PART IX:

CUSTOMARY LAW AND TRADITIONAL KNOWLEDGE

Chapter 23: Customary Law and the Environment

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1 Introduction

The very special relationship of traditional or indigenous communities to nature, to the use of natural resources in general, and to plants and animals in particular, has been the subject of many empirical studies and theoretical reflections.[1] Nevertheless, the focus on customary environmental law is a rather recent focus. So far, customary environmental law has not been of much concern to authors of textbooks on environmental law or legal anthropological treatises.[2]

In Namibia, the interest in customary environmental law developed when, after Independence, the Ministry of Environment and Tourism drafted a new conservation policy, which changed the inherited approach to conservation. Instead of focusing on nature alone, i.e. nature minus human beings, the new approach took note of the relationship between nature as such and human beings living in and with nature, and by doing so, also acknowledged that traditional communities had their own ways of dealing with nature.

It was in this context that customary environmental law research began. One first result was the publication of *Without Chiefs, There Would Be No Game. Customary Law and Nature Conservation.*[3] Later, the internationally designed and conducted BIOTA project requested legal anthropological research on the potential of customary law for the protection of biodiversity. *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law. Case Studies from Namibia*[4] a first set of studies was accomplished within the BIOTA project in 2008.[5] A second set appeared in a subsequent publication *Knowledge Lives in the Lake. Case Studies in Environmental*

1 Cf. Hinz (2003:16ff.) but also (2013b) with further references.

2 An exception is the discourse about the legal protection of traditional knowledge. Cf. on this Section 7 below and Chapter 24.

3 Cf. Hinz (2003).

4 Hinz / Ruppel (2008a). *Biodiversity and the Ancestors* is (apart from the introduction by Hinz / Ruppel (2008b) – and a summary by Hinz (2008b) composed of 11 pieces of research which were conducted by students of the Faculty of Law of the University of Namibia under the supervision of this author.

5 BIOTA stands for Biodiversity Transect Africa. The aim of the project (it started in 2000 and ended in 2010) was to monitor the state of affairs of biodiversity and to develop strategic options for political interventions in favour of the sustainability of biodiversity. Cf. Hinz / Ruppel (2008b:59ff.); Falk (2008), but in particular the comprehensive account of the project in Jürgens / Schmiedel / Hoffman (2010) and in this: Hinz / Ruppel (2010); Hinz / Mapaure (2010); Pröpper *et al*. (2010).

and Customary Law from Southern Africa.[6] Certain aspects of the research done in the BIOTA project could be pursued further in another internationally conducted project: the TFO project.[7] The TFP project was completed in 2015. The results produced in both projects have remained relevant in assessing the importance of customary law for matters of the environment.[8]

The three mentioned publications from the BIOTA project and the publications from the TFO-project are important sources for this Chapter.[9] It has been divided into six parts. The first part takes note of the development of the post-independence conservation policy and the implications for customary law in environmental matters. Following this, the place of customary law in the overall legal system of Namibia with special attention on customary environmental law is looked at. The next part offers information on the development of community projects (conservancies, community forests, fishery reserves) in Namibia and the role played by customary law in the implementation of these projects. Then follows an overview of the results of customary law research in the context of the BIOTA and the TFO projects. Traditional conservationism and a section on customary law and the protection of traditional knowledge are dealt with before the concluding remarks.

A note of reservation: The protection of the environment and the calls for the sustainable management of natural resources are on the international agenda. The deliberations on this agenda have confirmed, as will be illustrated in the course of this chapter, the importance of local agents, including traditional authorities and with this, the law created by traditional authorities. When looking at certain international features, regional treaties and rules applying to borders, i.e. in view of the case of Namibia the borders between Namibia and Angola and the borders between Namibia and Zambia

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6 *Knowledge Lives in the Lake. Case Studies in Environmental and Customary Law from Southern Africa* is edited by M.O. Hinz / O.C. Ruppel / C. Mapaure, Windhoek. Namibia Scientific Society, 2012. This volume contains 9 pieces of research by students of the Faculty of Law of the University of Namibia under the supervision of Oliver C. Ruppel and this author.

7 TFO stands for The Future Okavango. "The task of the TFO project was to assess important ecosystem functions and services and their valuation within the Okavango basin." (Jürgens (2013:7)). Cf. further Pröpper *et al*. (2015). The sub-unit directed by the author of this paper looked at relevant legal aspects, *inter alia* the customary water law in the Kavango basin. Cf. here Hinz (2013b; 2013d and 2014).

8 Generally, environmental matters are well-placed on the agenda of research in Namibia. However, there is not much concern about law (not to speak of customary law). The Namibia Sustainable Forest Management Project, which is to run from 2020 – 2023 and is implemented together with the Desert Research Foundation of Namibia, will most probably take note of the function of law to support sustainability. The resource book for environmental awareness for sustainable development (Garrard *et al.* (2017:160)) mentions customary law in its chapter about how people tackle the task of managing natural resources sustainably.

9 Part 7, the section on traditional knowledge and customary law extends the relatively short references to traditional knowledge in the introduction to *Biodiversity and the Ancestors*. (Cf. Hinz / Ruppel (2008b:17f.) An earlier version of this part on traditional knowledge was published in Vol. 3(1) of the *Namibia Law Journal*; Hinz (2011a).

and Botswana, the fact is that local agents, and especially traditional agents, have hardly, if at all, been involved in the arrangement of treaties and the establishing of border practices. This could be illustrated with reference to OKACOM Agreement and also the KAZA Treaty, but will not be part of the following deliberations.[10]

2 Post-Independence Conservation Policy in Namibia: Gateway for Customary Environmental Law[11]

The history of nature conservation in colonial and post-colonial Africa went through various stages. After exploration and exploitation, preservation was the principle that governed conservation policies for many years. Preservation was defined as the "complete insulation of wildlife and their habitat from human interference".[12] Reserves were established to which only conservation officials had access, aside from visitors and other, especially permitted persons.

Conflicts between those living inside such nature conservation areas and conservationists have not been resolved and are still a matter of lively debates. In many instances, people were moved from their ancestral lands, without any rights, not even visiting rights to sacred locations. In many cases, their move was facilitated by promises that they would eventually benefit from this change by receiving, e.g. a share in park fees or the sale of licences to hunters.

A particular problem exists with people living close to parks. In some cases, such park borders are borders on paper only, meaning that animals come and go. Instead of promised returns from cooperation with the official conservation policy, people often suffer from so-called 'problem animals', which are raiding fields and livestock. The purist approach to nature conservation, which primarily focused on animals, did not develop mechanisms to mediate this kind of conflict between humans and animals. In as much as park borders are not necessarily borders that stop the movements of animals, people very often do not understand that human behaviour and movements are disturbing to animals and cause them to develop into problem animals. How can people who moved into an area known as an area of elephants since time immemorial expect

10 OKACOM Agreement established the Permanent Okavango River Basin Water Commission on 15 September 1994 (see for the agreement: https://bit.ly/3EZZV7F, accessed 15 December 2021). The KAZA Treaty creates the Kavango Zambesi Transfrontier Conservation Area of 18 August 2011 (KAZA – TFCA; see for the treaty https://tfcaportal.org/system/files/resources/KAZA%20TFCA%20Treaty_SIGNED.pdf, accessed 28 September 2021). The TFO project produced relevant evidence with respect cross-border efforts of Namibian traditional authorities, which will be subject to a later publication.

11 Cf. for the following Hinz (2003:2ff.).

12 Yeager / Miller (1996:34).

to settle without problems? To declare animals that follow or even defend their customs 'problem animals' that need to be shot is certainly not the best solution.[13]

European concepts of nature conservation through preservation were, step by step, replaced with other approaches. Strategies for the ecologically balanced use of natural resources gained ground in the debate. The IV[th] World Congress on National Parks and Protected Areas resolved that protected areas[14]

> cannot co-exist with communities, which are hostile to them, but they can achieve significant social and economic objectives when placed in a proper context. The establishment and management of protected areas and the use of resources in and around them must be socially responsive and just.

This statement is based on the very obvious fact that "communities living in and around protected areas, often have important and long-standing relationships with these areas."[15]

However, the new approach manifested itself in concepts with implications differing according to the emphasis put on conservation through protection versus sustainable rural development for which conservation is not an end in itself.[16] While the first would still support the existence of protected areas, the second would opt for radical revision of the existing system of conservation through protection and would eventually abandon the concept of human-free protected areas.

This second concept is associated with the policy of creating Integrated Conservation and Development Projects (ICDP) as put forward by US-American conservationists[17] and adopted by the World Wildlife Fund (WWF).[18] The WWF proposes the introduction of ICDPs in Government-operated protected areas, also in conservation projects under the jurisdiction of indigenous people and in specifically designed initiatives on communal or private land in terms of joint management arrangements between the state and the respective communities.

Although the relevant Ministry[19] was reluctant to introduce the ICDP approach in its entirety, it nevertheless subscribed to its principles outside protected areas.[20] The

13 Many concerns about problem animals were raised to the author when he did fieldwork for Hinz (2003), Cf. Hinz (2003:2). See also *The Namibian* of 24 November 2010, which reports that the Ministry of Environment and Tourism compensated each conservancy in Namibia with N$ 60,000 for losses caused by wild animals.

14 IUCN, Parks of Life. Report of the IVth World Congress on National Parks and Protected Areas, quoted from Jones (1997:1).

15 Ibid.

16 Cf. Jones (1997:6ff.).

17 Cf. Wells / Brandon (1992); Brown / Wyckoff-Baird (1992).

18 WWF (1995:1ff.).

19 Then: Ministry of Environment and Tourism, now Ministry of Environment, Forestry and Tourism.

20 Cf. Jones (1997:10).

introduction of conservancies into the Nature Conservation Ordinance is proof of this.[21]

After the approval of the Ministry's Policy on Wildlife Management Utilisation and Tourism in Communal Areas by Cabinet, the Ministry stressed that the new policy intended[22]

> to remove discriminatory provisions of the Nature Conservation Ordinance (…) by giving conditional and limited rights over wildlife to communal area farmers that were previously only enjoyed by commercial farmers;
>
> to link conservancies to rural development by enabling communal farmers to drive a direct financial income from the sustainable use of wildlife and tourism; and
>
> to provide an incentive to rural people to conserve wildlife and other natural resources through shared decision-making and financial benefit.

The Ministry's policy document refers to the development to the actual situation, which is characterised by the alienation of rural people from their environment who, in contrast to commercial farmers, have been, denied access to wildlife and game by the legislation in existence at Independence,[23]

> [r]ural communities in pre-colonial times had a well-established conservation ethic based on religious beliefs, the right of chiefs and other cultural values. However, successive colonial administrations throughout Africa have alienated rural people from their environment by taking away their rights and responsibilities in favour of centralising control over natural resources and making traditional practices illegal.

The policy document continues:

> If Namibia is to successfully conserve the wildlife that still exists on communal land and which migrates annually from reserves into communal land and across international borders into Angola, Botswana and Zambia, then the needs and aspirations of rural people living in these areas still have to be addressed.

Not only will they have to gain some direct benefit from wildlife conservations, but they have to be re-empowered to take responsibility for wildlife management and to take responsibility themselves for managing natural resources sustainably.[24]

These policy considerations eventually led to the amendment of the Nature Conservation Ordinance by the Nature Conservation Amendment Act of 1996.[25] The Amendment Act is a very interesting example of the interrelatedness between customary law and the practices and statutory law of the Government. The development and legal implementation of the conservancy policy in Namibia are significant because it took note of the relevance of environmental concerns in customary law and practices.

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21 Ordinance 4 of 1975 (Official Gazette – South Africa - No. 3469) as amended by the Nature Conservation Amendment Act, No. 5 of 1996.
22 MET (1995).
23 Ibid:7.
24 Ibid:8.
25 No. 5 of 1996.

3 Customary Law and Customary Environmental Law within the General Legal System

Customary law in general terms enjoys a special constitutional status. Article 66(1) of the Constitution states:

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

This constitutional provision has changed the position of customary law. Under Apartheid, customary law was a set of second-class law – if law at all. With the enactment of the Constitution, customary law received constitutional confirmation and was placed at the same level as the imported Roman-Dutch common law.

What is customary law?[26] The Traditional Authorities Act describes customary law in its Section 1 as the "norms, rules, traditions and usages of a traditional community".[27] This definition is a clear indication of the difficulties existing in the jurisprudence of modern (Western) law in determining African customary law. Traditions and usages are usually distinct from legal rules. The statutory definition of customary law does not follow this distinction, thus acknowledging that African customary law operates differently from modern law. This is one of the reasons why colonial rule created, better accepted, a duality of legal systems in most African countries: the system of imported law and the system of inherited African customary law. African customary law was usually only applied subject to the so-called repugnancy clause. This clause implied that where customary law was understood to be against public policy or natural justice, it had to give way to the imported colonial law. This state of affairs led to substantial inroads into and to deformations of customary law, to which remedies had to be found after the African countries gained Independence from colonial domination. However, the duality of legal systems survived the move from colonialism to Independence. Up to now, most African countries recognise or at least accept legal pluralism as their way of legal order.[28]

In the case of Namibia, the blueprint for Independence was developed under the guidance of the United Nations Institute for Namibia (UNIN); it provided for the recognition of the importance of customary law, hence its inclusion as a constitutional clause.[29] Customary law neglected during the Apartheid era required space and freedom to develop out of the stagnation into which it had been forced by South African jurisprudence, centred, as this jurisprudence was, on Roman-Dutch law. Namibia enacted a number of statutes which provided the necessary space for the development of customary law in line with the country's new constitutional dispensation. Of these, the

26 Cf. for the following Hinz (2003:8ff.).
27 No. 25 of 2000.
28 Cf. here Hinz (2006b).
29 UNIN (1986:963).

already quoted Traditional Authorities Act is the most important: a kind of constitution of traditional governance.

The Namibian parliament enacted the first version of the Traditional Authorities Act in 1995.[30] The Act was amended in 1997 and a fully revised version was enacted in 2000. In pursuance of the 1995 Act, a process of recognition of traditional authorities began. To date, 50 traditional authorities have been gazetted in the Government Gazette of Namibia. All 50 traditional authorities are represented in the Council of Traditional Leaders, established under the Council of Traditional Leaders Act.[31]

Section 3 of the Traditional Authorities Act deals with the powers, duties and functions of traditional authorities. The powers and duties have to be seen as part of the overall responsibility of the traditional authority which is to "promote peace and welfare" amongst the members of their community.[32]

Section 3(2)(c) of the Act is about the environmental responsibility of traditional authorities. The provision stipulates that the members of the traditional authority

> shall ensure that the members of his or her traditional authority use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintain the ecosystem for the benefit of all persons in Namibia.

Although the wording of this provision is reminiscent of the wording of Article 95(l) of the Constitution, the legal status of Section 3(2)(c) of the Traditional Authorities Act reaches beyond the limits of Article 95(l) of the Constitution. Article 95 is part of Chapter 11 of the constitution, titled Principles of State Policy, which, as stipulated in Article 101, are not "of and by themselves enforceable by any Court". Section 3(2)(c) of the Traditional Authorities Act is fully legally enforceable in a court of law, be it a traditional court (community court in terms of the Community Courts Act[33]) or a state court. Despite of this, it must be noted that the so far existing law to protect the environment and support sustainable development has not made use traditional authorities to achieve generally accepted standards in environmental matters. Reference is not to the law that regulates environment-related community projects, but e.g. the Environmental Management Act.[34]

It is part of the already quoted overall responsibility of traditional authorities to supervise and to ensure the observance and enforcement of customary law.[35] According to Section 3(3)(c) of the Act, traditional authorities "may make customary law". It is obvious that the law-making capacity of traditional authorities is of utmost importance for any undertaking that looks at customary environmental law as it confirms the power of local stakeholders to embark on the necessary legislative translations of

30 Act No. 17 of 1995.
31 Act No. 13 of 1997.
32 Cf. Section 3(1) of the Traditional Authorities Act.
33 Act No. 10 of 2003.
34 Act No. 7 of 2007.
35 See the Chapeau of Section 3(1) of the Traditional Authorities Act.

the rapidly growing concerns with regard to the environment, the protection of biodiversity and the sustainable use of natural resources.

The collection of self-stated customary laws of the various Namibian communities in *Customary Law Ascertained* gives an interesting insight into the customary environmental law.[36] The following quotes some examples from the first volume of *Customary Law Ascertained,* which contains the customary law of the Owambo, Kavango and Caprivi communities:[37]

The Laws of Oukwanyama[38] provide for the protection of trees, fruit trees in particular, plants and water. It is an offence to cut fruit trees, and all water has to be kept clean. The Laws of Ondonga[39] provide for the protection of trees with specific reference to fruit trees, palm trees and the Marula tree. The use of fishing nets is only allowed when permission is given by the traditional authority. The Laws of Uukwambi[40] provide for the protection of water, the protection of trees, wild animals and grass. The Laws of Shambyu[41] provide for the protection of water: Anyone who pollutes or contaminates water commits an offence. In the Caprivi Region, the Laws of the Masubia[42] prohibit the cutting of fruit trees, causing veld fires and the use of fishing nets to catch small fishes.

It is interesting to note that the more recent versions[43] of the self-stated customary laws pay more attention to environmental issues than the earlier noted versions of self-stated customary laws. Obviously, environmental awareness is growing among traditional authorities. This led these to consider the extension and further development of their customary law in terms of the authority conveyed to them by Section 3(3)(c) of the Traditional Authorities Act. Apart from this, the references to the ascertained versions of customary law are already an indication for the holistic approach of customary understanding of the environment and its protection. The quoted customary laws do not distinguish between land or soil, and what is underneath and above the soil, wild animals, water. All what belongs to nature is environment and deserves protection. The holistic customary approach has now become of particular importance in discussing mining on communal land: a problem still far from solutions.[44]

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36 Cf. Hinz (2010a; 2013a; 2015a; 2015b and 2019).

37 The concept of self-stating customary law is explained in Hinz (2010a) but see also Hinz (2015b).

38 Hinz (2010a:169ff.).

39 Ibid:87ff.

40 Ibid:233ff.

41 Ibid:311ff.

42 Ibid:467ff.

43 Self-stated laws of communities, which self-stated their law only recently, i.e. for the publication in *Customary Law Ascertained* or amended older versions of the laws.

44 See here the study on sustainable mining law in Namibia by Renkhoff (2016) and the article by Odendaal and Hebinck on mining activities on communal land (Odendaal / Hebinck 2019). – In the part on traditional knowledge, the holistic approach to nature will be taken up again.

4 Community Projects (Conservancies, Community Forests, Fishery Reserves) and Customary Law[45]

In attempts to support community-oriented instruments with respect to the administration and management of natural resources, communal conservancies, community forests and community fishery reserves the government introduced laws to regulate these community projects and accepted the establishment of many projects making use of the new possibilities offered by law. Communal conservancies gained particular prominence. 86 conservancies have been approved; the conservancies cover about 19% of the land of Namibia,[46] thus covering one half of the communal land.

The policy that led to the *Nature Conservation Amendment Act* of 1996[47] and, with this, to the introduction of communal conservancies was driven by the intention to restore the rights of rural communities to wildlife. The policy was informed by anthropological evidence which showed that traditional communities had a balanced approach to the use of animals as part of their natural resources, which appeared to be in support of the conservation policy of the state.[48] The number of established conservancies shows that the policy of Government to open nature conservation in terms of the above-quoted policy was taken up positively. Indeed, there is no doubt that the possibility to establish conservancies met the aspirations and expectations of many people living on communal land.[49] The purpose of conservancies is to enable the inhabitants of communal land to contribute to the sustainable management and utilisation of game in communal areas. The expectation is to achieve this through the engagement of the local people, who will, in turn for accepting responsibility, gain benefits from income generated by the the utilisation of wildlife in their areas.

What does the Nature Conservation Amendment provide for? According to Section 24A(1)

> any group of persons residing on communal land and which desires to have the area which they inhabit, or any part thereof, to be declared a conservancy, shall apply therefore to the Minister in the prescribed manner (...) .

An application must be supported by the following: a document that lists the names of the persons who are members of the conservancy committee; the constitution of the committee; and a statement that sets out the boundaries of the area to be declared a conservancy. Before approving the application, the Minister must be satisfied that the conservancy committee is representative of the area's community.[50] It is also necessary

45 On the following see already: Hinz (2018) and Hinz / Schmidt (2021: paras 661ff).
46 See http://www.nacso.org.na/conservancies#statistics, accessed 15 December 2021.
47 No. 5 of 1996, amending Nature Conservation Ordinance 4 of 1975.
48 To this and the following, see: Hinz (2011b; 2012:2ff)), the contributions by: Anyolo (2012a and b) and in general: Boudreaux (2010); Stamm (2017).
49 Cf. NASCO (2006) and in particular Anyolo (2012a and b).
50 Cf. here and for the following Section 24A(2) of the Nature Conservation Amendment Act.

that the conservancy constitution contains provisions for the sustainable management and utilisation of game in the proposed conservancy. Further to this, it is required that the committee is able to manage funds accountably, and that it can guarantee the equitable distribution of the benefits derived from the consumptive and non-consumptive use of game in its area. The proposed area has to be sufficiently delimited and the views of the relevant Regional Council have to be accommodated.

The Amendment to the Nature Conservation Ordinance does not make any reference to traditional authority, traditional leaders or other institutions recognised under the Authorities Act.[51] What the Amendment Act applied is a civil society approach looking at individuals living in a particular area and by this in a way ignoring the traditional governmental structure that may be relevant to the individuals and the areas in which the individuals live.[52] However, practice shows that most if not all conservancies established on communal land are clearly related to traditional territories.[53] Their administrative structure is, in particular, in areas where traditional governance is firmly grounded in the local culture as it is the case in North and North-Eastern Namibia, closely linked to the respective traditional authority by providing the respective traditional authorities with possibilities to influence the process of decision making in the conservancies.[54]

The constitutions of conservancies are a very relevant source of the customary law of the various traditional communities. The constitutions of conservancies are striking examples for the potential of customary law to adopt statutory stipulations and to develop them in a creative manner. While the Nature Conservation Amendment Act provides for conservancies with respect to wildlife, many constitutions of conservancies go beyond wildlife and take note of other natural resources in their areas. Wildlife management, indeed, requires a comprehensive planning that includes the use of grass, water, forests etc. [55] The conservancy concept reflected in provisions of this nature is a product of the living customary law: it is an amendment to the Nature Conservation Amendment Act.

The need to draft constitutions for conservancies also contributed to open the collective memory and, by doing so, to develop social visions: In the preparatory stage of the Nyae Nyae in the Otjozondjupa Region (Tsumkwe East) conservancy,[56] people were asked to rate the importance of animals in their area. The ranking criteria were: healing, meat, household items, photographic safaris, professional hunting and

51 See here also Hinz (2011b).
52 The submission through the Faculty of Law of the University of Namibia to the Ministry Environment and Tourism, which pleaded for a clause on traditional authorities in the draft Nature Conservation Amendment Act was not accepted.
53 This was the result of the research done for Hinz (2003).
54 Cf. here again the findings produced in Hinz (2003:88ff.)
55 An analysis of the various constitutions of conservancies has not been done yet.
56 The Nyae Nyae conservancy was the first conservancy in Namibia.

national biodiversity. Seven species of animals were selectable: roan, elephant, buffalo, giraffe, gemsbok, leopard, and wild dog. 25 points could be allocated to those species separately and with one rank. Leaving aside interests only indirectly linked to the community (safaris, professional hunting, and national biodiversity), the results show an interesting concentration on some animals.[57] Eland and giraffe scored 22 marks, gemsbok 15 and roan 9. Eland and giraffe had 8, respectively 7 marks for healing. The same animals do not rate as well in terms of the indirect benefits for the community, i.e. through photographic safaris and professional hunting.[58] Roan gained the highest number of marks (10) while eland and giraffe received 4 and gemsbok 2 each. An explanation given in the conservancy constitution for the criteria of healing refers to the spirits of animals, which are "used to provide guidance to the traditional healer".[59]

Social visions were developed and implemented in the Nyae Nyae constitution in the benefit distribution scheme of the conservancy. In view of the sub-divisions of the area into districts and localities (*n!oresi*)[60] possible income from various sources were allocated in percentages to the whole of the conservancy, the district and the holder of a *n!ore*. 100% of the proceeds from subsistence hunting goes to the *n!ore*, while income from the sale of live game and concessions for trophy hunting goes to the whole community. Fees for the use of resources and the use of tourist camps are shared between the three levels.[61] This scheme of income distribution reflects the vicinity principle as it is known on customary law.[62] Those closest to the income-generating activity are given the bigger share of it or may even have the right to the whole.

Although the Act does not mention land and the tenure of land, the establishment of a conservancy has a bearing on land tenure. Giving the sustainable management of game prominence must mean that certain modes of production on the land the game of which has to be managed, e.g. cattle husbandry, will be excluded or, at least, limited. Such a change in the customary land tenure not only affects individual customary rights holders, who could be part of "any group", but also the overall responsibility of traditional authorities over the communal land in their jurisdictions. The Nature Conservation Amendment Act of 1996 did not provide any role for traditional authorities in the process of establishing communal conservancies. However, research has shown that in most – if not all – cases, the relevant traditional authorities have played a role in the establishment of such conservancies.[63]

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57 Nyae Nyae Constitution (1996:15).
58 Ibid.
59 Ibid.
60 Ju/'hoan for a "block of land that surrounds each water hole and provides the resources on which the people of the water hole depend"; Lee (1979:334).
61 Ibid:12.
62 Cf. Hinz (1998:201).
63 Cf.: Hinz (2003) 82ff.

A case, decided by the High Court of Namibia offers new insights into the relationship between the administration of conservancies in communal areas by the committee of the conservancy and the power to allocate rights under the Communal Land Reform Act.[64] Given the growing importance of communal conservancies, the decision deserves special attention.[65]

The High Court had to decide on rights granted by the !Kung Traditional Authority in Tsumkwe West in the N‡a Jaqna conservancy. The claim of the committee of the N‡a Jaqna Conservancy was mainly directed against 22 persons who had occupied land in the N‡a Jaqna conservancy, but also against the Minister of Lands and Resettlement, the chairperson of the Otjozondjupa Communal Land Board, the !Kung Traditional Authority and the Minister of Environment and Tourism. The respondents claimed to have rights to use the land in the conservancy granted by the !Kung Traditional Authority. The land claimed for was mainly used for grazing. The occupants had also erected fences around the land.

The court ruled that those respondents whose land rights were not ratified by the Communal Land Board did not have the right to occupy land in the N‡a Jaqna conservancy and had to leave the land within a given period of time. Fences had to be removed, as the fences were not erected, i.e. to protect a homestead as would have been allowed under Section 27 of the Regulations to the Act.[66]

On the procedural side, the court had to decide whether the applicant had *locus standi*. Section 43 (2) of the Communal Land Reform Act gives the chief or the traditional authority the right to "institute legal action for the eviction of any person who occupies any communal land" without a right properly acquired under the Act. For the Court, it follows from common law that a case has to be heard when a person demonstrates that he or she has "a direct and substantial interest in the outcome of legal proceedings".[67] The applicant represents the N‡a Jaqna Conservancy, which – so the Court – is a juristic person in the form of a *universitas* as provided for under common law. According to the constitution of the N‡a Jaqna Conservancy, the objectives of the conservancy was, in line with the objectives of the introduction of conservancies into the Nature Conservation Ordinance, namely "that the primary objective of the conservancy is to enable the inhabitants of the Conservancy to derive benefits from the sustainable management of the consumptive and non-consumptive utilization of the natural resources of the Conservancy."[68]

64 The *N‡a-Jaqna Cnservancy Committee v the Minister of Lands and Resettlement et al.*, High Court judgement, Case No. A 276/2013 – unreported.
65 Cf.: Hinz (2018), see also: van der Wulp (2016) and Hays / Hitchcock (2020).
66 Regulations Made in Terms of the Communal Land Reform Act, 2002, GN No. 27 of 2003, as amended.
67 At 41 of the N‡a-Jaqna Conservancy decision.
68 Ibid: at 45.

"Did the respondents unlawfully settle in the conservancy?" was the question the Court pursued in the substantial part of its decision. The Court found:[69]

> During the years 2002 to 2013 (…) respondents occupied land in the applicant's conservancy and erected their private fences within the applicant's conservancy outside the settlement area enclosing the commonage to the exclusion of the local community and the respondents' farm with livestock. None of the respondents are members of the !Kung Traditional Community and none have acquired any customary or other legal right to occupy the commonage. Despite demand from the applicant, the respondents have failed or refused to remove their fences or vacate the respective occupied areas and to restore vacant possession of the commonage to the applicant, its members and the local community.

Therefore, the court decided in favour of the conservancy. However, the decision lets open what would be the legal position if the !Kung Traditional Authority and the Communal Land Board decided correctly in allocating land rights in the N‡a Jaqna conservancy respectively endorsing the granting of the right. In other words: Are the rules set out in the constitution of the N‡a Jaqna conservancy and its management plan rules that bind the chief and traditional authority when granting land rights and also bind the Communal Land Board with the effect that it would have to veto the right when a matter comes before it where the chief of traditional authority granted land rights in a conservancy and by doing so violated the rules for managing the conservancy?

With respect to the other mentioned community projects (community forests and fishery reserves), not much can be reported. The Forest Act gives the responsible Minister the authority to establish community forests:[70]

> The Minister may, with the consent of the chief or traditional authority for an area which is part of communal land or such other authority which is authorized to grant rights over communal land enter into a written agreement with anybody which the Minister reasonably believes represents the interests of the persons who have rights over that communal land and is willing to and able to manage that communal land as a community forest.

Some 43 community forests projects are reported to exist in 2020.[71] Most of them overlap with communal conservancies.[72] Falk and Kirk submitted the very first assessment of the enforcement of statutory and customary rules in the Kavango regions.[73] They refer in particular to the fact that the Forests Act is silent on the role and function of customary law and the relationship between the governmental forest authority and the traditional authorities.[74] Research about the community fortes project in the territory of the Uukolonkadhi traditional authority stresses problems in the implementation of the forest project, but also shows the benefits from the project for the community.[75]

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69 Ibid: at 54.
70 Section 15(1) of the Forest Act No. 12 of 2001, as amended. See also: GRN (2005a).
71 Namibian Community Forests https://conservationnamibia.com/factsheets/community-forests.php, accessed 29 September 2021.
72 Cf. http://www.nacso.org.na/community-forests, accessed 15 December 2021; and Schusser (2012).
73 Falk / Kirk (2011): 333ff.
74 Ibid:347f.
75 Cf. Muhongo (2008); Vrabcová *et al*. (2019).

The Inland Fisheries Resources Act allows for the establishment of fishery reserves. According to Section 22 of the Act, the

> Minister, on his or her own initiative, or in response to an initiative of any regional council, local authority council or traditional authority, and in consultation with the regional council, local authority council or traditional authority concerned, may by notice in the Gazette declare any area of inland waters as a fisheries reserve,

if the conditions call for such an action to support the sustainability of fish resources.[76] 10 fisheries reserves have been declared, the first one in 2015, the second in 2016 and the remaining in 2020.[77]

All reserves are located in the Zambezi Region (formerly Caprivi Region). Adjacent conservancies are initiators in the setting of the management agreements for the fisheries reserves.[78] The fisheries reserves have attracted the interest of Kavango-Zambezi Transfrontier Conservation Area (KAZA-TFCA): which recently promoted the launch of a project titled Strengthening Community Fisheries in KAZA, funded by the European Union and under the authority of the Namibia Nature Foundation (NNF).[79]

5 BIOTA and TFO Research on Customary Law and the Environment[80]

The customary law research within the BIOTA project covered a broad range of topics. The research addressed questions to traditional and modern stakeholders, ordinary villagers and people who spend only part of their time in the village, younger and older people, people with different degrees of formal education, women and men were interviewed.

The overall picture emerging from the research[81] shows that customary law has mechanisms to protect biodiversity and natural resources, albeit with certain limitations. The same limitations also determine the extent to which these mechanisms are implemented. Traditional communities have knowledge about the value of biodiversity and the need to protect it against non-sustainable external and internal exploitation. Although this knowledge is very often bound by social and economic constraints, it indeed has the potential to be transformed into societally efficient norms.

The law applied in traditional communities certainly has more impact on the sustainable protection of biodiversity than the concurrent norms of the state. Under

76 Section 22(1) Inland Fisheries Resources Act; see also on fisheries reserves, including the need to amend the law on fisheries reserves: Consultants for Fishery, Aquaculture and Regional Development (2002); Jones (2008); Hay (undated).
77 See http://www.nacso.org.na/community-fisheries-reserves, accessed 15 December 2021.
78 See e.g. Section 3(1) of the Declaration of Sikunga and Kassaya Channel as fisheries reserves: Inland Fisheries Resources Act, 2003, GN No. 276 of 2015.
79 Cf. *The Namibian* of 6 May 2021.
80 Cf. for the following Hinz (2006:211ff. and 2013b).
81 As documented in Hinz / Ruppel (2008) and Hinz *et al*. (2012).

customary law, traditional communities enjoy more or less full responsibility for the administration of natural resources. However, the examples of difficulties caused by the complex interface between statutory law and customary law need further exploration.

Where traditional communities are reluctant to employ mechanisms of customary law or to develop them further although, even if environmental awareness should suggest such a development, there is need for political intervention. The administration of the allocation of land and grazing rights is a case in point, as is the regulating of the forest resources. Balancing economic interests against those of environmentally sustainable use, the examples explored show that decisions are more likely to surrender to economic interest than to take a stand for biodiversity and sustainability.[82]

The customary law research in the TFO project added important aspects to the understanding of customary environmental law. So far, customary water law was hardly considered in customary law research.[83] However, the research noted with interest that some Namibian communities found it worthwhile to self-state about the use of water in their customary law.[84]

Research done for a master's dissertation in law[85] revealed an unexpected picture on the 'ownership' of water:[86] For a good majority of the interviewed people the state,

82 See, e.g. Rukoro (2008).

83 Cf. Hinz / Mapaure (2012). With respect to statutory water law, see Water Act No. 54 of 1956 (as amended) and the Water Resources Management Act No. 11 of 2013.

84 See Section 15 of the Laws of Uukwambi in Hinz (2010a:270ff.). This section has seven, quite detailed sub-sections. I quote the first two: "15.1 Water is life. Therefore water shall be conserved because it is important to people, animals and plants for survival. 15.2 The Traditional Authority shall have the responsibility of protecting water, together with other Traditional Authorities. The Traditional Authority shall not allow water to be misused, including fishing with nets ad *iishongo* [Fishing equipment made of buckets or reeds]. Anyone who is found misusing water shall be prosecuted. If the Headman or people from the household misuse water, the matter shall be reported to the Traditional Authority."

85 Mapaure (2012).

86 The question about 'ownership', was not guided by the concept of ownership as it originated from the western traditional jurisprudence and which grants the individual the generally accepted power to deal with the object of ownership as he or she wishes. The general legal order of the country, indeed, knows 'ownership' in the latter sense since the integration of the Roman-Dutch law as the common law of the country (Article 66 of the Constitution) and with this also contributed to the spreading of this concept. However, the customary law research also experienced that a different understanding of 'ownership' existed. Land may be said to be 'owned' although it is clear that this ownership is very different from ownership of land outside communal areas. 'Ownership' of communal land only means that the 'owner' has the right to use the land in a way that excludes or limits the rights of others, including the right of the traditional authority responsible for the administration of communal land and the right of the state which has to respect the customary law rights of the 'owners'. (Cf. Communal Land Reform Act No. 5 of 2002, Sections 17(1) and 20).

although claiming ownership under general law,[87] was not seen to be the owner. Owners were the community, God and a mythical entity with the name of *Ekongoro*. The customary law research in the TFO project took note of these findings and enquired in particular the reference to *Ekongoro*. Of the interviews conducted within the framework of the TFO Project done between March 2011 and August 2015 in the Kavango Region, the adjacent part of the Caprivi Region and in the Kavango Delta, i.e. in Ngamiland of Botswana, about 70 focused on *Ekongoro*.[88] This was done so because, the very first interest of the empirical research was to generate qualitative information on water, i.e. on the general perceptions of the people on water[89] – water in the Kavango River as the main source of water, but also locally pumped water or water provided, in the case of Namibia, by NamWater.[90]

Who or what is *Ekongoro*? What is the social meaning of *Ekongoro*? Is there any legal relevance of *Ekongoro*? Most probably "yes" when we take note of what stated a 70 years old Thimbukushu-speaking farmer living at the Chobe River in the Caprivi Region in an interview about customary water law: "Makongoro are the Hafumu of water– the Makongoro are the rulers of water - and we respect them".[91]

So, who or what is *Ekongoro*? "Likongoro[92] is just another animal, no one can describe it," was said by one respondent,[93] while another stated:[94] "Dikongoro is a creature that cannot be classified to anything, no one can tell if Dikongoro is an animal or a reptile."

Where do we find *Ekongoro*? "The place where Dikongoro lives is mostly covered with foam. The water is always deep and dark and does not flow."[95]

87 See here Section 4 of the Water Resources Management Act No. 11 of 2013: "The State, in its capacity as owner of the water resources of Namibia by virtue of Article 100 of the Namibian Constitution has the responsibility to ensure that water resources are managed and used to the benefit of all people in furtherance of the objects of this Act."

88 See here also already Fisch (1979) and Seifert (2006:81ff.).

89 Cf. Hinz (2013b and 2013d), informing about this first phase of the TFO customary law research. The second phase of the research (currently in the process of evaluation) was to explore specific matters, such as access to water, control of access, rules against pollution and rules to protect water etc.

90 Namibia Water Corporation Limited, the Government controlled public water provider.

91 Cf. interview 069. *Makongoro i*s the plural of *Ekongoro*. *Fumu* (sing. to *Hafumu*) means king / queen or ruler. (The transcripts of all quoted interviews are on file with the Centre of African and Migration Studies, University of Bremen.)

92 *Ekongoro* (pl. *Makongoro*) is Rukwangali; *Likongoro* (pl. *Makongoro*) is Rumanyo (Rushambyu and Rugciriku); *Dikongoro* (pl. *Makongoro*) is Thimbukushu. Quoting from interviews, the language is the language used by the interviewee. In references of the author, the Rukwangali language is used.

93 Interview 026.

94 Interview 053.

95 Interview 041.

The same respondent is very precise in naming places where one should be able to find *Ekongoro*:[96]

> These days, they [Makongoro] are very scarce to be found, but they still live in the water. There is a place at Kanorombwe where Dikongoro still lives. Also at Popa and Andara. There are places where Dikongoro is expected to live currently.

Another respondent had to report the following:[97]

> According to what I was told: Dikongoro still lives in a place we call Shadikongoro. And the agriculture irrigation site of Shadikongoro[98] was named because of the fact that Dikongoro lived and still lives in this place.

The stories told about *Ekongoro* are stories heard along the Kavango River and in adjacent areas.[99] They are obviously told from generation to generation and even appear in material used in schools.[100] Incidents with *Ekongoro* are remembered with details. Who was with whom when *Ekongoro* attacked is remembered and even the year in which incidents happened is recalled. The key-sentence "Makongoro are the Hafumu of water – the Makongoro are the rulers of water – and we respect them" found, indeed, support in a broad number of the interviews. It was not just the narrative of one respondent, who enjoyed to be interviewed and who allowed himself to be taken away by his imagination. The key-sentence finds support in the sense that *Ekongoro* is still seen as a powerful animated entity in the relationship between human beings and water.

The animated non-human parts of the environment appear as if they were human-like entities, i.e. entities which human beings can see, even have encounters with. Human beings can communicate with these entities. Despite their power over human beings, they are part of the world of human beings. How else would it have been possible that the grandfather in one of the quoted interviews became *Ekongoro* after his death? As ancestor, he could become *Ekongoro*, as it is part of a widely spread understanding in African traditional cultures that ancestors remain as the living-dead part of the human world, are able to communicate with the living-living, have an influence on them,

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96 Interview 041. The places mentioned in the following quotation are in Mbukushu area (Mukwe District).

97 Interview 043.

98 Again, a place in the Mbukushu area.

99 There was no opportunity to investigate about *Ekongoro* in Angola. The fact that the same people live on the Angolan side where the river is the border between the two countries allows the conclusion that *Ekongoro* is present there as it in Namibia.

100 Helgard Patemann thankfully drew the attention of the author to a textbook for standard 2 in Thimbukushu that contains a chapter on *Ekongoro*. After referring to Shadikongoro as the place where *Ekongoro* "lived in this place long ago", the text requests the learner to consult with their grandfathers or elders to tell them "rightfully" about *Ekongoro*; Kloppers / Majavero (1991:25f.). It would certainly enrich the understanding of *Ekongoro* to learn to what extent learners have made use of the request to contact their grandfathers about *Ekongoro* and also to what extent the school-supported inquiries contributed to the story-telling on *Ekongoro*!

are even open to negotiate this influence.[101] They may induce fear, but they also allow negotiations to avoid negative consequences.

The fact the *Ekongoro* is called *Fumu* is also to be considered in this context. The *Fumu* is not only a respected personality, the *Fumu* usually an offspring of a royal house, has special relations to the ancestors that allow him/her to communicate with them for the benefit of the community. The office of the *Fumu* is religiously blessed, it is sacred, which does not exclude that the ruler acts wrongly and eventually against the aspirations of the community.[102]

Ekongoro is reported to attack canoes and human beings, *Ekongoro* is also said to kill people. This is one side; there is another side according to which *Ekongoro* saves water and natural resources and protects them, that *Ekongoro* provides for the growing of grass by holding water available. There is one voice that says that *Ekongoro* may swallow people but will always release them alive. To clarify the discrepant views, it will be helpful to refer here to the fact that, following other respondents, there are two sorts of *Ekongoro* or two mythical entities that live in the waters of the Kavango River: There is *Ekongoro* and *Mbava*, called the female side of *Ekongoro*, which has the same powers as *Ekongoro* and is said to be the most dangerous being in the waters.

As much as *Ekongoro* was part of the research interest from the beginning of the customary water law inquiry, *Mbava* came only late to the attention of the reported research. More information is, indeed, needed that would also require questions about the statement why *Mbava* is the female side to *Ekongoro*. *Ekongoro* and *Mbawa,* which represent separately the quality of good and bad or we have the two qualities in one is eventually not very relevant. Relevant is that we have a dichotomy, a dichotomy of elements that are related to each other. There is the one, the animated force, let's call it *Ekongoro*, that maintaining water as the source of life, for the availability of fish, it is the rainbow that shines over the earth after life-supporting rain. There is the other, let's call it *Mbava*, which is very dangerous to people and may cause harm to them. There is one side, which is good, there is another, which is bad.

The dichotomy of *Ekongoro* and *Mbava*, or the dichotomy within *Ekongoro* itself, reminds us of what is essential in the discourses on the animation of nature.[103] This discourse deals with the concept of force, which is neutral on the surface, but can turn out to be good or depending on the case of employment. The power in the animated

101 Cf. here Hinz (2003:36ff.); Patemann (2004).

102 Cf. e.g. the description of 'Royal prerogatives and duties' of the Kwangari Hompa in McGurk / Gibson (1981:68ff.). According to this the Hompa is "the source and repository of wealth, dispenser of gifts, leader in war, officiant in religious ceremonies, and in some situations a medicine man. (...) the chief or another member of the royal family is the 'rainmaker for all the tribes' and as such is the keeper of the hereditary rain-making medicine." Similar notations can be found for the other traditional communities in the Kavango Region; see Gibson *et al*. (1981).

103 Reference is here to discourses on African philosophy, which cannot be elaborated on here. See on this the articles in Coetzee / Roux (2002), but also Glenn's analysis of the legal traditions (Glenn (2014)).

nature can, indeed, be supportive to humans, but also harmful. The power of nature can be good or bad as the power of human beings can be good and bad.

There are two important messages in the philosophy of the animated nature:[104] The first is that otherwise unexplainable causes of events are explainable with reference to the execution of power by the animated non-human world: You are not ill because of an unexplainable illness, you are ill because somebody, a human or non-human force, made you ill.[105] The second message is that the described power, despite its ambivalence, is not excluded from human influence. Influence can be negotiated.[106] *Ekongoro* expresses a network of relationships that reach from human connotations (you communicate with *Ekongoro*) to humanised non-human and even supra-human connotations (*Ekongoro*, the *Fumu* of water; our grandfather is *Ekongoro*). The complex conceptualisation of *Ekongoro* reflects the complexity of the traditional world order. In ethno-philosophical terms and having customary law as the rules of this world order in mind, one could say that *Ekongoro* is the manifestation of some kind of a customary law *Grundnorm*, which, in focusing on power, sets rules and governs the behaviour of human beings.

6 Traditional Conservationism

The environmental discourse in general and the discourse in anthropology in particular have for years been occupied with interpreting traditional ecological and environmental approaches. Traditional conservationism is a topic that has filled countless pages in anthropological publications.[107] It is therefore worthwhile to place the results in a broader legal and political anthropological framework. A short summary of what is understood by traditional conservationism or by relating biodiversity to the ancestors[108] will be helpful in preparing the skeleton of this framework.

Environmental and anthropology-based environmental literature allows for the identification of two extreme views about traditional concepts of nature conservation:[109] The one denies their existence or ignores them as irrelevant in view of the modern mainstreams which prevail in environmental approaches. The other view overemphasises traditional conservationism. Traditional communities and their environmentalist approaches are said to reflect positions of the so-called Indian[110] eco-saint

104 Which go beyond the interpretation by Fisch who, at (1979:43), holds against a religious or ethical qualification of the *Ekongoro* and the stories about *Ekongoro*.
105 To the latter see again Patemann (2004).
106 This is exemplified in Patemann (2004).
107 Cf. Ingold (2000); the collection of articles in Grim (2001); but also Hinz (2003:19ff.); Falk (2008) and Pröpper (2009).
108 As the title of Hinz / Ruppel (2008) calls for.
109 The following relies on Hinz (2003:19ff.).
110 Indian from the Americas, i.e. Native Americans.

who always knew what to take from nature and never went as far as modern societies did – in their exploitation of nature to the point of irreparable destruction.

Ecological anthropology has undergone important theoretical changes. One of its last transformations no longer believes in the Indian 'eco-saint', the 'noble savage' and other myths that were the products of European escapists. The American anthropologist Headland can be quoted here: his views led to a far-reaching debate amongst scholars in this field.[111] Headland is a moderate revisionist, searching for a middle road which he defines as "history-grounded" and of "good anthropology".[112] He argues that "all ecosystems have been greatly modified by humans for thousands of years".[113]

Radical revisionism, on the other hand, rejects the view, held by many that "tribal peoples lived generally in great harmony, health, and happiness and in balance with their stable environment."[114] "Primitive polluters" is the title of a publication by the anthropologist Rambo.[115] Its message is to demonstrate "the essential functional similarity of the environmental interactions of primitive and civilised societies."[116]

In a brief, but empirically founded response to the debate on Headland's revisionism,[117] the hypothesis was submitted that people in traditional societies do conserve, but do so only in respect of natural resources whose "depletion they can envisage".[118] The author of the hypothesis, Dye, adds that such societies must "rely on very limited data to ascertain whether a particular resource is being seriously depleted."[119] In his research among a group of rain forest people in Papua New Guinea, Dye saw how crocodiles that had gathered in a small lake – the only bit of water available in an extraordinary dry season – were harvested to extinction. This occurred alongside the community's refusal to use long gill-nets for fishing in the lake, because they "would fish out the lake".[120]

Why is there a lack of conservationism in the case of the crocodiles, but conservationism in the case of the fish? Dye answers this by referring to the fact that the community had already experienced having wiped out fish when they had used their traditional way of fishing, i.e. by poisoning fish in pools in small streams. Dye discussed this with the villagers, who numbered only 125, saying that they would never be able

111 Headland's (1997) article was published in *Current Anthropology*. Ten scholars reviewed his article, with Headland responding. See also Vol. 101 of *The American Anthropologist*.
112 Headland (1997:609).
113 Ibid:605.
114 Edgerton (1992), quoted by Headland (1997:607).
115 Rambo (1985).
116 Ibid:2.
117 Dye (1998:352f.).
118 Ibid:353.
119 Ibid.
120 Ibid.

to fish out a lake measuring five square miles, but they were resolute in their defence: "What does he know, with only 10 years here? And anyway, he doesn't even fish."[121]

Dye's explanation that the lack of conservationism resulted from the lack of capacity to assess probabilities and the lack of traditionalised experience is certainly helpful to place conservationist concerns within the respective societal context. The efficiency of mechanisms of balancing short-term societal interests in using and consuming natural resources against long-term interests in sustaining those same resources depends on all sorts of factors; and these factors determine the actual situation of the given society or community and the environmental framework they live in. It is not only the knowledge of the consequences of certain behaviour, however: such knowledge must also – as the villagers' answer to Dye shows – have become part of the collective memory, thus influencing the behaviour of the villagers.

Dye's arguments did not reach out to this last point. Reaching out to it would have meant delving into the very difficult legal sociological and anthropological question of how knowledge becomes societally accepted, and how such knowledge is transformed into, again societally accepted, normative principles.

Bodley, an anthropologist whom revisionists criticise as a supporter of the 'noble savage' argument, warns against the exaggeration of revisionism with its focus on myths, which are easy to target, but, at the same time, "miss the point of the cultural ecological realities".[122] Contrary to what revisionists hold against him, Bodley quotes from his own writing where he does, in fact, employ a balanced view.[123] While he stresses, on the one hand, that man has always been a significant force for environmental modification and that primitive cultures have sometimes seriously disturbed their local environment, he says on the other hand that "primitive cultures achieved a far more stable environmental adaptation than presently assumed by industrial civilisation".[124]

Anthropological records are full of reports on rites that have formed part of traditional approaches to natural resources.[125] Traditional interventions into nature, such as fishing or hunting, had to be counterbalanced by acts of restoration and re-harmonisation. However, the interventions were not undertaken from a position of strength and superiority of humans over nature,[126] but from a position of caution. From a modern perspective, one may ask whether traditional rites were performed to secure the necessary supremacy over the animals the hunter wanted to hunt, or rather to prepare for a situation of disturbed forces which would arise with the killing of the animal and, thus, prompting efforts to bring the situation back to equilibrium.

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121 Ibid.
122 Bodley (1997:612).
123 Bodley (1976).
124 Ibid:47.
125 Cf. for Namibia e.g. Fisch (1994).
126 Cf. Hinz (1974:69ff.).

If the first were the prevailing function of the rites, then it would be very easy to understand why they became redundant: not only because of diverging ideological and religious influences, but also because of the increasingly available modern weapons that secured superiority and rendered the inherited practices superfluous. If the second were the function, an element of true and genuine traditional conservationism could be assumed. Whether this alternative approach would entail more than achieving the same goal through different avenues, or a goal that was grounded more securely, is difficult to ascertain. But even if only the first possibility were true, it would be worthwhile to pursue. To those whose way of life is more closely aligned to traditional concepts than to modern ones, a conservationism based on the traditional avenue would be more convincing than one based on modern approaches.[127]

In other words, and as it apparently gains increasing prominence in the interpretation of what is called traditional, instead of juxtaposing the so-called 'traditional' to the so-called 'modern', one should rather emphasise that the so-called 'traditional' of today is but one manifestation of several possibilities of modernity, or an alternative modernity. Such an interpretation will, indeed, open an unbiased approach to assess environmental perceptions and practices to the benefit of the protection of the environment and natural resources.

7 The Protection of Traditional Knowledge[128]

Brown writes in the preface to a book with the title *Who Owns Native Culture?*[129]

> In the late 1980s, ownership of knowledge and artistic creations traceable to the world's indigenous societies emerged, seemingly out of nowhere, as a major social issue. Before then, museum curators, archivists, and anthropologists had rarely worried about whether the information they collected should be treated as someone else's property. Today the situation is radically different. Scarcely a month passes without a conference examining the ethical and economic questions raised by the worldwide circulation of indigenous art, music, and biological knowledge.

Legal examinations have added their questions to the debate. While a few countries enacted statutes to protect traditional knowledge,[130] to be more precise: access to biodiversity and genetic resources, the main focus of the debate lies in international and regional fora. The aim here is to establish, a consensus on legal mechanisms suitable

127 The Constitutional Court of South Africa held that it would be more convincing for certain parts of the South African population to argue against the death penalty by referring to *ubuntu* than to international and national human rights discourses. Cf. *S v Makwanyane* 1995 (6) BCLR 665 (CC).
128 Cf. for the following Hinz (2011a and 2021).
129 Brown (2003:IX).
130 Cf. WIPO (2010).

to the protection of traditional knowledge.[131] When in 1997 WIPO, the World Intellectual Property Organisation, established its Global Intellectual Property Issues Division, it provided space to so far neglected voices in its first programme. The aim for this was[132]

> to identify and explore the intellectual property needs and expectations of new beneficiaries, including holders of indigenous knowledge and innovations, in order to promote the contributions of the IP system to their social, cultural and economic development.

WIPO conducted a worldwide fact-finding mission in 1998 and 1999, which took note of existing customary rules and practices employed in many communities as instruments to protect cultural assets against misuse and unwanted exploitation.[133] WIPO's fact-finding report is up to today the most comprehensive collection of legal anthropological data relevant for the still on-going effort to develop legal answers to the challenge posed by the demands to protect traditional knowledge.

The Harare-based African Regional Intellectual Property Organisation (ARIPO) has added to the debate by adopting the Legal Instrument for the Protection of Traditional Knowledge and Expressions of Folklore adopted in Lesotho in 2007 and, in pursuance of this, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore on 9 August 2010. 19 African countries are members of ARIPO,[134] of which nine have signed the protocol, amongst them Namibia.[135] In accordance with its Section 27(3) of the Protocol, it came into force in May 2015 after six states (as required by the Protocol): Botswana, Zimbabwe, Gambia, Rwanda, Malawi and Namibia deposited their instruments of ratification or accession.[136]

The Swakopmund Protocol deserves a special place in the debate about the protection of traditional knowledge, the question about what traditional knowledge is and why it is relevant to protect it will be discussed. It responds to questions of this nature by linking them in a special way to customary law and traditional authorities. This is the reason why the following, after an inquiry about approaches that have been

131 Cf. the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995 and its Article 27 (2), which accepts the possibility of *sui generis* regimes for certain intellectual property rights, albeit within certain limits set by the agreement in general terms.

132 Main Programme 11, Programme and Budget 1998-1999, quoted from WIPO (2001:16).

133 Cf. WIPO (2001:57ff. and 207ff.).

134 The 19 countries are: Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, São Tomé and Príncipe, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe.

135 Cf. Saez (2010).

136 The ratification of the Protocol by the Republic of Zambia in August 2015 brings the number of member states party to the Protocol to seven. See more at: http://www.aripo.org/news-events-publications/news/item/79-zambia-ratifies-the-swakopmund-protocol#sthash.99dOWmOZ.dpuf, accessed 14 October 2015.

explored to provide legal protection of traditional knowledge, focuses on the Swakopmund Protocol.[137]

What is traditional knowledge and why is it relevant to protect? There is not one generally accepted definition of traditional knowledge.[138] The fact-finding report of WIPO lists examples for what is commonly understood to be traditional knowledge, and illustrates the nature of such traditional knowledge:[139]

> Traditional knowledge is not limited to any specific field of technology or the arts. Traditional knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment and food and agriculture are well known. Other key components of traditional knowledge are the music, dance, and "artisanat" (i.e. designs, textiles, plastic arts, crafts, etc.) Although there are creations which may be done purely to satisfy the aesthetic will of artisans, many such creations are symbolic of a deeper order or belief system. When a traditional singer performs a song, the cadence, melody, and form all follow rules maintained for generations. Thus, a song's performance entertains and educates the current audience, but also unites the current population with the past.

Modern art and modern science are predominantly products of individual accomplishments. Traditional knowledge represents the cooperative efforts of communities. Plants used in accordance with traditional knowledge do very often carry symbolic values. When certain traditional sculptures are crafted, the process of crafting may be informed by inherited practices and with performing rituals in order to generate religious potential to be activated when need arises.[140] In the words of the fact finding report:[141]

> Traditional knowledge is a multifaceted concept than encompasses several components. Traditional knowledge is, generally, produced in accordance with the individual or collective creator's responses to and interaction with their cultural environment. This may apply to all forms of knowledge, however, whether "traditional" or "modern". In addition, traditional knowledge, as representative of cultural values, is generally held collectively. This results from the fact that what can sometimes be perceived as an isolated piece of literature (a poem, for example) or an isolated invention (the use of a plant resource to heal wounds, for instance) is actually an element that integrates a vast and mostly coherent complex of beliefs of knowledge, control of which may not vest in the hands of individuals who use isolated pieces of knowledge, but be vested in the community or collective.

The reference to 'traditional' in traditional knowledge is not to mean that the knowledge so characterised is ancient and static. Traditional knowledge is traditional

137 Reason for focusing on the Swakopmund Protocol is – and this very different from the Nagoya Protocol of 2011, which is promoted by the Secretariat of the Convention on Biological Diversity – also that this protocol is not really acknowledged in research.

138 Reflection of the difficulty to determine the concept of traditional knowledge is also that local knowledge is sometimes used instead of traditional knowledge. See Hinz (2002a and b). Cf. also Wekesa (2009:267).

139 Ibid:211.

140 Ibid:212.

141 Ibid.

only in so far as the knowledge referred to is part of the – often - only orally transmitted cultural tradition of a given community.[142]

While the fact-finding mission of WIPO still follows a very broad understanding of traditional knowledge, other discussions (including discussions in WIPO) distinguish between traditional knowledge and expressions of folklore. One can assume that the reason behind this distinction can be found in the different practical relevance of traditional knowledge in the narrower understanding and the expressions of folklore.[143] Traditional knowledge about plants, in particular their medicinal facilities, holds extreme societal values and is, above this, in high demand by manufacturers of industrially produced pharmaceuticals. More than half of the world population relies on traditional medicine. In some countries, more than 70% of the people depend on traditional medicine. More than 80% of the medicines used worldwide are of plant origin. ARIPO maintains that "a significant part of the global economy is based on the appropriation of traditional knowledge".[144] However, the same statement concludes that in spite of the important role traditional knowledge plays in sustainable development, it continues to be largely disregarded in development planning. It currently plays only a marginal role in biodiversity management and its contribution to the society in general is neglected. Furthermore, traditional knowledge is being lost under the impact of modernisation and of on-going globalisation processes.[145]

How to provide legal protection to traditional knowledge? At the very beginning of the debate about the protection of traditional knowledge (understood to include expressions of folklore) is the statement that intellectual property law, as it stands in international treaties, domestic legislation and decided cases, is unable to protect traditional knowledge. As a rule, intellectual property law aims at unknown knowledge generated by an individual.[146] Hence, the main purpose of such law is to protect the knowledge of the mentioned individual against the unauthorised trading of this knowledge. The need to create so-called *sui generis* protection for traditional knowledge was, therefore, seen to be a logical consequence.[147]

Yet, this approach turned out to be too simple. Although the just-quoted statement about conventional intellectual property law holds truth, it could not exclude the possibility of developing intellectual property law further so that it would also offer at least some protection of traditional knowledge. An example for this is the extension of copyright law to protect the performance of a traditional song, which would as such

142 Ibid.
143 Cf. Wekesa (2009:269f.) and LeBeau (2003:26ff.).
144 ARIPO (2006).
145 Ibid.
146 Cf. on this Matsushita *et al*. (2006:695f.) and also Oguanaman (2006).
147 The meaning of such a *sui generis* protection will be explained below.

not qualify for protection under copyright law, against the free recording (fixation) of the performance.[148]

The manifestation of *sui generis*-approaches are called upon for the more appropriate protection of traditional knowledge. When looking at what was developed as *sui generis*-approaches, one notes attempts to provide protection to traditional knowledge by placing it into the wider framework that seeks the recognition of rights of indigenous communities in terms of relevant parts of international law that distinguishes indigenous communities from other traditional communities.[149] The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples of 1993 illustrates this in a very significant manner.[150] The Preamble of the declaration refers to the much-debated right to self-determination of indigenous peoples[151] and has as its first recommendation to indigenous communities that a definition of their own intellectual and cultural property be formulated.[152] Thomas Cottier relates demands of this nature to claims "for new human rights, especially protecting the habitat and lifestyles of traditional indigenous and local communities and their intellectual property rights".[153] Accordingly, so Cottier, the "holistic concept of Traditional Resource Rights" emerged, grounded on very ("largely unclear") principles and rights.

The Earth Summit of 1992 and its overarching policy instrument – Agenda 21 – is still the most prominent and internationally agreed upon document, laying the groundwork for the *sui generis* treatment of all matters related to traditional knowledge. It recognises that traditional rule and customary law are grounded in their specific local knowledge and wisdom. Local wisdom governs practice in many instances. Taking note of the potential of traditional governance and customary law and the need to acknowledge this in development strategies, the way forward demands specific attention to what Chapter 26 of Agenda 21 states in its first paragraph:[154]

> Indigenous people and their communities have an historical relationship with their lands …. In the context of this chapter the term lands is understood to include the environment of the areas which the people concerned traditionally occupy. … They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.

The Convention on Biological Diversity of 1992, in force since 4 June 1993, translated important parts of the Agenda 21 into a binding international treaty. The Convention

148 See the WIPO Performances and Phonograms Treaty (WPPT) of 20 December 1996 at https://www.wipo.int/treaties/en/ip/wppt/, accessed 15 December 2021.
149 Cf. here UN (2009).
150 Reproduced in Hinz (2002a:90ff.).
151 Cf. the debate about the Declaration on the Rights of Indigenous Peoples of 13 September 2007 (UNGA Res 61/295), which was eventually adopted by the majority of the members of the General Assembly of the United Nations after consensus could be reached on the Namibia-promoted reservation clause of Article 46.
152 See Point 1.1 of the Declaration.
153 Cottier (1999:1828ff.).
154 Retrieved from www.un.org/esa/dsd/agenda21, accessed 15 December 2021.

contains a variety of obligations for actions by its members to protect biological diversity found in the member countries. Particularly noteworthy is that the Convention refers repeatedly to traditional knowledge. Article 8(j) of the Convention is a kind of constitutional *Grundnorm* with respect to traditional knowledge. The Article expects that the members of the Convention

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices;

Article 10(c) of the Convention demands from the members of the Convention to

> [p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

Article 17(2) of the Convention includes in the needed exchange of information "specialised knowledge and traditional knowledge". Article 15 of the Convention, in dealing with access to genetic resources, two principles, which have been also acknowledged beyond the field of genetic resources: the need to prior informed consent between the members of the Convention (Article 15(5)) and the need to have measures in place which will allow for the sharing of "benefits arising from the commercial and other utilisation of genetic resources with the Contracting Parties providing such resources (Article 15(7)).[155]

The Preamble of the Swakopmund Protocol acknowledges the value of traditional knowledge systems and their contribution to local and traditional communities as well as "all humanity". It further expresses the need

> to recognise and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of the populations, to the progress of science and technology, to the safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions.

The Preamble also underscores the need to respect the continuing

> customary use, development, exchange and transmission of traditional knowledge and expressions of folklore by traditional and local communities, as well as the customary custodianship of traditional knowledge and expressions of folklore.

Meeting the needs of the holders and custodians of traditional knowledge and expressions of folklore is an important aim of the Protocol. The empowerment of the holders of traditional knowledge and expressions of folklore is contained in this aim, to be able to exercise "due control over their knowledge and expressions". The Preamble further emphasises that the protection of traditional knowledge and expressions of folklore must be "tailored" to the specific characteristics of both.

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155 Cf. here also the various contributions in Kamau / Winter (2009).

According to Section 1 of the Protocol, it is its purpose to protect the holders of traditional knowledge against infringements of their rights and to protect expressions of folklore against misappropriation, misuse and "unlawful exploitation beyond their traditional context". Section 3 of the Protocol provides for the establishment of a National Competent Authority, the task of which will be the implementation of the Protocol. Education, advice and the settlement of disputes are amongst the duties of National Competent Authorities and also the office of ARIPO.[156]

The definition Section of the Protocol, Section 2, has definitions of expressions of folklore and traditional knowledge. Expressions of folklore are

> any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
>
> i. verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
>
> ii. musical expressions, such as but not limited to songs and instrumental music;
>
> iii. expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and
>
> iv. tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms.

Traditional knowledge

> shall refer to any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

Both parts of the Protocol specify traditional knowledge and expressions of folklore in the two opening Sections of Part II on traditional knowledge and Part III on expressions of folklore, which are both titled Protection criteria. Section 4 reads:

> Protection shall be extended to traditional knowledge that is:
>
> (i) generated, preserved and transmitted in a traditional and intergenerational context;
>
> (ii) distinctively associated with a local or traditional community; and
>
> (iii) integral to the cultural identity of a local or traditional community that is recognised as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Section 16 states:

156 Cf. Section 14 in the part on traditional knowledge; Section 22 in the part on expressions of folklore; and Section 24 on regional protection in the final part of the Protocol.

> Protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are:
>
> (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

The protection of traditional knowledge is not bound to any formality (Section 5(1)). The beneficiaries of traditional knowledge are the holders of that knowledge, i.e. the local and traditional communities, but also recognised individuals within the communities who are involved in the creation, preservation and transmission of traditional knowledge (Section 6). The right to authorise the exploitation of rights to traditional knowledge vests in the "owners" of the rights. Owners shall also have the right to prevent anyone from the exploitation of their rights (Section 7(1) and (2)). The owners of traditional knowledge have the right to assign the right to somebody else and also to conclude licensing agreements. However, traditional knowledge belonging to a local or traditional community may not be assigned (Section 8). Compulsory licences are possible in case that traditional knowledge is not sufficiently exploited by the rights holders and there is an interest of public security or public health (Section 12).

The fair and equitable sharing of benefits generated by the commercial or industrial use of the knowledge is to be part of the mutual agreement between the parties (Section 9). The use of traditional knowledge "beyond its traditional context" shall be acknowledged to the holders (Section 10). A special rule protects genetic resources: Section 15 clarifies that authorised access to traditional knowledge associated with genetic resources does not imply the right to access genetic resources (Section 15).

Part III of the Protocol, devoted to expressions of folklore follows basically the structure of Part II. The protection of expressions of folklore is also not bound to formalities (Section 16). Beneficiaries of expressions of folklore are the

> owners of the rights in expressions of folklore shall be the local and traditional communities:
>
> (a) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and
>
> (b) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.

Section 19 of the Protocol contains a detailed obligation for the members to the Protocol to develop the necessary legal instruments that will ensure that – as it is said in Section 19(2) of the Protocol "the relevant community can prevent (...) acts from taking place without its free and fair consent". Section 20 regulates exceptions and limitations applicable to the protection of expressions of folklore. Section 20 reads:

> Measures for the protection of expressions of folklore shall:
>
> (a) be such as not to restrict or hinder the normal use, development, exchange, dissemination and transmission of expressions of folklore within the traditional or customary context by members of the community concerned, as determined by customary laws and practices;

(b) extend only to uses of expressions of folklore taking place outside their traditional or customary context, whether or not for commercial gain;

(c) be subject to exceptions in order to address the needs of non-commercial use, such as teaching and research, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of expressions of folklore for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage, and incidental uses,

provided that in each case, such uses are compatible with fair practice, the relevant community is acknowledged as the source of the expressions of folklore where practicable and possible, and such uses would not be offensive to the relevant community.

Having noted these quotations from the Protocol, the contribution of the Swakopmund Protocol can be summarised in the following five points:

- Firstly: Looking back to the development of the debate on the protection of traditional knowledge, the Swakopmund Protocol is an important step forward to conceptualise the much demanded *sui generis* protection of traditional knowledge (and expression of folklore for that matter).
- Secondly: The Protocol gives the Namibian constitutional recognition and confirmation of customary law[157] an additional international blessing. It relies in its orientation to acknowledge and protect traditional knowledge on the respective existing customary law. In other words, it binds existing customary law into its international framework and acknowledges by this that all efforts to protect traditional knowledge will only work when they provide space for the law that is closest to traditional knowledge: customary law.
- Thirdly: The Protocol follows the established trend to link the use of traditional knowledge to the two principles that became prominent in the Convention of Biological Diversity, viz. the principle of prior informed consent and the principle of sharing benefits.
- Fourthly: The Protocol offers an approach to the determination of holders of traditional knowledge and expressions of folklore, which will certainly influence the on-going debate about the need to concretise traditional knowledge rights, but also to balance the realm of legally protected interests and public interests in intercultural communication.
- Fifthly: The tasks assigned to the National Competent Authority and the references therein to customary law are not only a clear indication that education and the creation of awareness will be paramount to the success of the Protocol, but also the active engagement of traditional authorities which, inter alia, have the task to ascertain and even develop their customary law – a task, which is a special challenge when it comes to traditional knowledge!

The Swakopmund Protocol is to be implemented by a "national competent authority" which each member of the Protocol is expected to establish. This has been done with

157 Article 66(1) of the Constitution of Namibia.

the enactment of the Business and Intellectual Property Authority Act of 2016. The Business and Intellectual Property Authority is "responsible for the administration and protection of business and intellectual property"[158] including matters of traditional knowledge.[159] The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act focuses on a number of matters regulated in the Nagoya and Swakopmund Protocols.[160] While the rights to biological and genetic resources vest in the state traditional knowledge associated with such resources "vest in the particular local community which holds and applies such knowledge for the sustainable conservation of the genetic resources". It is also the respective local community which enjoy the utilisation of the tratitional knowledge including "the fair and equitable sharing of the benefits". The Access to Biological and Genetic Resources and Associated Traditional Knowledge Act is not in force yet.

8 Concluding Remarks

The above-quoted Section 3(2)(c) of the Traditional Authorities Act obliges traditional leaders to ensure that the members of their communities use the natural resources in a manner that conserves the environment and maintains the ecosystem for the benefit of all persons in Namibia. Is this duty a new duty that the legislators found necessary to add to the inherited list of tasks of traditional authorities? Was the wording done in reference to the list of Government policy principles spelled out in Article 95 (l) of the Constitution of Namibia? Or: Is Section 3(2)(c) of the Traditional Authorities Act a mere confirmation of what was in any event traditionally part of the duties of a traditional leader?

Furthermore, why did the lawmakers find it necessary to translate the environmental requirement of the Constitution into the Traditional Authorities Act and not, for example, into the Local Authorities and Regional Councils Acts?[161] Would this not have been much more important – since traditional communities, by virtue of their direct social and economic dependence on their environments, have a genuine interest in the sustainable management of their natural resources and, therefore, would not need to be called upon to be environmentally sensitive? What is the explanation of the quoted sub-section in the Traditional Authorities Act referring to the "benefit of all persons" in Namibia and not to all persons, irrespective of domicile? Is this limitation, e.g.

158 Section 3 Business and Intellectual Property Authority Act, Act No. 8 of 2016.
159 Cf. BIPA (Business and Intellectual Property Authority) at www.bipa.na/intellectual-property "Traditional knowledge and cultural expressions", accessed 1 February 2021. See also: BIPA (2019:30).
160 See the critical remarks on the act by Chinsembu / Chinsembu (2020).
161 Local Authorities Act No. 23 of 1992, as amended, and Regional Councils Act No. 22 of 1992, as amended.

intended to mean that the use of water from the Kavango River, which may have negative implications for the people in Angola, should be of no concern to the traditional authority that has the say on the Namibian side of the river?

The problems reflected in these questions have their reasons, at least to some extent, in the uncertainty of modern law and policymakers to give traditional governance its place in society in general and in the structure of Government. The legislative orientation of traditional environmental responsibility to persons in Namibia was most probably not meant as an attempt to prevent environmental responsibility from becoming supranational, i.e. beyond national borders, but rather to secure the extension of traditional responsibility beyond 'tribal' borders. With the chosen wording, however, the lawmakers unfortunately lost the chance to link local interests to global ones, although the Earth Summit of 1992, the Rio+20 Conference[162] and Agenda 21 devoted considerable effort to do just that. Chapter 28 of Agenda 21 emphasises the beginning of successful movements worldwide to engage local authorities in the global process to achieve sustainability as the basic ingredient of societal policies and interventions. Chapter 26 of Agenda 21 complements Chapter 28 and the role of local authorities, by referring to indigenous peoples as being as equally relevant as other societal entities and actors in the process towards sustainability.[163] Therefore, it would have set a strong political signal to refer leaders of traditional communities to the fact that problems that appear on the surface to be local are indeed relevant to humankind as a whole.

The reasons for the second omission are easier to trace. The reluctance to write Agenda 21 implications into either the Local Authorities Act or the Regional Councils Act can be understood in view of the fact that what we see today in the movements of local authorities to join the universal battle for sustainability and protection of the environment is the result of a development that did not fall from heaven with the Rio Conference.[164] This is true not only for Europe and the United States of America, where local authorities have achieved a consolidated position throughout the countries concerned, but more so in other parts of the world, including Africa, where many local authorities are still struggling for financial and political survival.

Are traditional leaders – and, for that matter, African customary laws – things that should be left to the past and replaced by modern law? Will traditional governance and

162 Cf. on the Rio+20 UN A/Conf.216//1.

163 The mention of "indigenous peoples" in Chapter 26 of Agenda 21 is primarily a reference to indigenous peoples in the sense defined in the ILO Conventions and the UN Declaration on the Rights of Indigenous Peoples quoted in the Introduction to this publication. The use of this definition is motivated by the fact that paragraph 26.2 of Agenda 21 takes explicit note of the said international instruments. However, the introductory words of paragraph 26.2 read as follows: "Some of the goals inherent in the objectives and activities of this programme … ." This could be understood to mean that the programme envisaged by Agenda 21 has a wider range, and that what is found in the quoted instruments are just examples of that with which the Agenda is concerned.

164 Cf. here Hilliges / Nitschke (2007:14ff.).

customary law be able to respond appropriately to modern needs? Can traditional governance and customary law be brought in line with the requirements of the principles of democracy and human rights? Namibia and many other African countries have found answers to these questions.[165] On the one hand, governments recognise the existence of traditional governance and customary law as being relevant to their societies; but on the other, there is a great quantum of scepticism about the political realities to be associated with the recognition. The scepticism is nourished by ignorance of the potential of traditional authorities and customary law – a potential that contributes effectively to peace and welfare in the communities to which they apply, and beyond. Indeed, the reported research underlines the potential of traditional authority and customary law. The research on customary environmental law has shown that traditional rule and customary law are grounded in local knowledge and wisdom. Local wisdom governs practice in many instances; in others where this is not the case, it could be made available if desired.

Taking note of what has been said about the potential of traditional governance and customary law, the possible way forward would pay specific attention to an element that has been underestimated in respect of the inherited land tenure systems, which one finds in most traditional communities. Chapter 26 of Agenda 21 states the following in its first paragraph:

> Indigenous people and their communities have an historical relationship with their lands (…) In the context of this chapter the term lands is understood to include the environment of the areas which the people concerned traditionally occupy. (…) They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.

Whatever the concept of indigenous peoples is for the Agenda,[166] the quoted statement is also relevant for traditional communities in the broader sense. The anthropological fact that many traditional communities see land as an encompassing entity that includes what is underneath and above the soil; includes what moves on the soil and in water; and includes, in a wider sense the living and the dead, has not been fully explored yet in legal terms. How can all the resources: the trees, the wildlife, the mineral resources, the water, the traditional knowledge be managed and administered in a way that supports sustainability for the benefit not only of local owners, but also of those beyond the boundaries of the village, in a national and even global sense, now and in the future?

The customary law case studies done in the BIOTA project and more so in the TFO project have shown that, in many cases, members of local communities were not aware that traditional knowledge was a valuable asset. The apparent international trend in transforming – or, rather, dissecting – culturally determined social and, in terms of the quote from Chapter 26 of Agenda 21, holistic entities into marketable commodities

165 Cf. Hinz (2006a).
166 See the remarks on this above.

will have to be reviewed, as will the consequences of such marketing.[167] However, such reviewing will not be enjoyed by those who have interest in dissected parts of the environment, such as companies which – as it was recently reported - like to drill for oil in the Kavango area.[168] Whether local voices who speak against this project, will be heard must be seen. It is reported that the case has already been submitted to the High Court![169]

167 See her(e in particular Hinz (2012 and 2013c).
168 Cf. *The Namibian* of 26 May 2021.
169 Ibid.