

# ENVIRONMENTAL LAWS *of* NAMIBIA

## Constitutions, Conservation, and Cheetahs

By Stephen W. Snively



**T**he Republic of Namibia has enacted very progressive environmental protection laws and adopted a unique conservancy program to protect cheetahs and other exotic wildlife. This article is about how the Constitution of Namibia, as compared to the Constitution of the United States, facilitates the adoption and enforcement of such laws.

### Republic of Namibia

Namibia (nuh-mib'-ee-uh) is located on the west coast of Africa north of South Africa. It has a land area of 318,261 square miles and an estimated population of 2,147,585, making it twice the size of California, but with the population of Orlando, Florida. It is one of

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the most sparsely populated countries in the world. "Namibia" means a vast and barren plain and was adopted as the new name for the country when it gained independence in 1990. English is the official language. Windhoek is the capital city, and Walvis Bay is the best deepwater seaport on the west coast of Africa. The climate is arid, and the landscapes are spectacular. There are vast plains, mountains, canyons, enormous sand dunes, and a rugged coastline almost a thousand miles long. The government is democratic; the economy is based on free-market principles. Recognized internationally for its lack of corruption and commitment to the betterment of its people, Namibia is rich with natural resources, including enormous deposits of copper, zinc, lead, gold, tungsten, and granite. It is the world's fourth largest producer of uranium. Thousands

of diamonds are vacuumed from the ocean floor, cut, polished, and exported. One of its greatest natural resources, wildlife, is the basis for a growing tourism industry, which is the third largest contributor to the economy behind mining and fishing. There are elephants, giraffes, lions, rhinoceros, hippopotami, oryx, zebras, springbok, kudus, leopards, crocodiles, penguins, seals, baboons, and an endless variety of exotic birds. It has more cheetahs than any other country. These natural resources are the focal point for the conservation and environmental laws in Namibia.

### History

Rock carvings reveal that nomadic people inhabited the plains of Namibia 15,000 years ago. In 1488 the explorer Diogo Cão claimed the territory for Portugal. For the next 400 years, the

hostile climate, treacherous currents, and intimidating shoreline discouraged seafaring visitors from venturing inland. In 1884 Namibia became the German colony of "South West Africa." For simplicity, the country is referred to as "Namibia" in this article, even when the period discussed is the period before independence (when it was known as "South West Africa"). The German settlers brought a new culture that included their language, trades, technical skills, and Lutheran missionaries. The settlers also brought a mechanized military presence and genocidal administrative policies. Although at the beginning of World War I, South Africa invaded Namibia and seized control of the colony, a significant German influence remains in the country, as evidenced by the beer, bratwurst, and old-world architecture of buildings in the seaside resort community of Swakopmund.

For 75 years after the South African invasion, oppression of the indigenous people continued. More of the best farm land was confiscated for the white minority, and natural resources were exploited to a greater extent. The apartheid policies of the South African government denied those people most of their basic human rights. Although the occupying forces were always resisted, the liberation struggle in Namibia became an organized movement during the 1960s. A disciplined military force was formed that fought the South Africans within the country while formal diplomatic efforts were pursued tenaciously at the international level. This continued for 30 years. On March 21, 1990, Namibia declared its independence, making it one of the last countries on the continent to do so. At independence it adopted what is considered by many to be one of the most progressive constitutions in the world.

### **Constitution**

Namibia's Constitution is similar in many respects to the U.S. Constitution. There are executive, legislative, and judicial branches. The president and cabinet form the executive branch, along with the prime minister. A bicameral legislature consists of the National

Assembly and the National Council. Article 102 of the Namibia Constitution divides the country into regional and local units, each of which is governed by a Regional Council. There are 13 regions in Namibia. All legislation is enacted by the National Assembly.

Namibia has an independent judiciary with trial courts, a court of appeals, and a supreme court. The court system is open to both the government and private individuals and provides forums for the enforcement of conservation and environmental laws. International non-alignment is mandated, and the death penalty is prohibited by the Namibia Constitution. Not only are the personal freedoms set forth in the U.S. Bill of Rights (such as freedom of speech, religion, and due process) protected, but there are additional protections specifically for children, women, families, and the environment. It is clear from reading the Namibia Constitution that the drafters had an exceptionally strong commitment to the rule of law, personal freedoms, and human rights—a commitment that evolved along the long and painful road to independence.

Namibia was the first country in Africa to provide for environmental protection in its Constitution. Article

95 of Namibia's Constitution mandates the "maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of the Namibians, both present and future." Article 10 creates the Office of Ombudsman. The ombudsman assures that the constitutionally protected individual freedoms and other fundamental rights of all people are not denied by the government or others. One of the constitutional obligations of the ombudsman is to "investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystem and failure to protect the beauty and character of Namibia." The ombudsman in Namibia provides citizens with direct access to the courts and a means to stop activities that harm the environment.

Judicial review is particularly important with environmental legislation because of the broad discretion granted to enforcement agencies, technical complexity of the issues, and active participation of organized public interest groups. In the United States, conflicts arise when state and federal





court rulings do not agree or when state court decisions do not agree. In Namibia, those problems do not arise because of the unified, but nonetheless independent, judicial system.

### **Environmental Laws**

The environmental laws of Namibia are an embodiment of its history and the values of its people. In addition to the principles set out in the new Namibia Constitution, these laws include a mix of statutes that predated independence, Roman-Dutch common law inherited from South Africa, international treaties, and new legislation adopted since independence.

Unlike the United States, Namibia has not experienced the industrialization, economic development, population growth, and consumer consumption that caused global environmental problems such as pollution of the seas, depletion of the ozone layer, climate change, and degradation of biodiversity. Nonetheless, it must still deal with the consequences of these problems within its own borders. Namibia is more vulnerable to these global environmental problems because of the poverty and outdoor lifestyle of its people (particularly women and children), its dependence on subsistence farming, its arid climate, the scarcity of drinking

water, the prevalence of disease, its reliance on marine resources, and the absence of a developed infrastructure and financial resources to deal with the problems. The new nation must face all of these conditions.

International treaties provide Namibia with the legal means to address environmental problems that reach beyond its borders. Article 144 of the Namibia Constitution states that all international laws and agreements binding on Namibia at the time of independence are the law of the country to the extent not inconsistent with new laws. The international treaties relating to conservation and the environment adopted by Namibia include those sponsored by international and regional organizations such as the United Nations, the African Union, and the South African Development Community.

The "Roman-Dutch" common law developed by the courts of South Africa was proclaimed by the South African government to be the common law of Namibia before independence. Article 66(1) of the Namibia Constitution provides that such case law existing at the time of independence remains in effect to the extent not in conflict with new laws. Accordingly, Namibia inherited a well-developed body of common

law that includes concepts of legal precedent, negligence, fault, nuisance, self-help, abatement, and money damages. These common law rights and remedies provide the legal means to enforce rights relating to conservation and protection of the environment.

Article 140 of the Namibia Constitution provides that the statutory laws existing at the time of independence also continue to the extent not in conflict with new laws. Namibia inherited many of the environmental laws enacted by South Africa, including those relating to contamination of water, soil, and air.

More than 30 additional new conservation and environmental laws have been enacted in Namibia since independence. They are well drafted, sophisticated, clear, and concise. These laws promote the economy by protecting wildlife and preserving natural open spaces that are vital to the tourism industry. They also reduce the threat of future land contamination from mining operations, industrialization, and population growth. The Biosafety Act enacted in 2006 establishes an administrative framework to regulate the research, development, production, and marketing of genetically modified organisms. The Environmental Management Act of 2007 creates a



comprehensive national framework for assessing the potential environmental impact of new land development before it occurs. The Environmental Investment Trust Fund of Namibia Act 13 of 2011 forms a trust fund for the management of natural resources and sustainable environmental activities. The Atomic Energy and Radiation Protection Act of 2005 was adopted to minimize the exposure of individuals to harmful radiation, control nuclear materials, and facilitate compliance with international agreements relating to nuclear energy and weapons.

Nuclear materials are of particular importance. Not only is Namibia one of the largest producers of uranium, but its remote location, arid climate, and hundreds of thousands of square miles of uninhabited land have caused some nations with spent fuel from nuclear power generation facilities to covet it as a possible dumping site for nuclear waste. That is why Article 95 of the Namibia Constitution prohibits the dumping or recycling of foreign nuclear and toxic waste in the country. Much electricity used in Namibia is imported from neighboring countries. As those countries use more themselves, there is less to export. Shortages of power are common in Namibia and an impediment to future development.

To solve that problem, a regulatory framework is being drafted that will allow the construction and operation of nuclear power generation facilities without jeopardizing the environment.

One of the fundamental precepts of environmental management in Namibia is that the “cultural and natural heritage, including its biological diversity, must be protected and respected for the benefit of present and future generations.” A common thread woven through many of Namibia’s environmental laws is the concept that the “environment” includes not only what we commonly think of as the “natural environment” that surrounds us, but also the “human environment,” which includes the “cultural, historical, aesthetic, economic and social heritage and values.” Accordingly, the intangible characteristics and qualities that make the Namibian people unique are all considered part of the “environment” to be protected, along with the air, soil, and water. This holistic sense of oneness between people and the world in which they live is a legacy inherited from the nomadic people who inhabited the plains of Namibia thousands of years ago.

### **Conservation and Cheetahs**

Land in Namibia is classified legally as “commercial,” “state,” or “communal.” “Commercial” land is land and buildings owned privately, including business and residential properties. Much of the commercial land is agricultural and was acquired by white owners before independence. Article 100 of the Namibia Constitution provides that all other land—state land and communal land—is owned by the government. “State” land is held for the general welfare of all people and includes national parks. “Communal” land is held in trust for the benefit of those who live on it. Most land in Namibia is state or communal land. The latter includes not only sparsely inhabited areas in remote regions but also intense pockets of post-apartheid poverty on the outskirts of Windhoek and smaller towns. The legal concept of communal land does not exist in the United States. It was recognized officially in Namibia at independence

because there was so much land on which people had lived in villages for centuries, even though they had no legal ownership of the land. Today, about half of the population still lives on communal land.

Most of Namibia’s wildlife lives on communal land. Conflicts occur between the wildlife and the people. Sometimes these problems are caused by grazing, fencing, land clearing, and other agricultural activities. Poachers kill rhinos and elephants for their horns and tusks. Lions, leopards, and cheetahs are predators, and farmers kill them to protect their cattle and goat herds. Elephants bulldoze their way through villages to get to rivers or watering holes, leaving paths of death and destruction. Wildlife is essential to the economic well-being of Namibia and must be managed to mitigate conflicts with people.

Attempts by the government to manage wildlife in populated communal areas have not been effective. The necessary measures are prohibitively expensive, cannot be staffed adequately, and are not aligned with the economic interests of those who live in the small villages surrounded by the wildlife. To address this dilemma, Namibia adopted unique and innovative legislation. The Nature Conservation Amendment Act of 1996 transferred responsibility for management of the wildlife in communal areas from the government to autonomous “conservancies” created and operated by local residents. Currently, about 60 such conservancies manage over 50,000 square miles of communal land.

This law provides for the formation of conservancies with specific geographic jurisdictions and grants to their members the exclusive right to manage wild animals within these areas. The government, with assistance from some nongovernmental organizations, provides the start-up training and technical support and monitors the ongoing operation of the conservancies. The members do the hard work and benefit directly from their efforts, as do their local communities. That is the key to the success of the conservancy program.

Managing wildlife is a full-time

job. Conservancy members often live among the wildlife in huts with dirt floors and open windows and doors. Strange faces during the day and unusual sounds at night do not go unnoticed. Members scare off poachers, construct new elephant watering holes, reimburse farmers for goats killed by cheetahs, and supply guard dogs to protect herds of domesticated animals. The result has been that fewer cheetahs are shot by farmers, most poaching has been eliminated, and there is much more big game than before the 1996 statute. Black rhino, cheetah, elephant, oryx, lion, springbok, zebra, and other wildlife populations in Namibia are increasing at record rates, all because of this innovative program.

Conservancies are designed to be financially self-sustaining so that they will not take scarce dollars needed for other government projects. Expenses incurred for their operations are paid with fees received from the operators of campsites, lodges, safaris, and tour companies that bring tourists to observe and photograph the wildlife. Fees paid by trophy hunters also fetch thousands of dollars per animal and provide additional revenue. Members continue to live on the communal land and hunt springbok and other animals to get meat for their families. The

periodic distribution of cash to members is often accompanied by a daylong celebration with dancing and a feast in the center of the village. Profits earned by conservancies are distributed not only to their members but also to pay for local projects that are important to them, such as equipment for schools, scholarships, HIV/AIDS prevention and treatment programs, support for orphans, soup kitchens for the elderly, and health-care facilities. Because of the direct correlation between hard work and benefits, members are motivated by an entrepreneurial sense of ownership and pride that would not otherwise exist. They also develop specialized business and technical skills that qualify them for future jobs unrelated to the conservancies. The wildlife conservancy program is successful because it is self-funding and aligns the economic self-interests of villagers with the long-term goals of the government to protect natural resources, provide jobs for the unemployed, manage wildlife, and promote tourism. This innovative approach to accomplishing these goals is possible in Namibia only because of its history and the existence of communal land.

In addition to private conservancies, the government continues to protect the environment through the

establishment of national parks. The coastline that is the western border of Namibia stretches from Angola to South Africa. Last year, in a bold step to protect the environment and promote eco-tourism, Namibia declared the entire coastline a national park. It also signed an international treaty with its neighbors—Angola, Botswana, Zambia, and Zimbabwe—linking a series of national parks to create the world's largest protected eco-tourism zone. This new international park is the size of Sweden and shares ecosystems connected by waterways, migrating herds of animals, and indigenous peoples with related socioeconomic heritages. It is another example of how Namibia has taken the lead on the continent to advance biodiversity, conservation, protection of the environment, and ecotourism.

### **Constitutions and Governments**

Although the form of government established by Namibia in its Constitution is similar to that of the United States in many respects, there are differences that affect the adoption and enforcement of its environmental laws.

The form of government established by the U.S. Constitution makes the adoption and enforcement of environmental laws more complicated than in Namibia. This is the result of the division of power between the federal and state governments, the absence of a clear constitutional mandate to protect the environment, the requirement that federal legislation be approved by both the U.S. House of Representatives and U.S. Senate, and the frequency of political rivalry between the president and Congress.

The U.S. Constitution establishes a federal structure in which the power to make and enforce laws is split between national and state governments. The federal government is granted an enumerated list of powers in the Constitution. All other powers are reserved to the states. Sometimes this results in conflicting laws that frustrate environmental goals.

Although the U.S. Constitution does not contain a specific mandate for protection of the environment, it does grant the federal government the



authority to regulate matters that affect interstate commerce. That right provides the constitutional basis for the federal government to adopt environmental protection laws. The states may adopt environmental laws that do not conflict with federal laws.

In the United States, the president and members of the House of Representatives and Senate are elected independently. As a result, Congress may be controlled by a political party different from that of the president. In addition, members of Congress are accountable to diverse regional constituencies. The staggered terms of members of Congress also increase the likelihood that control of Congress will not be the same as the political party of the president. The requirement that new laws pass both the House of Representatives and the Senate before going to the president for signature makes it more difficult for new legislation to be adopted. The federal form of government and the manner in which the president and members of Congress are elected and new laws adopted interject politics into the process and increase the amount of time, debate, and compromise that go into the adoption and enforcement of environmental laws. This makes the laws more complex.

Environmental laws in the United States evolved within the country over a period of 30 years without much international influence. By the time Namibia gained its independence in 1990, science had eliminated any doubt about the threat of environmental pollution to life on earth. Environmental law had evolved into a well-recognized body of law.

The form of government established by the Namibia Constitution enables the adoption and enforcement of environmental laws to be more streamlined than in the United States. This is the result of a centralization of power in the national government, the presence of a clear constitutional mandate to protect the environment, the provision that legislation need be approved only by the National Assembly, and the infrequency of political rivalry between the president and National Assembly.

The Namibian Constitution provides that all authority to make and enforce laws is held by the national government. The Regional Councils have no lawmaking authority. This avoids competition and conflicts between national and regional governments that adopt legislation addressing environmental problems.

The authority to adopt laws resides exclusively with the Namibia National Assembly. The Regional Councils for Namibia's 13 regions have certain executive powers within their respective territories but do not have the authority to adopt laws. Each Regional Council elects two of its members to the National Council, which is only an advisory body that comments on legislation proposed by the National Assembly. Accordingly, in Namibia there is less debate and complexity that occurs as a result of compromises based on political considerations unrelated to protection of the environment than in the United States.

Members of the National Assembly are elected in accordance with the "party-list system with proportional representation." Under this system, registered voters do not vote directly for individual candidates. Instead, they vote for a political party with a list of candidates. Seats in the National Assembly are then allocated in proportion to the votes received by each political party. The general elections for the Namibia president, National Assembly, and National Council occur at the same time. This decreases political competition between the legislative and executive branches of government. It also increases the likelihood that the National Assembly, the entity with all legislative authority, will be controlled by the same political party as the president. This makes the process for adoption of environmental legislation less political and more pragmatic.

### **Conclusion**

In the two decades since independence, Namibia has developed an impressive body of law to protect the environment and expand its already plentiful wildlife populations. This was accomplished through its Constitution, international treaties, legislation,

and common law. The structure of government in Namibia, as compared to that of the United States, facilitated the process. The foresight and innovative land use efforts of Namibia to protect the biodiversity of the species of exotic wildlife within its borders will benefit future generations, including the increasing number of tourists from around the world. ■