be shared with the interested and affected parties for review and comment. All comments received must be recorded and included in the revised documents. All these documents must be in the public domain.

⁴³ <https://www.un.org/ruleoflaw/thematic-areas/governance/freedom-of-information/>

⁴⁴ Republic of Namibia. Government Gazette, 6 February 2012 No. 4878.

In terms of Regulation 7(2), once the terms of Regulation 7(1) have been met, the proponent must then submit:

- a) the scoping report;
- b) the management plan;
- c) copies of any representations, objections and comments received in connection with the application or the scoping report;
- d) copies of the minutes of any meetings held by the proponent with interested and affected parties and other role players which record the views of the participants; and
- e) any responses by the Environmental Assessment Practitioner (EAP) carrying out the process to any representations, objections, comments and views.

In terms of Regulation 8(f), the Scoping report must, among other things, contain details of the public consultation process conducted in terms of regulation 7(1) in connection with the application, including

- i) the steps that were taken to notify potentially interested and affected parties of the proposed application
- ii) (proof that notice boards, advertisements and notices notifying potentially interested and affected parties of the proposed application have been displayed, placed or given;
- iii) a list of all persons, organisations and organs of state that were registered in terms of as interested and affected parties in relation to the application; and
- iv) a summary of the issues raised by interested and affected parties, the date of receipt of and the response of the EAP to those issues;

Applicants for clearance certificates must keep a register of interested and affected parties which include the following (Regulation 22(1):

- a) all persons who as part of the consultation process have submitted written comments or attended meetings with the applicant;
- b) all persons who, after completion of the public consultation process have requested the applicant in writing, for their names to be placed on the register; and
- c) all organs of state which have jurisdiction in respect of the activity to which the application relates.

In terms of Regulation 23., a registered interested or affected party is entitled to comment in writing, on all written submissions made to the Environmental Commissioner by the applicant, and to bring to the attention of the Environmental Commissioner any issues which that party, believes may be of significance to the consideration of the application. Registered interested and affected parties must be given access to, and an opportunity to comment in writing on:

- a. scoping reports;
- b. scoping reports amended and resubmitted;
- c. assessment reports; and
- d. assessment reports amended and resubmitted.

Any written comments received by the applicant from a registered interested or affected party must accompany the scoping report when the report is submitted to the Environmental Commissioner.

On receipt of the scoping report the Environmental Commissioner must determine whether an Environmental Assessment is required in order to decide whether a clearance certificate can be issued. This determination will depend, among other things, on the information in the scoping report that indicates the likely effect of the activity on the environment and any comment received in terms of the consultative process.

In terms of Article 36.(1) of the Act, when reviewing the scoping report, the Environmental Commissioner may take any action appropriate for the review including

- a) consulting any person, institution, or authority on any matter concerning the application, the assessment or any submission received in relation to the application;
- b) carrying out, or appointing a person or a committee of persons to carry out, an investigation, including a process of public consultation, in relation to any matter concerning the application, the assessment or any submission; or
- c) holding a public hearing.

In the sections dealing with environmental assessments, neither the Act nor the Regulations specifically state that there must be further public consultation during the conduct of an environmental assessment. However, Regulation 8(f) requires the Scoping report to include terms of reference for a detailed assessment and Regulation 9 states that the terms of reference must include the nature and extent of the public consultation processes to be conducted during the assessment process. In addition, in terms of Regulation 14 the Environmental Commissioner could, when determining the scope, procedures and methods for an assessment, decide that further public consultation is required.

4.7 Land and Natural Resource User rights in Namibia under Sectoral Legislation

4.7.1 Land rights

Under Namibian law, land exists in one of the following categories:

- 1) Unalienated or unsurveyed state land, owned by the Government by virtue of the Namibian Constitution, which is not recorded under registered title in any deeds registry in terms of the *Deeds Registries Act, 1937*. Access to or occupation rights of State Land can be acquired, but are subject to approval under, among others, the *State Finance Act, 1991*.
- 2) Land in private ownership (freehold land), being surveyed land in respect of which a title deed has been issued, and which is subject to the national land registration system in terms of the *Deeds Registries Act, 1937*. Land in this category may include land owned or otherwise being held under title deed by individuals, companies, the State, or by a local authority or a regional council. Access to private land is principally acquired through private contracts (such as contracts of sale and lease). Private land owners have the right to exclude others from their land and from using the renewable natural resources on the land. Sectoral legislation enables

private land owners to use resources such as wildlife for their own benefit and to use the resources commercially.

- 3) Communal Land subject to the provisions of the *Communal Land Reform Act (CLRA) 2002*. Both traditional rights (not available to foreign investors) and rights of leasehold (available to foreign investors) can be granted over Communal Land through an administrative law process. In terms of Article 17.(2) of the CLRA no right conferring freehold ownership can be granted or acquired by any person in respect of any portion of communal land. In terms of Article 17.(1):

all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia.

This is often interpreted by government officials as meaning that communal Land is “State Land” giving the government the right to initiate development on communal land and allocate it for specific purposes⁴⁵. However some legal experts dispute that communal land is State Land as such, if it is vested in the State in trust. In addition they argue that if the land is vested in the State “in trust for the benefit of traditional communities” then those communities should have a say in how their land is used and allocated⁴⁶. Such a view would also be in line with the provisions of the UNDRIP.

The CLRA does not provide clear provision for group/community rights over land⁴⁷, although it does refer to the need to maintain the “commonage’ for use by the community without specifying how this must be done. The Draft National Land Tenure Policy of 2005 provides for the identification and registration of villages on communal land which would have control over village land including commonage for grazing. This draft policy was never approved. The former Ministry of Land Reform carried out several investigations into the possibility of introducing some form of group land tenure, but the recommendations of these studies have never been implemented. Efforts were made to merge the National Land Policy with the Draft National Tenure Policy, but this has not yet been realised⁴⁸.

Land rights are particularly important in an environmental context because they can form part of the necessary enabling conditions for sustainable management of the land and natural resources. The

⁴⁵ Haring, S. L., 1996, *The Constitution of Namibia and the 'Rights and Freedoms' Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100, and Schedule 5*. City University of New York School of Law.

⁴⁶ Haring, S. L. and Odendaal, W. 2002. “One day we will be equal”. A socio-legal perspective on the Namibian Land Reform and Resettlement Process. Legal Assistance Centre. Windhoek.

⁴⁷ Begbie-Clench, B. and Jones, B. T. B. 2019. Analysis of the effects of national laws, policies and institutions on territories and areas conserved by indigenous peoples and local communities (ICCAs) in Namibia. *Natural Justice*. Bangalore.P. 45.

⁴⁸ *Ibid* P. 38.

Rights and Resources Institute identifies a bundle of rights associated with land rights of different types⁴⁹:

- a. Access rights to the land and natural resource;
- b. The right to harvest natural resources (withdrawal rights);
- c. The right to make decisions over the use of the land and natural resources (management rights);
- d. The right to exclude outsiders from using the land or natural resources (exclusion rights);
- e. The tenure regimes confer the right to lease, sell or use land or a natural resource as collateral (alienation rights);
- f. The duration of the right – in perpetuity or time-bound;
- g. The law guarantees due process and compensation if the state revokes or extinguishes rights (extinguishability).

The rights of exclusion, withdrawal and management (which are largely held by private land owners in Namibia) are particularly important as holders of these rights can take decisions to manage the land and natural resources sustainably and maintain ecosystem services on the land, without the possibility that other people may use the same land and deplete the natural resources. However, without strong group rights to the land, communal area residents in Namibia find it difficult to exclude outsiders from using their land and resources and to manage the land sustainably. Sectoral legislation does provide for community user rights over various natural resources, particularly through the formation of wildlife conservancies and community forests (see the following sub-sections). Communities have used these user rights derived from sectoral legislation in order to protect their land rights.

A judgement of the Namibian High Court in September 2016 granted the Nṁa Jaqna Conservancy (a predominantly !Kung San area) halted illegal fencing by outsiders in the conservancy⁵⁰. The Conservancy committee alleged that 32 individuals had illegally fenced land in Nṁa Jaqna Conservancy and that some of those had obtained the land without following procedures provided for in the CLRA. The judgment ordered the removal of fences and for a number of the accused to vacate land and/or be restrained from occupying land in the Conservancy. The Court ruled that the conservancy is a juristic person and thus has full legal capacity to sue or be sued, and has a right to enforce land use planning and zoning decisions made by the conservancy. Similarly, the case also confirmed that conservancies have an interest in the land, because of the fact that they are entitled to protect their rights over wildlife utilisation given that wildlife are dependent on the land. This judgment is likely to set precedent for other contested areas of communal land in Namibia⁵¹.

4.7.2 Wildlife user rights

The *Nature Conservation Amendment Act 1996* amends the *Nature Conservation Ordinance 1975* to make provision for communal area residents to form management institutions called “conservancies”

⁴⁹ RRI. 2012. What Rights? A Comparative Analysis of Developing Countries’ National Legislation on Community and Indigenous Peoples’ Forest Tenure Rights. Washington DC: Rights and Resources Initiative. P. 15.

⁵⁰ The Njaqna Conservancy Committee v The Minister of Lands and Resettlement (A 276-2013) [2016] NAHCMD 250 (18 August 2016)

⁵¹ Begbie-Clench, B. and Jones, B. T. B. 2019. Analysis of the effects of national laws, policies and institutions on territories and areas conserved by indigenous peoples and local communities (ICCAs) in Namibia. Natural Justice. Bangalore

which then gain conditional wildlife user rights over the declared conservancy area. Section 24A(5) of the Ordinance as inserted by the Act provides conservancies with the same rights over wildlife as owners and lessees of land as set out in Part III of the Ordinance.

In terms of Part III of the Ordinance a conservancy gains “ownership⁵²” over “hunnable” game (oryx, springbok, kudu, warthog, buffalo and bushpig), and can hunt these species for its own use without a permit or quota from government, although the Ministry of Environment and Tourism (MEFT) has used administrative procedures to insist that quotas are approved and permits are obtained. The conservancy also qualifies for use rights through permitting and quota systems to capture and sell game, use specially protected and protected species and carry out trophy hunting.

The conservancy approach can be viewed as rights-based in the sense that the rights and obligations of local communities with regard to wildlife and tourism are entrenched in legislation. The area of land delimited by the conservancy boundaries is officially declared and the boundaries recorded in the Government Gazette. Conservancies can also:

- ✓ enter into a contract with a trophy hunting company to buy part of all the conservancy’s trophy hunting quota.
- ✓ enter into a contract with one or more tourism companies to develop a lodge or lodges and other tourism facilities.
- ✓ suggest trophy hunting and other quotas to MEFT, but MEFT must approve the quota. In order to make quota proposals, the conservancy needs to monitor its wildlife and be aware of numbers and population trends.

The conservancy receives all income directly from its tourism and wildlife activities and does not receive this income via the state or have to share it with the state.

Legally, conservancies can decide how to use their income according to the provisions of their constitutions with no interference from the state, although the MEFT has issued guidance that 50% of income from tourism or hunting concessions should be allocated to community development projects.

4.7.3 Forestry use rights

The *Forest Act 2001* makes provision for “Community Forests” to be established, with the consent of the chief or traditional authority for an area which is part of communal land by means of the entering into of a written agreement with any body which the Minister of the MEFT reasonably believes represents the interests of the persons who have rights over that communal land and which is willing and able to manage that communal land as a community forest. The agreement must include a management plan for the community forest and confers⁵³:

“rights, subject to the management plan, to manage and use forest produce and other natural resources of the forest, to graze animals and to authorize others to exercise those rights and to collect and retain fees and impose conditions for the use of forest produce or natural resources”.

⁵² In practice conditional user rights although the Ordinance uses the term “ownership”.

⁵³ *Forest Act, 2001* Section 15 (2) (d)

The agreement should also provide for “*equal use of the forest and equal access to the forest*” produce by members of the communal land where the forest is situated⁵⁴.

The use rights provided under such an agreement afford communities control over a broader suite of resources than is provided for by the conservancy legislation:

- ✓ Residents of community forests may harvest forest produce and dispose of it as they wish without a licence, but in accordance with the management plan, in which harvest quotas will be set⁵⁵.
- ✓ Wood can be harvested for household fuel or for building purposes subject to the management plan⁵⁶.
- ✓ The Director of Forestry determines the quantity of forest produce for which a licence for commercial use may be issued in a community forest and the maximum quantity of produce that may be harvested⁵⁷.
- ✓ The elected management authority of a community forest may dispose of forest produce from the community forest or permit the grazing of animals, the carrying out of agricultural activity or the carrying out of any other lawful activity⁵⁸.

4.7.4 Inland Fisheries

The *Inland Fisheries Resources Act, 2003* provides for the conditional use rights of community members for subsistence fishing provided they fish according to a set of restrictions on the type of gear used. The government may declare any area of inland water to be a fisheries reserve on its own initiative or in response to an initiative of a regional council, local authority or traditional authority if the Minister believes that this will promote the conservation of the fisheries resource and related ecosystem⁵⁹. No fishing may take place in a fisheries reserve without the written permission of the Minister.

The Act does not provide explicitly for community-based fisheries, but several conservancies in Zambezi Region have used the legislation to establish fisheries reserves in an attempt to manage dwindling fish stocks. The conservancies derive income from catch and release sport fishing in the reserves. Trained fish guards are employed and paid by the conservancies to prevent any other fishing from taking place.

4.7.5 Biocultural rights

Biocultural Rights refer to all the rights required to secure the stewardship of indigenous peoples and local communities over their lands natural resources and waters. This stewardship represents a way

⁵⁴ *Ibid.* Section 15 (2) (f)

⁵⁵ *Ibid.* Section 24 (3)

⁵⁶ *Ibid.* Section 24 (4)

⁵⁷ *Ibid.* 2001 Section 26

⁵⁸ *Ibid.*, 2001 Section 31

⁵⁹ *Inland Fisheries Resources Act, 2003* Article 22 (1)

of life where the identity of a community, its culture, spirituality, systems of governance and traditional occupations are inseparable from its lands and waters⁶⁰.

Internationally, bicultural rights are recognised in the provisions of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization which forms part of the Convention on Biological Diversity and was adopted at the tenth meeting of the Conference of the Parties on 29 October 2010, in Nagoya, Japan (known as the “**Nagoya Protocol**”).

In Namibia the *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act 2017* (which has yet to come into force) implements the provisions of the Nagoya Protocol. The Act provides local communities with specific rights in relation to traditional knowledge and technologies associated with any biological and genetic resource belonging to the community.

The Act grants the following rights to rights holder over biological and genetic resources and associated traditional knowledge⁶¹:

- ✓ *To collectively share the benefits arising from the utilisation of biological and genetic resources and associated traditional knowledge;*
- ✓ *To protect their biological and genetic resources and associated traditional knowledge as traditional custodians and users, and in terms of customary law and practices; and*
- ✓ *The inalienable right to use their biological and genetic resources and associated traditional knowledge in the course of sustaining their livelihood systems, conservation and sustainable use of biological diversity.*

The Act provides that “*The State must recognise and protect the community intellectual property rights as they are enshrined and protected under the norms, practices and customary law found in, and recognised by, the concerned local communities, whether such law is written or not*”⁶². Further, the non-registration of any traditional knowledge does not, in terms of the Act, render such traditional knowledge unprotected as community intellectual property rights⁶³. The Act further provides that the publication of any written or oral description of a genetic resource and associated traditional knowledge, or the presence of genetic resources in a gene bank or any other collection, or its local use, may not preclude the local community from exercising its community intellectual property rights in relation to those resources⁶⁴.

In terms of the Act, access to biological or genetic resources and associated traditional knowledge is subject to written prior informed consent of the concerned right holders of such biological or genetic resources and associated traditional knowledge⁶⁵.

The concerned rights holders may refuse access to their biological or genetic resources or associated traditional knowledge. However, the Minister of the MEFT, when required in terms of the provisions

⁶⁰ Bavikatte, S. 2011.. *Stewarding the Earth: Rethinking property and the emergence of bicultural rights.* University of Cape Town

⁶¹ *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017* Section 12

⁶² *Ibid.* Section 13 (1)

⁶³ *Ibid.* Section 13 (3)

⁶⁴ *Ibid.* Section 13 (4)

⁶⁵ *Access to Biological and Genetic Resources and Associated Traditional Knowledge Act, 2017* Section 9 (1)

of the Nagoya Protocol, may with reasons and in compliance with Article 18 of the Namibian Constitution reverse the decision by a community to refuse access⁶⁶.

The Act states that a fair and equitable share of benefits from access and utilisation of biological and genetic resources and associated traditional knowledge must accrue to the concerned right holders⁶⁷.

The Act defines a “local community” as a group - (a) living or having rights or interests in a distinct geographical area within Namibia with a leadership structure and it may include natural resource management organisations such as conservancies and community forest committees; or (b) with rights in relation to or stewardship over its natural resources, genetic resources and associated traditional knowledge and technologies, governed partially or completely by its own customs, traditions or laws⁶⁸.

4.8 Rights regarding Science and Research

Article 15 of the International Covenant on Economic, Social and Cultural rights provides for the right to benefit from scientific progress and its application. It also commits the State parties to the Covenant to undertake to respect the freedom indispensable for scientific research and creative activity⁶⁹.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) recognises the following rights regarding Science and Research which are applicable to environmental science and research⁷⁰:

- ✓ *Right to access good science, unfettered or perverted by political, ideological, state or interest-group intervention.*
- ✓ *Rights of all of society to interact openly with science.*
- ✓ *Scientists and scientific and research institutions have rights to freedoms of research and expression, as well as responsibility to defend these rights.*
- ✓ Rights to have human capital and other resources (1% of GDP) for good science and research, including supportive and insightful management and leadership.
- ✓ Rights to a positive environment (all aspects) for science and research to thrive.

In addition UNESCO identifies the following principles regarding Science and Research:

- National policy and decision-making to be evidence-based, on good neutral science and research.
- Science to be treated as a common good, with results and neutral interpretation to be in the public domain.

⁶⁶ *Ibid.* Sections 9 (4) and (5)

⁶⁷ *Ibid.* Section 10

⁶⁸ *Ibid.* Definitions

⁶⁹ <https://www.ohchr.org/documents/professionalinterest/cescr.pdf>

⁷⁰ <https://www.unesco.se/wp-content/uploads/2018/11/263618e.pdf>

- Science and research to be non-discriminatory, inclusive and neutral throughout all components.
- All aspects of the conduct of science and research to be subject to human rights – including subjects of research, stakeholders in areas of research and research staff.
- Scientific integrity and ethics to be of the highest standard, and open to public interrogation.

5. What can Namibians do to ensure their environmental rights are upheld?

5.1 Participation

If Namibian citizens want a voice in protecting the environment, individuals and communities must understand the right to participate and know when and how to use this right strategically. Public participation includes a range of activities and actions that allow people to engage in environmental decision-making around issues that affect them.

Participation is not a single event but a process or mechanism that allows individuals and local communities to learn about, provide input, and potentially influence government decisions.

The Namibian Government has adopted a general policy that public consultation must be carried out as part of the process of developing policies and laws. Examples include extensive public consultation before the 2nd National Land Conference held in 2018 and the public consultations carried out by the MEFT for the development of new and revised environmental, wildlife and forestry legislation. Such consultation processes provide citizens with the opportunity to gain information about proposed policies and laws as well as the opportunity to participate in their formulation.

Opportunities to receive information about environmental issues and to participate in environmental decision-making include the following:

- Government-led stakeholder consultations during the drafting and development process for policies and laws. These consultations or workshops are usually through invitation by the relevant government line ministries and may also be publicized in the media.
- Public consultations for purposes of applications for Environmental Clearance Certificates and during Environmental Impact Assessments, as per the provisions of the Environmental Management Act, 2007. These are required to be publicized and advertised in the media (see section 4.5 for further elaboration in this regard).
- Various information and discussion meetings held by NGOs, such as the Namibian Environment and Wildlife Society and the Namibian Scientific Society.
- Consultations on regional, city and town council planning proposals that can affect the environment and which are advertised in the media.
- Attending regional, city and town council meetings that take planning decisions that can affect the environment.
- Participation by affected individuals and communities in the design and implementation of conservation projects that affect land use and livelihoods, such as the establishment of protected areas, and development of conservancy management and zonation plans.

Participation in these and other processes requires citizen activism. Without active participation from citizens, many decisions will be taken that can negatively affect the environment and citizens will only find out after the decision has been taken – when it is too late to prevent or mitigate the damage.

5.2 Applications to the courts

The Namibian Constitution provides for protection of fundamental rights and freedoms by the courts of Namibia. However, the onus is on the applicant to the courts to prove that a fundamental right or freedom has been infringed upon and that he/she has standing as an aggrieved person under Article 25(2) of the Constitution.

According to legal experts, the common law test for such standing is that the person applying either has a private right or is able to demonstrate that s/he has a special interest in the subject matter of the action before the relevant court. The special interest can be of an intellectual or emotional concern, but must be an interest that is different from that of an ordinary member of the public⁷¹.

5.3 Complaints to the Ombudsman

The Namibian Constitution provides for the appointment of an Ombudsman whose role is to investigate complaints concerning alleged violations of fundamental rights or freedoms and abuse of power by government officials and alleged corruption in public affairs. The Ombudsman is also tasked, among other things, with investigating⁷²:

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;

Complaints may be submitted to the Office of the Ombudsman by any person free of charge. Authorities that may be complained about include government institutions, parastatals, local authorities, and in case of the violation of human rights or freedoms, private institutions and persons⁷³.

Legal experts point out that fulfilling the Ombudsman's environmental mandate may be one way of effectively addressing environmental rights in Namibia, but the Office of the Ombudsman needs to become more proactive, especially in view of its role as a national human rights institution⁷⁴. There

⁷¹ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek.

⁷² Republic of Namibia: Namibian Constitution. Article 91 (c)

⁷³ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek

⁷⁴ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek

have been relatively few examples of environmental complaints being made to the Ombudsman and again it requires citizen activism to identify key issues which need to be brought to the attention of the Ombudsman.

The Ombudsman can refer matters to the Prosecutor-General, with the result that a criminal charge can be laid against an offender and may further apply to the courts for action to halt an offending action or conduct⁷⁵.

5.4 Appeals under the Environmental Management Act

The Environmental Commissioner oversees the implementation of the *Environmental Management Act, 2007* (EMA) including decisions regarding the issue of Environmental Clearance Certificates (ECCs) and the need for carrying out full Environmental Impact Assessments (EIAs). The Act provides that any person may appeal to the Minister of the MEFT if a person is dissatisfied with a decision of the Environmental Commissioner.

Further, where citizens are of the view that the appropriate procedures for public consultation required by the Act for purposes of obtaining an Environmental Clearance Certificate were not carried out, such aggrieved citizen can bring this to the attention of the Environmental Commissioner. An objection to the issuing of the ECC should be lodged with the Office of the Commissioner with a request that the ECC be withdrawn until proper consultation has taken place and any EIA documents have been amended as might be appropriate.

If a complainant is dissatisfied with any decisions taken above by either the Minister of the MEFT or the Environmental Commissioner, an objection can be lodged with the Office of the Ombudsman.

Citizens can also use the list of activities that need an Environmental Clearance Certificate contained in Annex 1 to check with the Environmental Commissioner's Office whether developments have gone through the proper procedures and obtained an ECC.

5.5 Prospecting and mineral licences in Conservancies

The *Minerals (Prospecting and Mining) Act, 1992* states that no mineral licence holder may carry out any rights conferred upon such holder in terms of such mineral licence (which includes prospecting or mineral exploration activities, dependent on the type of mineral licence granted) on private land without entering into a written agreement with the owner, containing terms and conditions relating to the payment of compensation, or such owner waiving any right to compensation.

However, no similar provisions have been included in the *Minerals (Prospecting and Mining) Act, 1992* which relate to communal land, conservancies or community forests. Examples exist of conservancies discovering prospectors on their land operating in exclusive wildlife zones or wildlife corridors without the knowledge of the conservancy management. However, communal conservancies do not have the

⁷⁵ Republic of Namibia: Namibian Constitution. Article 91 (c) (cc) and (dd)

legal right to refuse prospectors and geologists access to their land if they have legally issued prospecting and reconnaissance licences.

As prospecting and mining can be in conflict with landscape and biodiversity conservation, as well as the farming livelihoods of conservancy members, measures are needed to ensure that both the environment and the interests of communal area residents are taken into account when prospecting and mining take place.

Fortunately, the provisions of the *Environmental Management Act, 2007* (EMA) do add some environmental protection and safeguards that can be applied in conservancies and community forests, as far as it relates to prospecting and mining activities. Using the provisions of the EMA, a directive for prospectors and geologists operating in communal conservancies has been developed that establishes how they must interact with the conservancy, and that in the case of prospecting that requires surface sampling, drilling or trenching, there must be a written agreement with the conservancy. In terms of the EMA, holders of mineral licences are required to obtain an ECC (as it is a listed activity) and so conservancies and local communities should have an opportunity to comment on the application for the ECC.

Annex 2 contains the directive to prospectors and geologists operating in conservancies and Annex 3 is a template for the agreement that should be concluded between the prospector/geologists and the conservancy. These documents may be used by conservancies to better manage prospecting and mining activities on their land and to provide a proper structure and set of procedures for how prospectors and geologists should recognise the interests of conservancies and their members.

5.6 Human rights and Conservation NGOs

International conservation agencies and donors have in recent years become much more aware of the need to uphold human rights in conservation activities. A group of global conservation organizations have formed a Conservation Initiative on Human Rights (CIHR) to strengthen integration of human rights in conservation policy and practice. Participating organizations include Birdlife International, Conservation International, Fauna & Flora International, the International Union for Conservation of Nature, the Nature Conservancy, Wetlands International, the Wildlife Conservation Society, and the World Wildlife Fund.

The CIHR participating organisations have committed to respect and promote human rights within their conservation programs and to ensure they do not contribute to infringements of human rights. These organisations have also agreed to guidelines for conservation Non-Governmental Organisations to follow, which include the following:

- Ensure full and meaningful participation in decision-making with regards to conservation projects and activities;
- Ensure that conservation projects and activities only proceed after receiving the free, prior and informed consent of local communities which have a right to give or withhold consent to actions which will affect them, particularly actions affecting their customary lands, territories and natural resources;

- Ensure that the land rights of local communities are recognised and protected and not undermined by conservation projects and activities:
- Encourage and ensure the protection of customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements:
- Respect sustainable development rights, and further contribute to human well-being through, among other things, generation of benefits from sustainable natural resource use and equitable benefit sharing;
- Avoid displacement of people and restrictions on access to resources as much as possible and, where necessary, minimize and mitigate the potential impacts through compensation for the loss of land, resources and other assets and the provision of alternative resources which should be sustainable and (at least) economically and culturally consistent with the losses incurred; and
- Ensure that conservation law enforcement activities are not carried out in ways that are inhumane, or result in unnecessary suffering to any human being, and support training of law enforcement officers in human rights, community relationships and conflict resolution.

Where these organisations are operating in Namibia, citizens can call them to account if they believe the organisation is not adhering to the above commitments and principles.

6. What more needs to be done in Namibia?

For existing Environmental Rights in Namibia to be upheld and fully implemented there is a need for more constructive engagement by citizens with government and more active participation in environmental issues. The public should be encouraged to submit more complaints to the Office of the Ombudsman and to raise more questions regarding the issuing of Environmental Clearance Certificates and the conduct of EIAs with the Office of the Environmental Commissioner.

This citizen engagement and participation should also translate into more matters being brought before the courts, and into appropriate judicial activism by the judiciary. According to Legal experts, a movement to enforce environmental rights on a court-level will not only result in more environmental justice for the individual, but will also require developers and the relevant governmental institutions to be more transparent and accountable than they have been so far and, in doing so, impact beneficially on the policy-making process⁷⁶.

Further, legal experts suggest that with regard to environmental concerns linked to fundamental human rights, a certain degree of judicial activism is also required. If there is an increase in cases brought to the Namibian court by citizens, the Namibian courts will gradually be required to clarify

⁷⁶ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek

the substance of those rights, in particularly by drawing from approaches from international experience⁷⁷.

However, even if the Namibian Courts make judgments which aim to protect the environment and enforce environmental rights, these judgments will not have any impact if there is a lack of enforcement, in particular by the relevant governmental institutions and stakeholders. Legal experts point out that the rule of law means nothing without effective access to justice, without compliance with and enforcement of judgments made by the courts⁷⁸.

Enforcement of judgments is proving a particular problem in the case of the High Court ruling for the removal of illegal fences in the Nṁa Jaqna Conservancy referred to in section 4.6.1 above. This judgment could be an important precedent for other contested areas of communal land in Namibia. However, only some fences have been removed and new illegal fences have been erected. This represents a severe failure of government agencies to implement the judgement of the court. For proper recognition of Environmental Rights in Namibia, better compliance and enforcement by government is crucial.

It is also important that relevant governmental institutions, conduct investigations and monitoring to ensure that licence and ECC conditions are upheld.

More also needs to be done with regard to providing secure group land tenure rights on Namibia's communal lands. This would enable communities to have more control over how their land can be used, and would give better alignment for Namibia with the principles of the UNDRIP, particularly the rights of indigenous peoples to:

own, use, develop and control the lands, territories and resources that they possess and *States shall give legal recognition and protection to these lands, territories and resources;*

and

to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

A draft National Land Tenure Policy of 2005 provides for the identification and registration of villages on communal land which would have control over the village land including commonage for grazing. This draft policy was never approved. The former Ministry of Land Reform carried out several investigations into the possibility of introducing some form of group land tenure on communal land, but the recommendations of these studies have never been implemented.

The provision of group tenure over land for self-identifying communities would go a long way towards enabling communities to protect and manage their own natural resources and the environment in general. Ideally community land rights should be accompanied by automatic rights over the wildlife, forestry, grazing and water resources on that land without the need for sectoral legislation allocating

⁷⁷ Ruppel O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds). *Constitutional democracy in Namibia A critical analysis after two decades*. Konrad Adenauer Foundation. Windhoek

⁷⁸ UNEP (2019). Environmental Rule of Law: First Global Report. United Nations Environment Programme, Nairobi.

these rights. In effect, communal tenure should no longer be a form of second-class tenure which provides only use rights over resources at the whim of the state. Communal tenure rights need to be elevated to the same level as freehold tenure rights through the provision of tenure security and rights of exclusion.

Resources

Information regarding rights

<https://www.merriam-webster.com/dictionary/legal%20right>

<https://www.right-to-education.org/monitoring/content/glossary-rights-holders>

<https://www.right-to-education.org/monitoring/content/glossary-duty-bearers>

<http://www.therepublic.com/2020/01/30/theres-a-difference-between-a-right-and-a-privilege/>

Human rights

<https://www.un.org/en/global-issues/human-rights>

<https://www.un.org/en/about-us/universal-declaration-of-human-rights>

African (Banjul) Charter on Human and Peoples' Rights 1981

<https://www.refworld.org/docid/3ae6b3630.html>

Environmental rights

UN General Assembly Resolution 64/292 of 28 July 2010: The human right to water and sanitation.

<https://undocs.org/pdf?symbol=en/a/res/64/292>

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https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what?_ga=2.180903975.1683110379.1623226102-956585199.1623226102

Elizabeth Moses Carole Excell: 2020. A COMMUNITY ACTION TOOLKIT: A Roadmap for Using Environmental Rights to Fight Pollution. World Resources Institute. <https://files.wri.org/d8/s3fs-public/community-action-toolkit.pdf>

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Jenny Springer and Jessica Campese with Michael Painter. 2011. Conservation and Human Rights: Key Issues and Contexts. Scoping Paper for the Conservation Initiative on Human Rights. <http://www.thecihr.org/>

Namibia's constitution and environmental law

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Ruppel, O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds.). *Constitutional democracy in Namibia: A critical analysis after two decades*. Konrad-Adenauer Stiftung. Windhoek. https://www.kas.de/c/document_library/get_file?uuid=52ac8330-376e-7a2e-c517-62c13965e8fe&groupId=252038

Environmental Justice

Ruppel, O. C. 2010. Environmental rights and justice under the Namibian Constitution. In: Bösl, A., Horn, N., and du Pisani, A. (eds.). *Constitutional democracy in Namibia: A critical analysis after two decades*. Konrad-Adenauer Stiftung. Windhoek. https://www.kas.de/c/document_library/get_file?uuid=52ac8330-376e-7a2e-c517-62c13965e8fe&groupId=252038

Indigenous Peoples' and Local Communities' Rights and the Environment in Namibia

Begbie-Clench, B. and Jones, B. T. B. 2019. Analysis of the effects of national laws, policies and institutions on territories and areas conserved by indigenous peoples and local communities (ICCAs) in Namibia. Natural Justice. Bangalore.

Jones, B.T.B. 2012. An analysis of international law, national legislation, judgements and institutions as they interrelate with territories and areas conserved by indigenous peoples and local communities. Report No. 4: Namibia. Natural Justice. Bangalore. <https://naturaljustice.org/publication/namibia/>

Freedom of Information

<https://www.un.org/ruleoflaw/thematic-areas/governance/freedom-of-information/>

List of activities that may not be undertaken without an Environmental Clearance Certificate

See Annex 1.

Directive for prospectors and geologists operating in communal conservancies and template agreement

See annexes 2 and 3

Annex 1. Activities that may not be undertaken without an Environmental Clearance Certificate

Government Gazette, 6 February 2012. No. 4878

LIST OF ACTIVITIES THAT MAY NOT BE UNDERTAKEN WITHOUT ENVIRONMENTAL CLEARANCE CERTIFICATE

ENERGY GENERATION, TRANSMISSION AND STORAGE ACTIVITIES

1. The construction of facilities for -
 - (a) the generation of electricity;
 - (b) the transmission and supply of electricity;
 - (c) refining of gas, oil and petroleum products; and
 - (d) nuclear reaction, including production, enrichments, processing, reprocessing, storage or disposal of nuclear fuels, radioactive products and waste.

WASTE MANAGEMENT, TREATMENT, HANDLING AND DISPOSAL ACTIVITIES

- 2.1 The construction of facilities for waste sites, treatment of waste and disposal of waste.
- 2.2 Any activity entailing a scheduled process referred to in the Atmospheric Pollution Prevention Ordinance, 1976.
- 2.3 The import, processing, use and recycling, temporary storage, transit or export of waste.

MINING AND QUARRYING ACTIVITIES

- 3.1 The construction of facilities for any process or activities which requires a licence, right or other form of authorisation, and the renewal of a licence, right or other form of authorisation, in terms of the Minerals (Prospecting and Mining Act), 1992.
- 3.2 Other forms of mining or extraction of any natural resources whether regulated by law or not.
- 3.3 Resource extraction, manipulation, conservation and related activities.
- 3.4 The extraction or processing of gas from natural and non-natural resources, including gas from landfill sites.
- 3.5 The extraction of peat.

FORESTRY ACTIVITIES

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

LAND USE AND DEVELOPMENT ACTIVITIES

- 5.1 The rezoning of land from -
 - (a) residential use to industrial or commercial use;
 - (b) light industrial use to heavy industrial use;
 - (c) agricultural use to industrial use; and
 - (d) use for nature conservation or zoned open space to any other land use.
- 5.2 The establishment of land resettlement schemes.
- 5.3 Construction of veterinary protected area or game proof and international boundary fences.

TOURISM DEVELOPMENT ACTIVITIES

6. The construction of resorts, lodges, hotels or other tourism and hospitality facilities.

AGRICULTURE AND AQUACULTURE ACTIVITIES

- 7.1 Construction of facilities for aquaculture production, including mariculture and algae farms where the structures are not situated within an aquaculture development zone declared in terms of the Aquaculture Act, 2002.
- 7.2 The declaration of an area as an aquaculture development zone in terms of the Aquaculture Act, 2002.
- 7.3 The genetic modification of any organism with the purpose of fundamentally changing the inherent characteristics of that organism.
- 7.4 The import, processing and transit of genetically modified organisms.
- 7.5 Pest control.
- 7.6 The release of genetically modified organisms into the environment where an environmental assessment is required by law.
- 7.7 The release of any organism outside its natural area of distribution that is to be used for biological pest control.
- 7.8 The introduction of alien species into local ecosystems.

WATER RESOURCE DEVELOPMENTS

- 8.1 The abstraction of ground or surface water for industrial or commercial purposes.

WORKING DRAFT

- 8.2 The abstraction of groundwater at a volume exceeding the threshold authorised in terms of a law relating to water resources.
- 8.3 Any water abstraction from a river that forms an international boundary.
- 8.4 Construction of canals and channels including the diversion of the normal flow of water in a river bed and water transfer schemes between water catchments and impoundments.
- 8.5 Construction of dams, reservoirs, levees and weirs.
- 8.6 Construction of industrial and domestic wastewater treatment plants and related pipeline systems.
- 8.7 Irrigation schemes for agriculture excluding domestic irrigation.
- 8.8 Construction and other activities in water courses within flood lines.
- 8.9 Construction and other activities within a catchment area.
- 8.10 Reclamation of land from below or above the high-water mark of the sea or associated inland waters.
- 8.11 Alteration of natural wetland systems.
- 8.12 The release of brine back into the ocean by desalination plants.

HAZARDOUS SUBSTANCE TREATMENT, HANDLING AND STORAGE

- 9.1 The manufacturing, storage, handling or processing of a hazardous substance defined in the Hazardous Substances Ordinance, 1974.
- 9.2 Any process or activity which requires a permit, licence or other form of authorisation, or the modification of or changes to existing facilities for any process or activity which requires an amendment of an existing permit, licence or authorisation or which requires a new permit, licence or authorisation in terms of a law governing the generation or release of emissions, pollution, effluent or waste.
- 9.3 The bulk transportation of dangerous goods using pipeline, funiculars or conveyors with a throughout capacity of 50 tons or 50 cubic meters or more per day.
- 9.4 The storage and handling of a dangerous goods, including petrol, diesel, liquid petroleum gas or paraffin, in containers with a combined capacity of more than 30 cubic meters at any one location.
- 9.5 Construction of filling stations or any other facility for the underground and aboveground storage of dangerous goods, including petrol, diesel, liquid, petroleum, gas or paraffin.

INFRASTRUCTURE

- 10.1 The construction of-
 - (a) oil, water, gas and petrochemical and other bulk supply pipelines;

- (b) public roads;
- (c) railways and harbours;
- (d) airports and airfields;
- (e) any structure below the high water mark of the sea;
- (f) cableways;
- (g) communication networks including towers, telecommunication and marine telecommunication lines and cables;
- (h) motor vehicle and motorcycle racing and test tracks;
- (i) the outdoor racing sites of motor powered vehicles including -
 - (i) motorcars;
 - (ii) trucks;
 - (iii) motorcycles;
 - (iv) quad bikes;
 - (v) boats; and
 - (vi) jet skis;
- (j) masts of any material or type and of any height, including those used for telecommunication broadcasting and radio transmission, but excluding -
 - (i) flag poles; and
 - (ii) lightning conductor poles.

10.2 The route determination of roads and design of associated physical infrastructure where -

- (a) it is a public road;
- (b) the road reserve is wider than 30 meters; or
- (c) the road caters for more than one lane of traffic in both directions.

OTHER ACTIVITIES

11.1 Construction of military demonstration and testing sites,

11.2 Construction of cemeteries, camping, leisure and recreation sites.

Annex 2. Guidelines for landowners and custodians (e.g. communal conservancies) to better engage in the Environmental Impact Assessment process and to manage and control access to their land as may be requested by prospectors and other developers