

Chapter 17: Forestry Related Law and Policy

Clemens C.C. von Doderer, Jonathan M. Kamwi and Oliver C. Ruppel

1 Introduction

Namibia's surface area is 824,268 km² with three major categories of land tenure: the so-called commercial farmland with freehold tenure (approximately 44% of the country situated predominantly in the south and centre of Namibia), communal areas which are situated mainly in contiguous blocks in the northern Namibia (approximately 41% of the country), and the state land including conservation areas (approximately 15% of the country).

Namibia is one of the driest countries in sub-Saharan Africa with a mean annual rainfall of approximately 270 mm with wide regional and seasonal variation. Against the backdrop of variation in climate and aridity in the country, it is explainable that the vegetation cover in Namibia is generally low. The main groups of soils in the country are unconsolidated sand (arenosols) and shallow and weakly developed soils on bed-rock (lithosols, xerosols, regosols and yermosols).¹ Owing to very low contents of clay in the soil, the water holding capacity is generally very low. Nonetheless, Namibia has a broad variety of vegetation types including deserts, savannahs (dwarf shrub savannah, various acacia-based tree and shrub savannah associations and the mopane savannah) and dry woodlands. Moreover, Namibia has an abundant dense and diverse mammalian fauna.

To quite some extent, Namibia faces environmental problems that are similar to those experienced in many parts of Africa, including climate change,² water stress, land degradation and soil erosion, and deforestation. Forests provide a wide variety of ecosystem services, which are not only critical for the local environment, but also for the global context. Forests play a critical role in the context of climate change since they are one of the biggest reservoirs of carbon, helping to maintain the carbon cycle and other natural processes. They are key to reducing climate change.

Recent figures assessing global forest resources reveal that in the period from 2010 to 2020, Africa had the highest net loss of forest area.³ Respective figures pertaining to Namibia confirm this assessment. In 2000, more than eight million hectares of Namibia was covered by forests (down from 8.7 million hectares in 1990).⁴ By 2020, the

1 Sweet / Burke (2006).

2 Cf. Niang and Ruppel *et al.* (2014).

3 Cf. FAO (2020a:125).

4 Cf. MAWF (2014b:10).

total forest area has decreased to only 6.6 million ha.⁵ While in 1990, the forest area was at 10.6% of the total land area, it was at only 8.2 in 2018.⁶

Forest resources in Namibia are of essential importance as woodlands stabilise fragile soils and prevent soil erosion, especially in the flood-prone areas along the river streams in the northern part of the country. Moreover, forest areas are the home of parts of Namibia’s rich biological diversity. And forests also play a vital role from a socio-economic perspective, especially in the rural areas of Namibia, as many are directly or indirectly dependent on the availability of forest resources for browsing, building material for homesteads, fuel wood for cooking, light and heating, and medicines amongst others. Forest resources in Namibia are exploited for various uses, including charcoal production and the production of fire blocks from crushed bush for energy production. Moreover, woodlands harbour fruit and nut-bearing tree species such as *Sclerocarya birrea* (marula), *Berchemia discolor* (bird plum), and *Strychnos cocculoides* (monkey orange) are gaining commercial importance, just as medicinal plants such as *Harpagophytum procumbens* (devil’s claw).⁷ Figure 1 shows the trend in forest cover and other wooded land in Namibia, from 1990 to 2020.

Figure 1: Trends in Forest Cover and Other Wooded Land

FRA categories	Area (1000 ha)								
	1990	2000	2010	2015	2016	2017	2018	2019	2020
Forest	8 769.17	8 059.08	7 348.99	6 993.95	6 922.94	6 851.93	6 780.92	6 709.91	6 638.90
Other wooded land	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98	54 080.98

Source: FAO (2020b) noting that the data on forest area is old and not very reliable, but due to lack of more recent and better data it is being used despite other datasets (Hansen, Africover, etc) indicate substantially less area covered by trees.

Official estimates from Namibia’s Directorate of Forestry reported to the FAO⁸ reveal that in 2020, the forest area was 6,638,900 ha (down from 8,769,170 million hectares in 1990) of Namibia (8.06% of the total land surface area). More than 2.5% of the forest area has disappeared since 1990.

Major threats to forests in Namibia include the expansion of land for agriculture; the cutting of wood for fuel and for domestic use; clearing for infrastructure development; uncontrolled wildfires; selective logging through timber concessions, legal and illegal timber harvesting for exporting as logs to international markets and unlicensed

5 Cf. FAO (2020b:9).
6 See World Bank data at <https://data.worldbank.org/indicator/AG.LND.FRST.ZS?locations=NA>, accessed 21 June 2021.
7 Cf. Annexure 2 to the 2015 Forest Regulations: Forest Act, 2001, GG No. 5801, Notice No. 170.
8 See FAO (2020b).

curio carving; climate change and habitat destruction by elephants. As the total land area is fixed, increases in population will control the person to land ratio. The increase of population goes hand in hand with an increase in unsustainable use of timber for fuel, housing, fencing, fire, and poses a severe strain on the environment as deforestation not only leads to the loss of resources used for human activities, it also results in desertification and severe degradation of land.⁹ A Forest Research Strategy for Namibia (2011–15)¹⁰ addressed issues associated with sustainable forest management and the issue of value addition to forest products. The strategy identified forest research areas, including a vegetation (forest and rangeland) monitoring programme; forest products (value added) research; ecological studies; growth and yield studies; silvicultural research; economic, policy and sociological research; and management of information. However, the degree to which these research areas were achieved remains largely unknown.

With its ambitious aim laid down in the INDC¹¹ to achieve “a reduction of about 91% of its GHG emissions at the 2030 time horizon compared to the BAU [Business as Usual] scenario” forest related law and policy moves to the centre of Namibia’s mitigation strategies predominantly in the agriculture, forest and other land use (AFOLU) and the energy sectors. The reduction of the deforestation rate by 75%, reforestation and restoration of grassland will demand a more progressive and effective implementation of existing forest-related law and policy based on the pillars of Namibia’s Constitution. Within the updated NDC submitted to the UNFCCC in 2021, Namibia has identified ambitious measures contributing to climate change mitigation including to reduce the deforestation rate by 75%; to reforest 20,000 ha per year; to plant 10,000 ha of trees per year under agroforestry; to plant 5,000 ha of trees under urban forestry; to restore 15.5 million hectares of grassland; and to increase the share of renewables in electricity production from 33% to 70%.

2 Constitutional Provisions Relevant to Forests

According to Article 1(6) of the Namibian Constitution, the latter is the law above all laws. Therefore, all legislation ought to be consistent with the provisions of the Constitution. The Constitution lays the foundation for all policies and legislation in Namibia and contains three key environmental clauses relevant to sustainable use of natural resources.

9 MET (2006:13).

10 MAWF (2011).

11 Available at https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Namibia%20First/Namibia%27s%20Updated%20NDC_%20FINAL%2025%20July%202021.pdf, last accessed 11 January 2022.

Article 100 of the Constitution vests all natural resources in the state, unless otherwise legally owned. Thus, unless legal ownership of natural resources in a specific locality is proven, such natural resources are owned by the state; the provision implies thus that natural resources can be legally owned as private property.

Article 95(l) stipulates that the state shall actively promote and maintain the welfare of the people by adopting policies, which include “the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians (...)”. Through this particular Article, Namibia is obliged to protect its environment and to promote a sustainable use of its natural resources.

Furthermore, Article 91(c) stipulates that one of the functions of the Ombudsman is “the duty to investigate complaints concerning the over utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.” Further to these environmental key provisions, Article 144 must be pointed out as the constitutional link to international environmental law applicable in Namibia.¹²

3 Relevant Regional Frameworks, Statutory Law and Policy

A sound legal framework protecting Namibia’s forests is of utmost importance. Namibia, since Independence, has placed a strong emphasis on integrating environmental concerns into the post-colonial legal framework. Many legislative steps have been taken, in order to comply with obligations under international law and to ensure the conservation of natural resources by legislative means. A wide number of enactments are pertinent – directly or indirectly – to environmental issues. Environmental framework legislation of cross-sectoral nature such as the Environmental Management Act¹³ or the Nature Conservation Ordinance¹⁴ are rather broad in scope, while sectoral legislation such as the Forest Act No. 12 of 2001 cover specific environmental issues. The main law and policy instruments pertinent to forests in Namibia are the following:

- The 2002 SADC Protocol on Forestry on the regional level;
- the Forest Policy of 1992;
- the Development Forestry Policy for Namibia of 2001;
- the Forest Act No. 12 of 2001 as amended by the Forest Amendment Act No. 13 of 2005;¹⁵

12 Article 144 reads as follows: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

13 No. 7 of 2007.

14 No. 4 of 1975.

15 Hereinafter referred to as the Forest Act.

- the Community Forestry Guidelines of 2005;
- the 2015 Forest Regulations to the Forest Act;
- the customary law of traditional communities; and
- the Environmental Management Act No. 7 of 2007.

A variety of provisions within the aforementioned legal instruments deal with the management of forests. The Directorate of Forestry within the Ministry of Environment, Forestry and Tourism (MEFT) is the primary institution responsible for all issues related to forests in Namibia, as one of its functions is to develop, manage and facilitate the economic and sustainable utilisation of forest resources.

3.1 The SADC Protocol on Forestry and the Forestry Strategy

Regional approaches for policy harmonisation and trans-boundary forest conservation and sustainable use concepts are essential mechanisms for the protection and conservation of the environment and its biodiversity, and ultimately, to poverty alleviation. Recognising the essential role which forests play with regard to maintaining the earth's climate, controlling floods and erosion, and as sources of food, wood and other forest products, the 2002 Protocol on Forestry of the Southern African Development Community (SADC), which came into force in 2009, aims to promote the development, conservation, sustainable management and utilisation of all types of forests and forest products in order to alleviate poverty and generate economic opportunities. This overarching framework for forestry collaboration in the SADC region is binding on Namibia and contains a set of rules or principles agreed upon by the SADC member states on how to integrate and cooperate among them in order to commonly conserve and manage the SADC forests and woodlands for the benefit of the SADC people. To this end, the Protocol *inter alia* addresses issues of common concern including deforestation, genetic erosion, climate change, forest fires, pests, diseases, invasive alien species, and law enforcement. States are called upon to facilitate the gathering and monitoring of information, and the sharing and dissemination of information, expertise and technology concerning forests; and to harmonise approaches to sustainable forest management, forest policy, legislation and enforcement, and issues of international concern. The Protocol emphasises that traditional forest-related knowledge must be protected and requires mechanisms to ensure the equitable sharing of benefits from forest resources.

The Protocol recognises the transboundary nature of these forests, the importance of trans-boundary management strategies, the vital role of forests in protecting water catchments particularly of shared water courses and understands that potential harm to these forests is not limited by national boundaries. One of the objectives of the protocol is the effective protection of the environment and the ways listed to achieve the objectives include “harmonising approaches to sustainable forest management, forest

policy, legislation and enforcement (...).¹⁶ The guiding principles include the obligation of member states to “facilitate, promote and continually improve policy and legal frameworks that promote sustainable forest management”.¹⁷ The Protocol provides a definition of “forest” relevant for Namibia, defining forest as “any ecosystem containing trees and which is so defined by national policy or legislation and includes the concepts of ‘forest land’, ‘forest product’, ‘forest resource’ and ‘forest genetic resource’.”¹⁸ The Protocol thus indicates that it is necessary to consult Namibian policy and legislation for a definition of ‘forest’. The SADC Forestry Strategy of 2010¹⁹ aims to revive the forest sector and to identify areas in forestry development of strategic importance to the region. It contains eight strategic programme areas including climate change mitigation and adaptation, the protection of key catchment forests, energy supply and poverty reduction.

3.2 The Forest Policy of 1992

The first post-independence forestry relevant instrument approved by cabinet was the Forest Policy of 1992. This Policy builds the foundation for forest law and policy in Namibia today and provides that existing forest lands be conserved and protected, their productivity increased and new areas to be brought under forests. The policy states that the goal should be to have a minimum of one tenth of the national land area under forest or tree cover. Management of state forests; afforestation; social and farm forestry; rights and concessions; diversion of forest land to non-forest purposes; wildlife conservation; rural communities and forests; damage to forests from fires and grazing; forest-based industries; forest extension; forest education and research; personnel management; forest survey and data base; and legal support and infrastructure are sub-sections under the 1992 Forest Policy.

3.3 Namibia’s Forestry Strategic Plan of 1996

The 1996 Forestry Strategic Plan²⁰ identifies main national issues in sustainable forestry development with a specific view to production, protection and participation. The issue of ‘production’ focuses on the management of natural forests, the supply of environmental benefits, and the processing of forest products. Protection measures are

16 Article 3(1)(f) of the Protocol.

17 Article 4(4) of the Protocol.

18 Article 1 of the Protocol.

19 Available at https://www.sadc.int/files/4815/9125/6651/SADC_Forestry_Strategy_2010-2020-English.pdf, accessed 18 January 2021.

20 GRN (1996).

put in context with population pressure, forest fires, and deforestation, whereas participation deals with the societal aspiration to have a greater say in how forest resources are managed and how the benefits of a managed forest resource are shared equitably.

3.4 2001 Development Forestry Policy for Namibia

The 2001 Development Forestry Policy for Namibia²¹ aims to reconcile rural development with biodiversity conservation by empowering farmers and local communities to manage forest resources on a sustainable basis. The policy identifies effective property rights; a supportive regulatory framework; good extension services; community forestry; and forest research, education and training as instruments essential to the successful implementation of sustainable forestry management in Namibia. The policy also paves the way for the establishment of community forests and their custodianship by the people most dependent on such resources. The Policy acknowledges shortcomings in Namibia's framework for forest management, by concluding that the implementation of effective property rights, a more supportive regulatory framework, and the strengthening of extension services and the promotion of community forest management is critical for sustainable forest management in Namibia. To some extent, the implementation of the Forest Act No. 12 of 2001 and an increased uptake of community forests have contributed to change this situation.

3.5 *De Lege Lata*: The Forest Act No. 12 of 2001

3.5.1 Overall Scope

Forest management and exploitation in Namibia is primarily governed by the Forest Act No. 12 of 2001. The Forest Act consolidates the laws relating to the use and management of forests and forest produce; it provides for the control of forest fires and creates a Forestry Council. Protection of the environment is found in part IV of the Act. This part of the Act deals with protected areas, protection of natural vegetation and control over afforestation and deforestation.

The Forest Act replaces the Preservation of Trees and Forests Ordinance²² and the 1968 Forest Act.²³ It establishes a regime for authorisation of the harvesting of trees²⁴ in order to combat deforestation and thereby preventing the exacerbation of related

21 GRN (2001d).

22 No. 37 of 1952.

23 No. 72 of 1968.

24 Article 27 of the Forest Act No. 12 of 2001.

natural hazards. The Act is formulated around the tenets of sustainable management of forests, and the purpose for which forest resources are managed and developed. This also includes the planting of trees where necessary, as well as soil conservation, safe-keeping of water resources, maintenance of biological diversity, and the use of “forest produce in a way which is compatible with the forest’s primary role as the protector and enhancer of the natural environment”.²⁵

3.5.2 Definition of the Term ‘Forest’

It should be noted that no single, for Namibia generally applicable explicit definition of ‘forest’ exists. No explicit definition is contained in the Forest Act. Neither exists a distinction among native forest and planted forest, or between managed and unmanaged forests. Neither does the Forest Act draw a distinction between specific sub-definitions of other legal terms like, e.g. ‘open forest’, ‘closed forest’, ‘forest land’, ‘forested area’, ‘woodland’, ‘wooded area’, ‘timberland’, ‘secondary vegetations’, or ‘agroforest area’. However, the Act in its definition section²⁶ contains various definitions closely related to forests. The most relevant definition contained in the Forest Act is probably the definition on, ‘forest produce’, which is defined in very broad terms as anything that “grows or is naturally found in a forest”. The definition on forest produce furthermore specifies that “any living organism or product of it; and any inanimate object of mineral, historical, anthropological or cultural value” are also considered as forest produce.

Further definitions are provided for the following: ‘classified forest’, ‘community forest’, ‘forest management area’, ‘forest reserve’, ‘regional forest reserve’, and ‘state forest reserve’. The Forest Act does not explicitly distinguish between forest and woodland, however, the Directorate of Forestry has identified as one of its core functions to “establish, manage, utilise and conserve forests, including *woodlands*, for human benefit”.²⁷ It is thus evident that the Directorate of Forestry *de facto* draws specific distinctions with regards to forest and woodlands. A report drafted for the MAWF in 2005²⁸ by referring to the FAO definition of forests²⁹ states that the definition of woodlands is much broader than that of a forest and includes “landscapes, which are not forests but where reasonably tall trees are conspicuous.”

25 Section 10 of the Forest Act.

26 Section 1 of the Forest Act.

27 MAWF (2014a), emphasis added.

28 See Mendelsohn / el Obeid (2005).

29 Defining forests as land covered by trees with a canopy cover of more than 10% and higher than five metres. A forest should extend over more than half a hectare, and includes plantations and stands of young indigenous trees that are expected to develop into taller groves, see Food and Agricultural Organization (1998).

Because so far, no explicit definition of ‘forest’ in Namibian statutory law exists, it can be stated that the terminology regarding forests is of rather relative nature. By no means has the legislator once and for all established an absolute definition of ‘forest’ applying equally to all fields of law. The Forest Act does not *de iure* exclude certain categories of forest or forested areas from its scope of application. The type of legal definition of ‘forest’ in Namibia is of a mixed nature. From the perspective of the 2001 Forest Act, one would most probably classify the type of nature as regulation-based (forests are classified on the basis of different legal protection regimes to which the forests are subjected), as the Forest Act provides for a system of classified forests, namely forest reserves, community forests or forest management areas. However, this regulation-based definition is combined with elements of quantity-based definitions³⁰ and list-based definitions.³¹ Elements of list-based definitions are contained in Annexure 2 to the Forest Regulations of 2015 relating to Section 22 of the Forest Act and Regulation 13 of the Forest Regulations of 2015, which lists eighty specific protected plant species and the reasons, why these species have to be protected. In practice, elements of quantity-based definitions play an important role, when it comes to inventory questions as can for example be observed with regard to the National Forest Inventory and also the national classifications as used in Namibia’s Country Report to the 2015 FAO Global Forest Resource Assessment.³² In this assessment, Namibia has applied definitions as summarised in Table 1 below.

Table 1: National Classifications and Definitions Used in the Namibian Country Report for the FAO Global Forest Resources Assessment 2015

National Class	Definition
Dense Forest	70% crown cover, tree height >5m" /> >70% crown cover, tree height >5m
Dense Savannah	70% shrub cover, <2m" /> > 70% shrub cover, <2m
Medium Forest	5m" /> Crown cover 40-70%, tree height > 5m
Medium Savannah	40-70% bush cover, 2-5m
Medium Savannah	< 2m" /> 40-70% shrub cover, < 2m
Open Forest	5m" /> Crown cover 10-40% , tree height >5m
Open Savannah	10-40% bush cover, 2-5m
Open Savannah	<2m" /> 10-40% shrub cover, <2m
Very open Forest	5m" /> Crown cover 2-10%, tree height >5m

Source: MAWF (2014b:7).

30 E.g. spatially based on land cover – that is the physical cover of the earth’s surface observable from aerial or satellite views – expressed in hectares, tree height in meters, percentage of tree canopy cover, etc.; or based on an annual yield capacity per hectare expressed in cubic meters of wood including bark, etc.

31 E.g. by providing lists of tree species given in an annex to the national forestry legislation, or lists of vegetated areas, etc.

32 See MAWF (2014b).

In its *Country Report for the Global Forest Resources Assessment (FRA) of 2020*,³³ Namibia has applied the FRA 2020 categories and definitions,³⁴ providing, among others, definitions on ‘forests’³⁵ and ‘other woodland’.³⁶ For forest inventory purposes, Namibia has applied national classifications. Based on the Namibian National Forest Inventory³⁷ the following rough estimates have been summarised in 2005:³⁸

- Approximately 10% of all plant species in Namibia are trees (woody plants that usually grow to one metre or more in height).
- Less than 10% of the country is covered by trees with a canopy cover of more than 10% and higher than five metres.
- Around 50% of the country are areas of woodland and 40% are desert or shrub land.

Namibian case law has, so far, not played a role in interpreting the term ‘forest’ as stipulated in statutory law. To date, Namibian Courts have not been tasked to deal with interpreting the definition of ‘forest’. Legal doctrine has so far played a minor role in interpreting the term ‘forest’. Where such discussion exists in outline, a flexible approach is preferred.³⁹ However, recent discussions around the lack of a clear definition of the term ‘forest’ have, among other issues, resulted in efforts dealing with a revision of the Forest Act and the Forest Regulations. Highlighting that the Forest Act fails to define the term ‘forest’, an *Alignment Report for the Revision of the Forest Act and Forest Regulations* submitted by the Southern African Institute for Environmental Assessment in 2020⁴⁰ lists as one of the primary objectives of suggested revisions that “[t]he term ‘forest resources’ includes all timber products, all woody biomass products (e.g. bush encroachment products), and non-timber products of plants (e.g. fruits, resin, leaves).” However, for the time being, the Forest Act in its current version remains applicable.

33 See FAO (2020b).

34 See FAO (2020d).

35 “Land spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of more than 10 percent or trees able to reach these thresholds in situ. It does not include land that is predominantly under agricultural or urban land use.” See FAO (2020d:4).

36 “Land not classified as ‘Forest’ spanning more than 0.5 hectares with trees higher than 5 meters and a canopy cover of 5-10 percent or trees able to reach these thresholds; or with a combined cover of shrubs bushes and trees above 10 percent. It does not include land that is predominantly under agricultural or urban land use.” See FAO (2020d:4).

37 The Forest Act in its Section 11 provides that the Director of Forestry has the duty to compile and maintain a national forest inventory. The compilation of such inventory has started in 1999 and resulted in a collection of datasets, maps and reports managed by the Directorate of Forestry in Windhoek, Namibia. The National Forest Inventory organised by regions is an ongoing collection of information about forests countrywide. For more information and selected inventory reports see <http://www.mawf.gov.na/de/inventory-reports> accessed 18 January 2021.

38 See Mendelsohn / el Obeid (2005:21).

39 Ibid:10.

40 SAIEA (2020).

3.5.3 Classifications of Forests

The Forest Act, in part III deals with four different classifications of forests: state forest reserves (Section 13); regional forest reserves (Section 14); community forests (Section 15); and forest management areas (Section 16).

Community forests, related to the most dominant form of forest management in Namibia, are forests where the local community plays a significant role in forest management and land use decision-making. Community forests can be declared on communal land, with the agreement of the Chief or Traditional Authority. An organisation representing the people who traditionally use the community forest is appointed as the forest management authority. The aforementioned authority has the legal rights to use the forest resources and graze animals there, or to rent out these rights to others. The management authority has to look after the forest according to a management plan; to ensure that all community members have equal access to the resources in their forest; and to reinvest the income accrued from the forest to keep protecting the forest, and equitably share what is left over between the community members. As of 2019, Namibia had 43 registered community forests. State forest reserves can be created on state land that is not communal land. A management authority is appointed to manage the state forest reserve in accordance with a management plan. State forest reserves are declared by respective notice in the Government Gazette. In contrast to state forest reserves, regional forest reserves are created on communal land at the request of the Regional Council, which negotiates with the Chief or Traditional Authority and others whose rights are affected and makes recommendations to the Minister. Regional forest reserves can be created provided that the communal land needs to be managed as a classified forest and that effective management cannot be achieved through management of the communal land as a community forest.

Forest management areas can be created by agreement between the owners or legal occupiers of land that is not part of a classified forest and the Minister. Part of such agreement is a management plan, which may set out details for the planting of trees, the management of natural forest and harvesting practices. Furthermore, technical or other assistance from the Ministry may be subject to such agreement.

3.5.4 Protected Areas and Fire Control

The 2001 Forest Act makes provision for any land area to be declared a protected area if it is necessary to “protect the soil, water resources, protected plants and other

elements of biological diversity”.⁴¹ For such area, the various stakeholders involved⁴² must reach an agreement on various issues, including the obligations to maintain and protect the forest resources of the protected area. In terms of protection of natural vegetation, the Forest Act provides that all trees and plants within 100 metres of a river, stream or watercourse are protected and may not be cut or destroyed without a licence.⁴³ The same protection is awarded to vegetation growing in dunes or drifting sands or on a gully. The Forest Act furthermore makes provision to declare as a fire management area areas contiguous to or situated near a classified forest.⁴⁴ A fire management plan for such area contains among other things provisions with regard to circumstances in which burning of things may be allowed and on how veld and forest fires are to be prevented, controlled and extinguished. Furthermore, any area can temporarily be declared a fire hazard area under the Forest Act⁴⁵ if this is necessary.

3.5.5 Use of Forests and Forest Produce

As per Section 24(1) of the Forest Act:

Forests and forest produce shall, in Namibia, subject to the permission of the owner of the land or the management authority of a classified forest and to the terms of a licence issued under this Act, be used in accordance with an applicable management plan.

In classified forests, vegetation or harvest forest produce may not be destroyed or damaged, no activity may be carried out for the purpose of mining minerals, no road, building or structure may be built, soil may not be removed or disturbed and no agricultural activities may be carried out, neither may animals be grazed, unless such activity is authorised by a management plan, a forest management agreement or a licence issued under the Forest Act. Section 24 (3) stipulates that owners or legal occupiers of land may harvest without a licence, however, within the limits of the management plan, if applicable. Furthermore, people living near a forest reserve or community forest may harvest forest produce for use as household fuel or for the construction of personal or livestock shelter, subject to a management plan, if applicable. Specific provisions for licensing are contained in Sections 27 to 30 and Section 34 of the Forest Act.

41 Section 21 of the Forest Act.

42 Namely the Minister of Lands, Resettlement and Rehabilitation, the Minister of Agriculture, Water and Rural Development, the owner or occupier of the land in question and in the case of communal land, the chief or traditional authority for that communal land or the authority which is authorised by law to grant rights over that communal land.

43 Section 22 of the Forest Act.

44 Section 36 of the Forest Act.

45 Section 39 of the Forest Act.

3.5.6 Offences

Examples of offences under the Forest Act (see Section 45 for a catalogue of offences) relate to damage or destruction of vegetation in a protected area or the destruction or removal of living trees, bushes or shrubs growing within 100 metres of a river, stream or watercourse. Groups of cases in the Forest Act requiring the involvement of courts are primarily those related to offences and penalties⁴⁶ and those related to the payment of compensation. Cases related to forests heard by community courts within traditional communities particularly deal with the felling of trees without permits and the use of forest resources as only local residents are allowed to use forest resources for domestic use.⁴⁷

3.6 *De Lege Ferenda*

Recent discussions around the lack of a clear definition of the term ‘forest’ have, among other issues, resulted in efforts dealing with a revision of the Forest Act and the Forest Regulations. Highlighting that the Forest Act fails to define the term ‘forest’, the above-mentioned *Alignment Report for the Revision of the Forest Act and Forest Regulations* by the Southern African Institute for Environmental Assessment in 2020⁴⁸ lists as some of the primary objectives of suggested revisions to simplify the Forest Act and to improve existing governance structures:

- The revised legislation should address current and future demands on forest resources. The term ‘forest resources’ should include all timber products, all woody biomass products (e.g. bush encroachment products), and non-timber products of plants (e.g. fruits, resin, leaves).
- The revision should close existing loopholes and ambiguities, so that the laws cannot be interpreted in ways that allow offenders to ‘get off the hook’.
- The resulting Act and Regulations should be free of unnecessary complications so that they are easily understood by government officials and the general public. The revision shall improve control over the unsustainable use of forest resources through robust and user-friendly mechanisms.

46 See e.g. *Tsamkxao Oma v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2018-00093) [2020] NAHCMD 162 (7 May 2020).

47 See Falk (2008:92). With regards to the Mbunza for example, Falk summarises as follows: “According to customary law, cases are first heard by the headman or headwoman, but defendants can appeal to the Hompa. Those who are unable to pay their fines are supposed to work for the community under the Hompa. Confiscated wood is sold and the proceeds as well as fines are transferred to the account of the Mbunza.”

48 SAIEA (2020).

Adding to the SAIEA's Alignment Report, a benchmarking of the Forest Act against existing regional and international policy and legislative frameworks relevant to forest conservation and management has been conducted in 2020.⁴⁹ Overall, the benchmarking report concluded, that the Forest Act is based on a top-down approach, placing forest authorities and administrative structures at the centre rather than the forests ecosystems themselves. In an environment of a framework with unclear definitions and criteria, a system of prohibitions and licences in combination of a control mechanism is being applied, resulting in exuberant red tape, high risk of mismanagement, a system of dependence and minimised responsibility of stakeholders outside of protected areas.⁵⁰ Albeit the Directorate of Forestry's mission statement,⁵¹ which is "to promote a well organised forestry sector that is socially, environmentally and economically sustainable, while creating significant and equitable wealth and opportunities", current provisions hardly consider and promote sustainable forest management as a mechanism to reveal the benefits of multi-functionality of forests to society, economy and the environment. Less administrative barriers, freedom in decision-making processes within given legislation and regulations, as well as free access to markets are key to implement sustainable forest management, whilst ensuring forest ecosystem protection.

Taking international forest policy and legislative standards and principles into consideration, any alterations *de lege ferenda* should be based on responsibilities and expectations of all stakeholders along the entire value chain, balanced with prohibition and monitoring as steering tools. This should include a strong focus on enabling rights-based land use for communities, private and institutional ownership. However, for the time being, the Forest Act in its current version remains applicable (*de lege lata*).

3.7 The 2015 Forest Regulations to the Forest Act

Illegal harvesting is a major problem throughout Namibia, especially in the north-eastern regions where the forest cover is relatively thicker. The Forest Regulations of 2015⁵² provide a detailed legal framework for the prevention of illegal harvesting. The Regulations expand on the foundations laid out by the 2001 Forest Act and regulate matters including the marking of forest produce; measures to be taken for forest protection; and permitting, licencing and other documents required for the harvesting,

49 Klein von Wisenberg (2021).

50 Ibid.

51 Available at <https://www.met.gov.na/about-meft/forestry/273/>, accessed 12 January 2022.

52 Forest Regulations: Forest Act 2001, Government Notice number 170 on the Forest Regulations: Forest Act 2001, Government Gazette number 5801 of 2015.

transportation, processing, sale, importation, transit, and exportation of forest produce. The Regulations also set out a detailed list of protected plant species.⁵³

The Regulations, together with the provisions of the Forest Act, provide that a person is not authorised to harvest, transport, sell, market, transit, export or import forest produce without a licence for harvesting or permit for transport, marketing, transit, export or import. The Regulations refer to prescribed application forms (e.g. for harvesting licenses) and specify documentation to accompany applications such as a written permission from the landowner.

3.8 The Community Forestry Guidelines of 2005

Much effort has been made since the preparation of the 1992 Forest Policy to establish a forestry related effective institutional, legal and policy framework. One focus has been on community-based management to preserve indigenous forests and to ensure a sustainable use of woodland resources for the benefit of local communities. In 2005, the Ministry of Agriculture, Water and Forestry's Directorate of Forestry introduced the Community Forestry Guidelines.⁵⁴ The main objective of these guidelines is to provide all stakeholders with a standard for establishing and managing community forests, by describing the legal procedures involved in setting up a community forest; describing the organisational arrangements and administrative procedures necessary for the sustainable management of community forests; and by specifying the respective roles of Government forestry officials, communities and other stakeholders involved.⁵⁵

3.9 The Customary Law of Traditional Communities

Before the arrival of colonists, indigenous populations have lived for generations according to their own distinctive laws and despite the legal influence of colonial and post-colonial powers, a large number of Namibians still live under customary law.

Article 66 of the Namibian Constitution lays the foundation for the constitutional recognition of customary law. It states that both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent that such customary or common law does not conflict with the Constitution or any other statutory law. Section 3 of the Traditional Authorities Act⁵⁶ gives certain powers, duties and functions to traditional authorities and members thereof. It is the overall

53 See Annexure 2 of the Forest Regulations: Forest Act 2001, Government Notice number 170 on the Forest Regulations: Forest Act 2001, Government Gazette number 5801 of 2015.

54 GRN (2005a).

55 Ibid.

56 No. 25 of 2000.

responsibility of traditional authorities to supervise and ensure the observance of the customary law of that community by its members. As to nature conservation it is one of the duties of a traditional authority to ensure that members of the traditional community use the natural resources at their disposal on a sustainable basis and in a manner that keeps the environment and maintains the ecosystem for the benefit of all Namibians. Customary law plays an important role in the sustainable development of natural resources and the protection of biological diversity as it incorporates a broad knowledge of ecosystems relationships.⁵⁷ This is particularly true for the protection and management of forest resources.⁵⁸ Many of the customary laws contain specific provisions for the protection of plants, trees and forests. One example⁵⁹ is Section 12 of the Laws of Ombalantu on the protection of forests, providing that “forests shall be protected and shall not be cut down, because this can lead to deforestation (...). No one shall cut down a tree, which bears fruit. The fine for this is a payment of two heads of cattle”.

3.10 The Environmental Management Act No. 7 of 2007

The Environmental Management Act (EMA) consolidates the laws relating to the management of the environment by promoting the sustainable management of the environment and the use of natural resources through the establishment of principles for decision making on matters affecting the environment; to establish the Sustainable Development Advisory Council; to provide for the appointment of the Environmental Commissioner and environmental officers; to provide for a process of assessment and control of activities which may have significant effects on the environment; and to provide for incidental matters.

As per Section 27 of the EMA, the Minister may list, by notice in the Government Gazette, activities which may not be undertaken without an environmental clearance. To this end the Minister has published a list of activities that may not be undertaken without environmental clearance,⁶⁰ including energy generation, transmission and storage activities, mining and quarrying, forestry activities, tourism development, agriculture and aquaculture activities, water resource development, infrastructure, hazardous substance treatment and land use and development activities. With regard to forests, it is specified that an environmental clearance is required for the “clearance of

57 Hinz / Ruppel (2008a:57).

58 Muhongo (2008); on the ownership of forests see also Mapaure (2012).

59 Further relevant customary law provisions are contained for example in Section 5.2 of the Laws of Ombadja, Section 16 of the Laws of Ongandjera; Section 8.1 of the Laws of Uukwaluudhi; Section 16.1 of the Laws of Uukwambi; the Sections on Deforestation and Gathering of Firewood of the Laws of the Mashu; or Section 10.3 of the Laws of the Mayeyi.

60 Government Gazette No. 4878, Government Notice No. 29.

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

4 Concluding Remarks

Namibia has a relatively young history of forest management under the Forest Act No. 12 of 2001 with its system of classified forests under which the community forests have been gazetted. However, it is generally acknowledged that it is important to preserve existing and develop new forest resources, aimed at combating climate change and at maintaining ecosystem services. This includes protecting biological diversity and ensuring that socio-economic values of forests are maintained for the benefit of the people living in Namibia, especially those in rural areas who are directly or indirectly dependent on the availability of forest resources.

The fact that existing statutory law in Namibia lacks a clear definition of ‘forests’ can be seen as a deficiency, which in practice is compensated on the one hand by referring to the terminology as used under the system of the FAO and on the other by providing specific definitions on forest-related terms such as on ‘forest produce’. A further point of reference is the system of classified forests, namely forest reserves, community forests and forest management areas. The body of cases giving practical meaning to the Forest Act by courts is still relatively limited.

Given that until about 2015 forest resources were used predominately within the borders of Namibia, meeting the domestic demand, it was commonly accepted, that in general terms, a solid legal and policy framework existed in Namibia to protect forests from threats like deforestation to obtain land for agriculture; the cutting of wood for fuel and for domestic use; clearing for infrastructure development; uncontrolled wild fires; selective logging through timber concessions and unlicensed curio carving; and habitat destruction by elephants.

However, the dynamic development of the forest sector in Namibia due to an increased bush encroachment on traditionally open, semi-dry savannah land, a growing economic subsector for bush-based biomass products as well as a national concern of possible overexploitation of forests in the north-eastern region of the country has disclosed loopholes and ambiguities of the current legislative framework. This prompted efforts dealing with a revision of the Forest Act and the Forest Regulations.

Addressing the current and future demands on forest resources, revised legislation should provide a clear definition of a number of key terms (e.g. forest) and processes and should close existing loopholes and ambiguities. Revealing the benefits of multi-functionality of forests to society, economy and the environment, the revision should also be based on the globally accepted principle of sustainable forest management,

placing the active management, utilisation and protection of the forest ecosystem as well as the responsibilities and expectations of all stakeholders at the centre.

However, any good intentions to revise the forestry legislation will be futile, if they are not accompanied by efforts to strengthen the executive and the judiciary in terms of technical, financial and human resources, as well as know-how, aimed at ensuring that the principles anchored within the field of Namibian law on forests are implemented in due consideration of all aspects of good governance, including transparency, reliability, accountability, predictability and the rule of law.⁶¹

61 Ruppel (2008d); Ruppel / Ambunda (2011).