

The protection of natural resources and biodiversity: Work in progress in three Master's theses in the Faculty of Law of the University of Namibia

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Introduction

For the past six seven years, the Faculty of Law of the University of Namibia has been part of the international research consortium entitled *Biodiversity Monitoring Transect Analysis in Africa* (BIOTA), a project being funded by the German Government until 2010 and implemented in three regions of Africa. As is clear from its title, the objective of the BIOTA Project, which will come to an end in 2010, is to monitor biodiversity. The results of the monitoring exercise are then evaluated with the aim of recommending interventions by governmental and non-governmental stakeholders for the sustainability and, where necessary, enhancement of biodiversity.

Several LLB dissertations were promoted and completed under the BIOTA Project.¹ The following progress report focuses on three Master's theses, which are expected to be submitted for approval by early 2010. The BIOTA-related LLB and LLM dissertations have one important element in common: they investigate the role and function of customary law in the interest of protecting natural resources and biodiversity.² In this sense, they take seriously what the Convention on Biological Diversity refers to where it emphasises the importance of traditional knowledge.³ The Convention on Biological Diversity is part of the

¹ Cf. Hinz, MO & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society. This collection of contributions contains 11 studies conducted by students of the University of Namibia's Faculty of Law.

² To this and to the following, see Hinz, MO. 2008. "Findings and the way forward". In Hinz & Ruppel (ibid.:211ff).

³ Cf Articles 8(j); 17(2) and 18(4) of the Convention.

law of Namibia, and customary law enjoys confirmation in Article 66 of the Namibian Constitution.

The legal – or, rather, legal anthropological – research done as regards implementing the objectives of the BIOTA Project has, on the one hand, shown problems in the relationship between the general law of Namibia, i.e. the enacted statutory law, and customary law. On the other, the research could also assess the limits of customary law. Both findings contribute to our knowledge on the workings of law at the interface between statutory and customary law.

The jurisprudential interpretation of the law in a statutorily defined legal order as a legally pluralistic order is still a strongly debated matter. Jurisprudential conclusions, including their normative consequences, to be drawn from legal pluralism are equally open to debate. Progress in these fields will help in conceptualising the said interface and, thus, assist in the more efficient application of the law.

The following preview gives an insight into work in progress. The preview's intention is to draw attention to three research projects that investigate three specific problems of general legal and political interest.

Water wars: Legal pluralism and hydro-politics in Namibian water law⁴

Conflicts and multifarious questions about water in Namibia, a country with scarce water resources, are manifold. Central to the enquiry on water law is the question as to who owns water in Namibia. Since this is a jurisprudentially controversial question, concise and/or coordinated answers are as scarce as the water itself. Whereas the Namibian Constitution creates a public trusteeship principle in the ownership of all natural resources in the country, the communities on the ground do not seem to agree to the provisions of the Constitution. Communities subscribe to their customary laws; hence, the plurality or at least duality of legal systems in the country is a situation to be reckoned with in so far as the management of all natural resources is concerned.

⁴ This part of the progress review is by Clever Mapaire.

If one says that Namibia is the driest country among the members of the Southern African Development Community (SADC), is it justifiable to say that Namibian rural communities and their livestock are thirsty? The answer seems to be “No”: geohydrological surveys show that Namibia has enough water to sustain its small population. Why is it then that rural communities go without water for days, if not weeks? This question can only be answered if one critically considers the country’s hydro-political institutional set-up.

The study currently under way shows that rural communities in Namibia suffer from second-order water scarcity, which ranges at a scalar level from macroeconomic and institutional underdevelopment to micropolitics. The scarcity seems to arise out of the hydro-political interactions between various actors in the rural water supply industry, evidencing not only the aforesaid legal pluralism, but also the associated conflictual water management and ownership regimes.

Why is this all so, and what remedy could be recommended? In attempting to answer these questions one has to look at the policies and programmes put in place by the water administration bodies, which have had some unintended implications for rural water supply. The official promise to local communities is to secure water supply through a decentralisation programme. This programme gave rise what is known as *community-based management*, whereby rural communities control water points in their areas through Water Point User Associations and Water Point Committees. Inasmuch as this programme was accepted by Cabinet as well as some sections of the population and eventually found legislative force, the current situation shows that the process of decentralisation has created some unhealthy hydro-politics. For example, employees in the Ministry of Agriculture, Water and Rural Development’s Directorate of Rural Water Supply are supposed to work under the Regional Councils in all of Namibia’s 13 Regions, but the situation on the ground shows this not the case. Officials at the Directorate feel that the Regional Councils are not ready to handle regional water supply affairs so it is not willing to delegate these services to them. The Regional Councils, however, feel they are able to cope with rendering rural water supply services. This presents an irony: the Directorate’s employees willingly report to the Regional Councils and, to this end, signed secondment letters to allow the intended delegation process to proceed. Despite these signed letters, however, the delegation process has been halted. This situation has not only created resentment in the Regions, the end user of the water is also being affected – without knowing why. This is indeed a sad situation.

It is also surprising that people own private boreholes on communal land. A few residents in the Otjozondjupa Region, especially around the communal area of Okondjatu, have private

boreholes. These have even been fenced off, contrary to the Communal Land Reform Act.⁵ These individuals, who mainly specialise in cattle ranching, also have what they call 'plots'. These 'plots' are also fenced off, again contrary to the latter Act. Although these residents say that they share the water with other community members as per the Chief or Headman's directive, it appears that such directives are ignored. For this reason a new system of water ownership is budding in the Otjozondjupa Region.

The questions, however, are these:

- Can water be privately owned?
- Can there be private ownership on communal land?

Whereas the issues of communal water rights and rural water supply have received special attention in both the Water Resources Management Act⁶ and the Draft Water and Sanitation Policy of 2009, the details on water ownership, water governance, water utilisation by rural populations, and communal property rights still need to be clarified in Namibia's water legislation.

Notably, the Water Resources Management Act created a public trustee in water ownership; thus, there is only public ownership of water in Namibia. The question that arises now is whether Namibia's shift to this public rights system is in line with the Constitution, which recognises both private and public ownership of natural resources.

Water appears to be the new oil, i.e. internationally the most-wanted scarce resource, and discussions on the scarcity of water have led to conclusions that the next World War will be about water. Admittedly, there is considerable talk of water wars, but in fact there is little evidence of any international violent conflict over water. What is evident is that conflicts arise as a result of socio-political constructs of water scarcity, called *second-order* scarcity. These microlevel complaints seem to emerge out of the hydro-political interactions among various actors in rural water supply and the centrifugal dynamics of the institutional control of water in Namibia.

⁵ No. 5 of 2002.

⁶ No. 24 of 2004.

Biofuel production on communal land⁷

The current debate on climate change and rising oil prices has greatly increased interest in renewable energies such as biofuel. Consequently, many industrialised countries and more advanced developing countries are seeking to promote biofuel as a way of reducing fossil fuel consumption and mitigating the adverse effects of climate change.

In Namibia, the past few years have witnessed the emergence of an energy industry which is primarily based on oil plants. It has been held that an established and thriving energy industry will contribute meaningfully to the economy and support Namibia's Vision 2030 development goals. Due to the African continent's many arid climatic zones and the large extent of supposedly marginal land, *Jatropha*, a perennial oil-nut-bearing tree, has been given much attention as a potential energy source.

The study reported here constitutes an investigation into whether the allocation of land for *Jatropha* farming is legal in terms of procedure as well as the powers of institutions in charge of land allocation under the Communal Land Reform Act,⁸ on the one hand, and in terms of the customary law concept of land tenure, on the other. Relevant land tenure research has shown that the land allocation procedures on communal land found in the Caprivi and Kavango Regions, for example, are twofold: there are those provided for by the Communal Land Reform Act, and those provided for under customary law. Although there was an attempt to incorporate customary land law concepts into the said Act, it became obvious that traditional authorities preferred to manage communal land under customary land law.

Moreover, the relationship between Traditional Authorities and State institutions (e.g. the Land Boards) lacks harmony. Traditional Authorities perceive Land Boards in communal land administration as an attempt to frustrate their customary mandate. In light of the above, it is clear that, as far as land allocation for *Jatropha* is concerned, there is a constant clash between the land allocation procedures in the Act and under customary law. However, research has also revealed that, despite most Traditional Authorities regarding other institutions as wearisome, they nevertheless seek assistance from the latter when faced with conflicts involving external parties such as *Jatropha*-cultivating companies.

⁷ The following is contributed by Emily Ndateelela Namwoonde.

⁸ No. 5 of 2002.

The research being conducted for this study is also exploring the socio-economic benefits that farmers stand to gain from *Jatropha*. Researchers from Namibia and elsewhere question the reputed benefits of *Jatropha*, and believe that the current rush to produce this type of biofuel on a large scale is ill-conceived and under-researched, and could contribute to an unsustainable trade that will not solve the problems of climate change, energy security or poverty.

The *food v biofuel* debate is given special attention in the study, as it is feared that *Jatropha* could replace the production of crops aimed at securing food for communal farmers. Although *Jatropha* is not farmed on a scale large enough to determine this aspect fully in the Namibian context, research in other countries has shown that *Jatropha* is planted in direct replacement of food crops by subsistence farmers. Notably, communal farmers in Namibia are in essence subsistence farmers, i.e. they produce basically what they consume; hence, major concerns arise when one considers the plan to encourage subsistence farmers to plant large amounts of *Jatropha*, particularly since such farmers have very weak links to markets in general, and they lack storage capacity.

The research for this study demonstrates that some investors have opted for farming contracts as a means of acquiring land. However, the obligations in farming contracts are mostly aimed at protecting the interests of the companies investing in the produce concerned – usually at the farmers' expense. It also became very clear during the research that many farmers did not understand the concepts stated in the agreements they had signed, and their decisions to do so had been clouded by the promise of huge profits and other developmental agendas.

The *Jatropha* experience proves that, although the procedures under the Act as well as under customary law are used to allocate land for *Jatropha* farming, the two sets of rules are not properly geared to protecting sometimes ignorant communal farmers from potential exploitation by investors. The lack of a remedial mechanism can be attributed to the lack of an appropriate legal accommodation of the interface between customary and statutory law. It is recommended, therefore, that the Act be revisited by the legislature and that it incorporate customary land law practices and principles. There is also a need to ensure that the ever-widening gap between customary law and statutory law is bridged. The current major recommendation of the study is the introduction of a National Policy for Biofuels.

Conservancies: What is the way forward in terms of protecting natural resources through community ownership?⁹

This research will present information on the Namibia Conservancy Programme (NCP). It will highlight the development impact that Namibia's incentive-based conservation laws have produced in communal areas, and how the NCP has alleviated poverty among the country's rural communities. A case study on the Uukwaluudhi Conservancy is used to provide information on the contributions that wildlife and tourism make to the livelihoods of the local people.

Traditionally, residents of communal land in Namibia have depended heavily on subsistence crop production and livestock management to support their daily livelihood needs. However, there is a growing concern about the suitability of land for arable crop or sustainable livestock production. In 1996, the Namibian Government, through its Ministry of Environment and Tourism, took a concrete step towards addressing this concern by enacting the Nature Conservation Amendment Act,¹⁰ which amended and superseded the Nature Conservation Ordinance of 1975. The passage of the new conservancy legislation initiated a national conservancy movement that seeks to promote and integrate, where appropriate, wildlife production and tourism development efforts for the benefit of communal land residents. This has resulted in the registration of more than 50 communal conservancies to date, encompassing more than 118,704,000 km². Indeed, since 2000, communal conservancies under the Government's Community-based Natural Resource Management (CBNRM) Programme have become an important vehicle for meeting its goal to address both environmental and sustainable developmental issues in rural areas.

The central hypothesis of the study reported here is that multi-species animal production systems such as live game sales, game meat production, hide production and tourism provide a greater financial return on investment than do single-species domestic livestock systems. The background of the study tends to stress maximising foreign exchange earnings. The shift from single-species to multi-species production has been underpinned and encouraged by the Government as the latter was found to be more ecologically resilient and stable.

⁹ This section is by Prisca Nangoma Anyolo.

¹⁰ No. 5 of 1996.

Empirical research was undertaken in the Uukwaluudhi Conservancy in the Omusati Region to recount not only what has been done there in terms of wildlife management, but also whether the conservancy has enhanced the livelihood of the rural communities.

Like many other communal conservancies in rural Namibia, the Uukwaluudhi Conservancy caused parts of communal land to be converted to land that was to be administered in terms of conservancy law. It was only after the establishment of the conservancy that it was realised that the co-area¹¹ demarcated for wildlife was too small to cater for the imported and indigenous species. Wildlife needed to meet the core intention of the conservancy, which was to increase wildlife for trophy hunting, the sale of game, etc. Therefore, the conservancy was extended to include sections formerly used as grazing areas by community members for stock farming as well as cultivation area for crop production. As a result, people had to give up their rights to communal farmland to the conservancy, which led to serious economic losses for those who had to be relocated.

In assessing the conservancy's degree of success, its financial report for the period ended 31 December 2008 is a telling account of events. The report shows that the total income from wildlife resources increased from about N\$50,000 in 2005 to over N\$600,000 by 2008. The wildlife populations were said to have shown remarkable growth and recovery during the same period. Despite this positive account, recent research shows that the three employees who work for the conservancy as security guards and caretakers of the co-area have never received any payment for their services. Although one of the principal motivations behind the CBNRM Project – as indeed manifested in the conservancy's Constitution – is to empower local people who cannot find jobs in the formal sector, otherwise jobless people work for the conservancy as volunteers. Where has the conservancy's income gone? For example, the audited financial reports for 2007 and 2008 reveal that over N\$200,000 income has not been accounted for.

Although the above-mentioned official report of 2008 shows impressive figures in terms of total capital value and an increase in wildlife populations, no local investments have been made with the actual income generated, and no conservancy benefits have been paid out to the local community. These facts beg for an explanation. Despite the laudable intentions behind the Government's conservancy policy and the new Act, which empowered rural communities to be in charge of the wildlife in communal areas, the governance and ownership of wildlife in conservancies has remained a critical issue to many residents.

¹¹ The part of the conservancy area with game-proof fencing.

Most communal conservancies, including the Uukwaluudhi Conservancy, show great potential for generating an income that will benefit their members and others. Although it is acknowledged that the latter conservancy decided to donate the meat by-products of trophy hunting to nearby schools, and to assist hostels in the area for more than two months when NamWater cut off their water supply, the way in which Conservancy Committees distribute the income and benefits derived from communal conservancies' resources in general remains an issue.

In assessing customary rights over wildlife, the study examines the consequences for the local people losing their land to the conservancy without being recompensed. The study submits that there is no legal protection available to those affected by this change in the land tenure system, because the new Act does not provide for any remedy.

In conclusion, the study recommends ways to avoid conflict between the economic survival of agricultural communities and the foraging needs of wildlife. The study suggests certain law reforms that could bridge the gap between the statutory conservancy law and the right of residents of communal land recognised and protected under customary law.