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GREEN HYDROGEN HYPE

INDUSTRIAL ACTIVITIES IN
NAMIBIA'S NATIONAL PARKS PART 2
Lack of Regulatory Oversight

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SUMMARY

Part 1 of this article examined the issues surrounding the triple planetary crisis of climate change, biodiversity loss and pollution, and why this crisis is considered to be the biggest threat to human rights globally. The question of whether industrial activities should be permitted in national parks which harbour ecosystems that contribute to climate regulation, nutrient cycling and carbon sequestration was also explored. As pointed out in Part 1, the envisaged industrial activities in biodiversity hotspots such as the Tsau ||Khaeb National Park (TKNP) come with the risks of displacement of local people, environmentally unsound development of infrastructure for heavy vehicles, pollution of both the land and sea, damage to pristine environments and ecosystems, migration of labourers into the pristine areas, and development of ports which pose greater threats for the country. The hydrogen-production projects in Namibia, including the Hyphen project in the TKNP, are currently regulated only by Memorandums of Understanding – a form of contract that is usually not legally binding as it is merely a precursor to a formal binding contractual arrangement. No specific and adequate policy or legal framework is in place to regulate the implementation, control, evaluation and monitoring of green hydrogen production in Namibia. This part of the article focuses on the non-compliance with existing legal frameworks and the general lack of a legal framework regulating this sector. The lack of community consultations, and the legal validity of the recently established Green Hydrogen Council, are also discussed.

1. EXISTING POLICY AND LEGISLATION IN NAMIBIA OF RELEVANCE TO THE ISSUES SURROUNDING GREEN HYDROGEN PRODUCTION

1.1 Namibian Constitution

Article 1(6) recognises that the Constitution is the supreme law of Namibia. Thus, all laws as well as the Executive and other organs of the State are subject to the Constitution.

Article 100 of the Constitution provides that –

[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

This means that the State is the *custodian* of all natural resources, land areas and bodies of water that are not privately owned. The High Court of Namibia has stated that natural resources are “... *simply administered by the State on behalf of the Namibian people*,” as the natural resources “*belong to the people*.”¹ Hence resources such as oil, minerals and gas which are not privately owned “belong to the people” and are merely administered by the State.

¹ *Rostock CC and Another v Van Biljon* (844 of 2010) [2011] NAHC 259 (14 June 2011) (<https://namiblii.org/akn/na/judgment/nahc/2011/259/eng@2011-06-14>).

Article 100 cannot be read in isolation. Article 95 of the Constitution obligates the State to –

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

(l) 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 all Namibians, both present and future;

This means that policies and other measures must be geared towards ensuring that the living natural resources, natural ecosystems and biological diversity are protected and preserved on a sustainable basis for future generations to enjoy, in the same condition as they are currently, or in an even better condition. This would apply to the ecologically sensitive and unique landscape along the coastline.

The right to a clean and safe environment² is underpinned by the right to life bestowed by Article 6 of the Constitution, since human life depends on the state of the environment, including water, air, natural resources, plant and animal life. Environmental degradation is a threat to people's livelihoods and survival. It can therefore be said that the right to life underpins all of the legislation in Namibia that deals with protection of the environment.

Article 19 provides that –

[e]very person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Participation in cultural life cannot be fully realised unless indigenous people such as the Nama in the TKNP have access to land and natural resources. Without these, this right is meaningless. Production of hydrogen in Namibia serves the national interests of this particular developing country without consideration being given to the fact that the envisaged industrial plants will be located in biodiversity hotspots, such as the Hyphen plant in the TKNP.

Article 144 states that –

[u]nless 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.

This has been interpreted to mean that international law needs no legislative act to become law.³ International agreements, conventions or treaties become law once they enter into force in Namibia.

² As per UNGA, "The human right to a clean, healthy and sustainable environment", A/RES/76/300 (28 July 2022).

³ G. Erasmus, "The Namibian Constitution and the Application of international Law in Namibia", in D. van Wyk et al (eds), *Namibia – Constitutional and International Law Issues*, VerLoren van Theimaat Centre for Public Law Studies, Pretoria, 1991, p. 94.

1.2 Convention on Biodiversity

Namibia signed the Convention on Biological Diversity (CBD)⁴ in Rio de Janeiro on 12 June 1992, and ratified it on 18 March 1997. Accordingly, Namibia is obliged to ensure that its domestic legislation conforms with the objectives and obligations of the CBD. The CBD's "Preamble" affirms that biodiversity is humanity's common concern and that it has to be conserved for continued human survival. Rather than laying down substantive rules, the CBD sets up overall principles, objectives and goals, and leaves it up to the Parties to the Convention to develop and adopt detailed means to achieve these. The CBD also provides guidelines and directions for using the applicable resources in a conservative manner for the benefit of present and future generations.

The CBD provides that States have and should maintain their sovereign rights over their biological or genetic resources, and that they have the power to determine access to those resources through established mechanisms for fair and equitable sharing of benefits arising from their use. Article 8(j) of the CBD provides that States are obliged, subject to their national legislation, to respect 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 of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of benefits arising from the utilisation thereof.

Namibia has given effect to the CBD by, among other things, implementing the National Biodiversity Strategy and Action Plan (NBSAP), the aim of which is to protect ecosystems, biological diversity and ecological processes through conservation and sustainable use, thereby supporting livelihoods, self-reliance and the quality of life of Namibians.⁵ The Hyphen project in the TKNP directly violates Namibia's obligations under the CBD, and totally disregards the NBSAP.

1.3 Namibia's Policy on Climate Change

The National Policy on Climate Change for Namibia (2011) addresses specific issues pertaining to climate change in the Namibian context, such as sustainable access to water, fisheries and marine resources, and sustainable energy and low-carbon development. The policy was launched in 2011. Regarding water availability, the policy notes that climate change impacts are expected to affect the availability of water in Namibia through increased variability of rainfall, temperature increases, prolonged and more severe droughts, and increased evapo-transpiration. Regarding sustainable energy and low-carbon development, the policy refers to the "*looming energy crisis*" in southern Africa, and the need to adapt energy production "*toward long-term energy security through the use of renewable and energy efficient production technologies and decrease[d] dependence on non-renewable, volatile and environmentally unsound resources*".

The international cooperation, collaboration and networking envisaged in the policy are aimed at tapping into information, data, expertise, financial and other resources to benefit Namibia's efforts to address climate change. The policy recognises, as a guiding principle, the importance of the

⁴ Known informally as the "Convention on Biodiversity" or "Biodiversity Convention".

⁵ For a more detailed discussion, see Oliver Ruppel and Katharina Ruppel-Schlichting (eds), *Environmental Law and Policy in Namibia: Towards Making Africa the Tree of Life* (Third Edition), Hanns Seidel Foundation, 2016, p. 52.

participation of women, children and other vulnerable or marginalised groups and individuals, and the use of appropriate local knowledge for adaptation. The policy strongly advocates not only for sustainable and equitable use of natural resources as catered for in existing policy, legal and development instruments, but also for a human-rights approach to climate change. It also recognises the need for private-public partnerships for the development and transfer of technology for climate change adaptation and mitigation. The policy does not specifically address hydrogen production. As will become apparent in this article, the approach adopted by Namibia disregards key guiding principles of the policy, particularly that of consulting with affected communities, including marginalised indigenous people such as the Nama in the TKNP.

1.4 National Policy on Coastal Management

The National Policy on Coastal Management adopted in 2012 notes that there is no adequate legislation that deals directly with the comprehensive governance of the marine environment and coastal environment. Coastal management involves the protection and development of coastal natural ecosystems and resources. The policy further notes that the Sea-Shore Ordinance 37 of 1958 is significantly outmoded for the purposes of coastal governance. Furthermore, the policy notes that the existing legal framework has significant gaps with regard to adopting an integrated approach to the management of the coastal environment. The main economic activities in coastal areas include fishing, mining, tourism, transport, real estate, industry and manufacturing. Legal frameworks for the regulation of these sectors exists.

1.5 Nature Conservation Ordinance 4 of 1975

The Nature Conservation Ordinance 4 of 1975 (“the Ordinance”) is a major biodiversity law and governs the conservation of protected areas. It appears that section 17(2)(k) of the Ordinance is being advanced as authorising the Minister to approve the construction of hydrogen infrastructure within the national parks,⁶ by providing that the Minister may establish a renewable electricity source for the purposes of managing game parks, nature reserves and other protected areas, or protecting the environment or combating climate change. The term “renewable energy source” is not defined in the Ordinance, but is generally understood to include renewable sources such as solar or wind power. It is submitted that an interpretation that “renewable energy sources” at an industrial scale such as the Hyphen project in the TKNP is permitted, is misplaced. Section 17(2)(k) should not be read in isolation. Even though the Minister, in terms of section 18(1)(a) read with section 19(c), may grant persons permission to reside in or enter a national park for purposes of conducting “lawful business”, it is submitted that the type of commercial activities envisaged by the Legislature relates to those types of businesses that would not defeat the purpose and objects of national parks as set out in section 14 of the Ordinance, nor violate the right to life. Section 14 specifically states that the Minister may, in the *Government Gazette*, declare an area as a national park for –

the propagation, protection, study and preservation therein of the wild animal life, fisheries, wild plant life and objects of geological, ethnological, archaeological, historical and other scientific interest and for the benefit and enjoyment of the inhabitants of Namibia and other persons.

⁶ Namibian Broadcasting Corporation (NBC), *Good Morning Namibia*, interview with the Commissioner of the Green Hydrogen Council at the commencement of the Global African Hydrogen Summit 2024, Windhoek, 4 September 2024.

The words “... *for the benefit and enjoyment of the inhabitants of Namibia and other persons*” suggests that the Legislature envisaged primarily tourism-related commercial activities or commercial activities that, unlike industrial activities, would have a minimal impact on the environment.⁷ With the introduction of conservancies in Namibia in the late 1990s, amendments were made to the Ordinance and its regulations which came into effect in 1996. The amendments were made to take into account the establishment of conservancies and Wildlife Councils. Wildlife conservancies are important because they allow for the communities to have custodianship of the natural resources in the areas that they inhabit, particularly wildlife and fish.

Community-based natural resource management (CBNRM)⁸ projects both within and outside the conservancies give the communities the opportunity to administer and manage their own natural resources to benefit the community members. This provides not only for sustainable employment in the tourism and agriculture sectors, but also for sustainable resource management, which in turn enables the communities to provide for their own basic needs and to maintain their livelihoods as they continue practising their cultures⁹ and traditions. The CBNRM projects and the various national parks have been gazetted and are managed according to individual management plans that are designed specifically to protect the particular environment and its unique ecosystems while benefiting the people who depend on that environment, as well as the tourism industry.¹⁰

National parks, conservancies and forest management committees are guided by their management plans. These plans, although not law, set out the objectives and guidelines for the management and development of these parks, and represent the policies and intentions of the Ministry of Environment, Forestry and Tourism (MEFT) as well as conservancies and forest management committees apropos how to manage the land conferred to them legally and sustainably for their benefit and the benefit of those to come after them. According to the current Minister of Environment, Forestry and Tourism, Hon. Pohamba Shifeta, “*Management Plans for Protected Areas is viewed as the guiding light for proper management.*”¹¹ Therefore, any development plans for these areas should not only conform to the objectives of specific management plans, but should also enhance the latter. They cannot be ignored or bypassed. Doing so undermines the authority of community bodies put in place and also infringes their right to be included in any decision-making processes relating to the areas that they are mandated to manage. The TKNP Management Plan *specifically condemns industrial activities in parts of the park*. About 43.3% of Namibia’s population still live in multidimensional poverty.¹² If the

⁷ For a detailed discussion on how the environment in the TKNP could be impacted, see *When Green Hydrogen Turns Red – Threatening a global biodiversity hotspot*, Namibian Chamber of Environment Position Paper, May 2024 (<https://n-c-e.org/wp-content/uploads/Green-hydrogen-Tsau-Khaeb-National-Park-NCE-Position-Paper.pdf>).

⁸ Brianne Riehl, Hisham Zerriffi and Robin Naidoo, “Effects of Community-Based Natural Resource Management on Household Welfare in Namibia”, *PLOS ONE*, 12 May 2015 (<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0125531>).

⁹ Traditional authorities are recognised under the Traditional Authorities Act, 2000 (Act No. 25 of 2000). Traditional leaders who are not recognised as such are easily excluded from public consultation processes. Instead of addressing this gap in the current legal framework, the gap is being exploited to ensure that communities are not properly informed of activities affecting the natural resources on which they depend.

¹⁰ Ministry of Environment and Tourism, *National Policy on Community Based Natural Resource Management*, March 2013 (https://meft.gov.na/files/files/CBNRM_20Policy%20Approved.pdf).

¹¹ Minister of Environment, Forestry and Tourism, “Foreword” of the *Management Plan for Tsau //Khaeb (Sperrgebiet) National Park 2020/2021-2029/2030*, 2020 ([https://www.meft.gov.na/files/downloads/bfd_Management%20Plan%202%20-%20Tsau%20Khaeb%20\(Sperrgebiet\)%20National%20Park.pdf](https://www.meft.gov.na/files/downloads/bfd_Management%20Plan%202%20-%20Tsau%20Khaeb%20(Sperrgebiet)%20National%20Park.pdf)).

¹² Namibia Statistics Agency, *Namibia Multidimensional Poverty Index (MPI) Report 2021* (accessed at [https://www.unicef.org/namibia/media/1616/file/Namibia%20Multidimensional%20Poverty%20Index%20\(MPI\)%20Report%202021.pdf](https://www.unicef.org/namibia/media/1616/file/Namibia%20Multidimensional%20Poverty%20Index%20(MPI)%20Report%202021.pdf)).

resources that they rely on for their livelihoods are compromised by economically driven projects which are not in line with the Ordinance, this impacts on local communities' mode of self-sufficiency.

1.6 Environmental Management Act, 2007 (Act No. 7 of 2007)

The Environmental Management Act, 2007 (“the EMA”), which does not specifically provide for hydrogen production, seeks to give effect to Article 95(1) of the Namibian Constitution and establishes general principles for the management of the environment and natural resources. It intends to give statutory effect to Namibia’s Environmental Assessment Policy and enables the Minister to give effect to Namibia’s obligations under international environmental conventions. Environmental impact assessments and consultations with communities are provided for, but are seldom enforced.¹³

Although the EMA does not specifically address hydrogen production, government institutions and private persons are obligated to take account of the principles set out in the Act when undertaking an activity that will have a significant impact on the environment, such as the Hyphen project in the TKNP. The principles of environmental management are set out in section 3(2) of the Act. The most notable of these, for the purposes of this discussion, is that “*renewable resources must be used on a sustainable basis for the benefit of present and future generations*”.

The EMA requires both cultural and natural heritage to be protected and respected for the benefit of present and future generations. The administrative mechanisms, such as environmental clearance certificates and environmental assessments, are intended to ensure that the impact of activities on the environment are considered, with interested and affected parties being given an opportunity to participate in the environmental assessment when government institutions or private parties are carrying out projects such as the hydrogen production projects. All activities that require a clearance certificate must follow the regulations pertaining to environmental impact assessment.

Legislative weaknesses include “*a lack of requirements for impact monitoring and strategy on enforcement, lack of personnel including environmental inspectors and environmental officers and lack of requirements for strategic assessment.*”¹⁴ In addition, fines and penalties are diminutive and therefore not an effective deterrent, and there are no sector guidelines on activities that require an environmental impact assessment. Since so many hydrogen projects will be undertaken in Namibia, guidelines should be available so that projects are not undertaken differently. Another weakness of the Act is the inconsistent use of terms and concepts. Terms such as “public participation” and “public consultation” are used interchangeably and are not clearly defined.¹⁵

Moreover, the EMA does not address specific issues relating to the appointment of environmental officers and processes, assessments and control of activities that may affect the environment. Frequently environmental officers are contracted by the project proponent.¹⁶ The EMA regulations

¹³ Dietlinde N. Nakwaya-Jacobus et al., “Evaluating the performance and procedural effectiveness of Namibia’s Environmental Impact Assessment system”, *Environmental Impact Assessment Review* 91, 2021.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Environmental Management Act 7 of 2007 (<https://www.lac.org.na/laws/annoSTAT/Environmental%20Management%20Act%207%20of%202007.pdf>); Namibia’s Environmental Assessment Policy for Sustainable Development and Environmental Conservation (January 1995), (https://meft.gov.na/files/downloads/05c_Environmental%20Assessment%20policy.pdf).

provide the framework for environmental management, which includes the duties and general requirements for environmental assessment practitioners (EAPs) and proponents of projects.¹⁷ However, the specific framework is not very detailed. This situation can compromise the objectivity of monitoring and evaluation if the officers are directly benefiting from the activities that they are supposed to regulate. It is important to have clear guidelines and safeguards in place to prevent such conflicts of interest and ensure that environmental assessments are conducted impartially and effectively. The EMA and its regulations are currently being reviewed for possible amendment.

1.7 Urban and Regional Planning Act, 2018 (Act No. 5 of 2018)

The Urban and Regional Planning Act, 2018 provides a legal framework for spatial planning in the country. It covers principles and standards of spatial planning, establishment of planning boards, preparation of national spatial development frameworks, regional and urban structure plans, zoning schemes and more. It does not specifically mention “strategic location assessments”, but it emphasises responsible land management and development, which would ideally involve thorough assessments before making decisions about project locations.

Since 2019 when Namibia came to know about the opportunity for production of green hydrogen, it was always communicated that such a project would be developed in the TKNP. The whole of Namibia has significant potential for green hydrogen production, but for its water shortage, so why, one may ask, would the TKNP, Daures Constituency¹⁸ and Walvis Bay¹⁹ be the locations pinpointed? In all three locations the production plants will significantly impact the environment as well as community access to water and natural resources. Were there any prior assessments considered to determine alternative sites for these ambitious projects, such as sites already cleared for other purposes but abandoned, or for which the prospects of success have become murky?

For instance, the country’s largest dam, the Neckartal Dam in ||Kharas Region, a very bold initiative undertaken to provide the vast south with access to water, could be a conducive site for a green hydrogen project, due to the availability of a large water basin with a capacity of 857 cubic metres spanning an area of approximately 40 square kilometres.²⁰ The Neckartal also has infrastructure such as turbines and a pumping station, which could potentially support the energy needs of a hydrogen-production project.²¹ Additionally, the Government’s budget allocation for development projects in ||Kharas Region indicates support for sustainable and renewable energy initiatives.²² The dam area is ecologically less sensitive than the TKNP, because most of the clearing and damage to develop the area has been done.

¹⁷ Environmental Impact Assessment Regulations (<https://www.lac.org.na/laws/annoREG/Environmental%20Management%20Act%207%20of%202007-Regulations%202012-030.pdf>).

¹⁸ The Daures Green Hydrogen Village project (<https://daures.green/>) is considering using water from the Ugab River, which is a vital source for wildlife in the Namib Desert (see <https://www.namibian.com.na/daures-hydrogen-project-faces-water-supply-headache/>).

¹⁹ Some of the commercial farmers have raised their concerns relating to sandstorms and the effects these may have on aluminium solar panels, the historical artefacts and their livelihood.

²⁰ Webuild Worldwide, “Neckartal Dam”, 2023 (<https://www.webuildgroup.com/en/projects/dams-hydroelectric-plants/neckartal-dam/>).

²¹ Knight Piésold Consulting, “The design and construction of Neckartal Dam” (<https://www.knightpiesold.com/sites/en/assets/File/AFRICA%202017%20-%20The%20Design%20and%20Construction%20of%20Neckartal%20Dam.pdf>).

²² Namibian Broadcasting Corporation (NBC), “The 2023/24 budget has allocated 10 million to green schemes projects”, 2023 (<https://nbcnews.na/node/99925>).

Proper site evaluation is crucial for sustainable development, especially in ecologically sensitive areas like the national parks that have been set aside specifically for their ecological importance. Without a comprehensive assessment, potential negative impacts on biodiversity, ecosystems and local communities may not be adequately considered. It is essential that such assessments are conducted transparently and independently to ensure responsible decision-making prior to the decisions actually being made.

Namibian environmental law supports the need to take proactive measures to prevent environmental degradation, especially in cases where scientific certainty has not yet been attained. It is a tool for making better health and environmental decisions by aiming to prevent harm from the outset. This “precautionary principle” is widely applied in environmental protection and management in the country to safeguard natural resources for present and future generations.²³ This principle encompasses three sub-principles:

- **Anticipatory action:** Rather than waiting for conclusive evidence of harm, the precautionary principle encourages acting proactively to prevent negative impacts.
- **Scientific uncertainty:** When scientific knowledge is incomplete or uncertain, decisions should prioritise environmental protection.
- **Burden of proof:** It lies with those proposing an activity (e.g. Hyphen) to demonstrate its safety, rather than expecting opponents to prove harm.

In summary, the precautionary principle requires thorough assessments of environmental, social and economic impacts before proceeding. If there is any uncertainty about the project’s effects on biodiversity, ecosystems or local communities, caution should prevail. The principle calls for transparent, independent evaluations to ensure responsible decision-making and to minimise irreversible harm.²⁴

Strategic location assessments are essential for evaluating impacts on the environment, biodiversity and community wellbeing before establishing projects in sensitive areas. Transparency and adherence to legal frameworks are crucial to responsible development. Had proper site inspections and assessments been conducted, Namibia, with its many vast empty spaces, sufficient sunlight and reliable winds, could definitely have offered sites other than national parks for the hydrogen mass-production projects. These options should have been explored before any authorisation was given for clearing areas specifically identified as parks for ecological reasons.

1.8 Local Authorities Act, 1999 (Act No. 23 of 1999) and Regional Councils Act, 1992 (Act No. 22 of 1992)

Probably the most significant omission from the ambitious dream to mass-produce hydrogen in Namibia is local-community engagement. This represents a significant oversight by developing countries that undermines democratic principles and respect for local populations, especially in areas where a local community’s access to natural resources and land will be negatively affected.

²³ Legal Assistance Centre, “Namibia’s environmental laws” (https://www.lac.org.na/news/probono/ProBono_42-ENVIRONMENTAL_LAWS.pdf); Environmental Information Service (EIS) Namibia, “precautionary principle” (<http://the-eis.com/elibrary/index.php/taxonomy/term/106623>).

²⁴ SLR Consulting Limited, “Hyphen - Green Hydrogen Production and Supply Project in the Tsau//Khaeb National Park”, 2024 (<https://www.slrconsulting.com/public-documents/hyphen-project/>).

Both the Local Authorities Act and the Regional Councils Act encourage community participation in the development-planning and service-delivery system. Namibia adopted the relevant state policies with the overall aim of ensuring economic, cultural and socio-economic development, which includes giving people at grassroots level the opportunity to participate in making decisions about their own development, thereby extending democracy to them as a right based on national ideas and values. The Judiciary also recognises that communal land must be respected and given the same consideration as that given to private land in relation to local town developments.²⁵

Failure to involve communities in decision-making processes denies them the opportunity to voice their concerns and preferences as regards potential impacts on their lives and environment. This omission disregards the fundamental right of citizens to participate in decision-making about issues that affect them directly, which leads to a sense of disenfranchisement and disempowerment among the communities affected. By neglecting to engage with the people of Namibia prior to making decisions that are cast in stone, the hydrogen-production projects have risked alienating and marginalising those who will bear the brunt of the consequences, as well as eroding their trust in the democratic process and fostering resentment towards the initiatives.

Meaningful community engagement is essential for fostering transparency, accountability and social acceptance, and its absence in this context not only violates democratic norms but also undermines ethical and sustainable development of projects in Namibia. Meaningful engagement extends beyond merely requesting interaction with the public during the process of applying for an environmental clearance certificate under the EMA; it requires public and local community engagement and contribution from the outset. Early consultation allows for better understanding of community needs, concerns and aspirations related to any project. It also allows for inclusion in the decision-making process, and for transparency that brings about trust and empowers the communities to make informed decisions.

Community engagement plays a crucial role in the context of industrial projects, because these can have an impact on the community members' right to life. Additionally, community engagement has to be understood against the backdrop of historical colonial practices that violated the rights of local people, particularly practices that denied them access to land and natural resources.

Some of the benefits derived from respecting democracy and upholding the practice of community engagement are as follows:

- Community conservancies established adjacent to national parks and in corridors between the parks contribute to enhancing the viability of the protected-area network, and allow for conservation efforts at a landscape scale, not only within Namibia but also in neighbouring countries.²⁶
- Community-based activities in wildlife conservancies positively impact household welfare.
- Conservancies provide benefits such as training in management, income-generating projects and tourism enterprises.

²⁵ *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others* (SA 15 of 2017) [2018] NASC 409 (16 November 2018) (<https://namiblii.org/akn/na/judgment/nasc/2018/409/eng@2018-11-16>).

²⁶ Community Conservation Fund of Namibia, "Positive impacts of CBNRM in Namibia", 2024 (<https://www.ccf-namibia.org/impacts-of-cbnrm-in-namibia/>).

- The impact of community engagement is poverty-neutral in some regions and pro-poor in others, therefore it benefits both participant and non-participant households.²⁷
- Community engagement ensures that local communities have a stake in conservation efforts.
- Community engagement fosters sustainable development, enhances livelihoods and promotes responsible resource management.
- Engaging communities in decision-making about industrial projects helps to balance economic development with environmental protection.

In summary, community engagement ensures that local communities benefit while preserving the natural environment.²⁸ The observed lack of community engagement in respect of the green hydrogen projects in Namibia is a violation of democratic principles and a disregard for the rights of the local populations.

1.9 Access to Information Act, 2022 (Act No. 8 of 2022)

The Access to Information Act, 2022, although passed by Parliament, is not yet in operation. It was moulded to promote the right of access to information held by both public and private entities in a manner that facilitates transparency, accountability and good governance.²⁹ It provides the legal framework for the right to access information held by public bodies, such as the relevant ministers and parastatals. This Act is arguably premised on the right to freedom of expression enshrined in Article 21 of the Namibian Constitution.³⁰ In terms of section 64 of the Act, an information officer is obligated to grant access to requested information if the disclosure thereof would reveal evidence of corrupt activities or any serious contravention of law, or an imminent and serious public health and safety risk, or an imminent and serious environmental risk. The disclosure of information in such an instance is subject to the fact that the interest of the public associated therewith, undeniably outweighs the resulting harm to the interest protected under the relevant exemption, should the disclosure of the information be granted.³¹

The Green Hydrogen Project has been shrouded in secrecy since the plans were first disclosed in 2021 and the Office of the President successfully ignored correspondence from civil society requesting answers on, *inter alia*, the lack of transparency that surrounds the various international agreements

²⁷ Sushenjit Bandyopadhyay et al., “Benefits to local communities from community conservancies in Namibia: an assessment”, *Development Southern Africa*, 26(5), 2009: 733-754 (<https://www.npc.gov.na/wp-content/uploads/2021/04/BENEFITS-TO-LOCAL-COMMUNITIES-FROM-COMMUNITY-CONSERVANCIES-IN-NAMIBIA-AN-ASSESSMENT.pdf>).

²⁸ Ministry of Environment and Tourism (MET) and Namibian Association of CBNRM Support Organisations (NACSO), *The State of Community Conservation in Namibia (Annual Report 2018)*, 2020 ([https://www.nacso.org.na/sites/default/files/State of Community Conservation book 2018 web.pdf](https://www.nacso.org.na/sites/default/files/State%20of%20Community%20Conservation%20book%202018%20web.pdf)).

²⁹ Christian Schumacher, “Namibia: The right of access to information vs the right to privacy – Considering the impending promulgation of the Access to Information Act”, *Bowmans*, Nairobi, 2023 (<https://bowmanslaw.com/insights/the-right-of-access-to-information-vs-the-right-to-privacy-considering-the-impending-promulgation-of-the-access-to-information-act-in-namibia/>).

³⁰ Ibid.

³¹ Ibid.:

An information officer is precluded from granting access to information that would:

- involve the disclosure of personal information about a natural third party, including a deceased individual;
- constitute a breach of duty of confidence owed to a third party in terms of an agreement; and/or
- contain information that was supplied in confidence by a third party, the disclosure of which could reasonably be expected to prejudice the future supply of similar information or any information from the same source, and it is in the public interest that similar information or information from the same source should continue to be supplied.

and the plans to produce hydrogen along Namibia's coast for export.³² The message that “[c]ivil society should resist the temptation of becoming unelected politicians”³³ was understood clearly as an indirect threat to all who stand in the way of ‘development’.³⁴

The Government's lack of transparency should be cause for serious concern for investors interested in investing in Namibia's green hydrogen projects, but more importantly for Namibian citizens. Transparency is important for building trust between citizens and their government. It helps to ensure that citizens have access to accurate and timely information about their government's policies, regulations and decision-making processes. This information is crucial for citizens to make informed decisions about their lives, and to hold their government accountable for its actions.³⁵

A lack of transparency on the part of government offices can lead to a general lack of trust in the government and its institutions, which in turn can result in citizens feeling disconnected from their government and being less likely to participate in the democratic process. It can also lead to corruption, since officials who know that their actions are not being scrutinised by the public may be more likely to engage in unethical behaviour.³⁶ Be that as it may, even if scrutiny is possible, the absence of rigorous legislation empowers bodies to act ‘in ignorance’ against the rights of communities. Corruption diverts resources away from the delivery of services to locals, as happened in the notorious Fishrot case referred to in Part 1 of this article.

Overall, a lack of transparency in government offices can have serious consequences for citizens in Namibia. It is a human rights violation if government is not transparent and cannot be held accountable by their citizens. Citizens should be able to participate fully in making decisions about matters that could or would affect their access to resources on which they rely for their survival. There should be no threat when their concerns are articulated; instead there should be a sincere attempt to avoid creating gaps and leaving the communities hanging for responses.

2. POLICY AND LEGAL FRAMEWORK LACKING

Namibia's Climate Change Policy makes provision not only for existing policies to be reviewed but also for new policies to be developed. On projects of this nature, a policy framework would usually precede the promulgation of a legal framework. The public policy-making process in most instances involves extensive research as well as consultation with stakeholders or even the general public regarding alternatives before the executive decides to go forward with legislation. Policies,

³² Timo Shihepo, “Govt secretive on new green hydrogen-linked projects”, *The Namibian*, 16 August 2023 (<https://www.namibian.com.na/govt-secretive-on-new-green-hydrogen-linked-projects>); see also Donald Matthys, “Civil society demands disclosure amid green hydrogen ‘secrecy’”, *The Namibian*, 6 October 2023 (<https://www.namibian.com.na/civil-society-demands-disclosure-amid-green-hydrogen-secrecy>); and the above-mentioned letter to the President, dated 27 November 2023 (available at <https://drive.google.com/file/d/1crrEFDIwQ3aV17sD8JcEhcOAJaS-1C7k/view?pli=1>).

³³ Staff reporter, “Hengari: ‘Resist temptation of becoming unelected politicians’”, *New Era*, 11 October 2023 (<https://neweralive.na/hengari-resist-temptation-of-becoming-unelected-politicians>).

³⁴ See, for example, the press release issued by the Legal Assistance Centre on 31 May 2023, available at https://www.civic264.org.na/images/pdf/2023/6/Press_Release_31_May_2023-green_hydrogen_development.pdf.

³⁵ SpringerLink, “Corruption, lack of Transparency and the Misuse of Public Funds in Times of Crisis: An introduction”, 17 August 2022 (<https://link.springer.com/article/10.1007/s11115-022-00651-8>).

³⁶ *The Namibian*, 6 October 2023, op. cit.

although not law, are important instruments that not only guide not only public officials in their day-to-day functions but also influence the content of legislation.

The urgency with which strategies for mitigating climate change have to be adopted does not relieve states from the duty to adopt regulatory frameworks for green hydrogen production. Crafting an effective regulatory framework is crucial to ensure compatibility with international standards and to promote sustainable development. A legal framework is also necessary to balance the existing conservation efforts of the natural ecosystems of Namibia, and to ensure that the rights of indigenous peoples are recognised for a sustainable future. The issue of access to land and natural resources is crucial for the protection of the local communities of Namibia.

This lack of legal oversight undermines the principles of democracy by allowing powerful interests to operate with impunity, disregarding the rights and concerns of the public. Citizens are left vulnerable to the negative impacts of uncontrolled industrial development, such as pollution, resource depletion and displacement of local people. It is essential for lawmakers to prioritise the implementation of robust regulations to protect both democracy and the welfare of the people whom they serve.

Since there is currently no legal framework governing the appointment of the Green Hydrogen Council (discussed more fully in section 3 on the next page), it follows that the tasks of the Council are in fact unregulated and so are the project objectives. It is trite to say that policies are easily undermined in the Namibian context, and without a rigid legal framework sufficiently detailed by its regulations, decisions may change quickly and without warning.

The Petroleum Products and Energy Act 13 of 1990 as amended, and the Minerals (Prospecting and Mining) Act 33 of 1992, do not suffice to govern the production of hydrogen in Namibia.³⁷ The Petroleum Products and Energy Act as amended governs the discovery, extraction and processing of hydrocarbons (i.e. the traditional hydrocarbon exploration and production which include oil and gas), but does not specifically address green hydrogen production or its regulatory requirements. Also, the Environmental Management Act 7 of 2007, which aims to consider and assess the environmental effects of various activities including offshore drilling, provides for a foundation for sustainable development but does not explicitly focus on green hydrogen production. Existing legislation therefore does not cover the unique aspects of green hydrogen technology and its effects on an already vulnerable climate-risk country such as Namibia. This country requires targeted regulations that address safety, environmental impacts and economic incentives for producing green hydrogen. While the existing legal framework provides a foundation, Namibia now needs specific regulations tailored to producing, storing and transporting green hydrogen, to promote this industry's development in Namibia³⁸ in an environmentally safe manner.

³⁷ Newsbase, "AfrElec: Namibia investigates legal framework to regulate fledgling green hydrogen industry", 16 January 2022 (<https://newsbase.com/story/afrelec-namibia-investigates-legal-framework-to-regulate-fledgling-green-hydrogen-industry-231820>); see also Oliver Ruppel and Magano Sophia Katoole, *Promoting Sustainable development through renewable energy: A regulatory framework for green hydrogen production in Namibia*, Hanns Seidel Foundation, Windhoek, 2023, p.33.

³⁸ Environmental Management Act 7 of 2007 (<https://www.lac.org.na/laws/annoSTAT/Environmental%20Management%20Act%207%20of%202007.pdf>); and Corinna van Wyk and Caroline Walka, *Namibia's Legal Provisions Regarding Offshore Oil Drilling*, Legal Assistance Centre, 2023 (https://www.lac.org.na/projects/lead/Pdf/Offshore_Oil_Drilling_Namibia_Legal_Provisions_2023.pdf)

3. ARE THE APPOINTMENTS OF A GREEN HYDROGEN COUNCIL AND GREEN HYDROGEN COMMISSIONER LAWFUL?

By appointing a Green Hydrogen Council and Green Hydrogen Commissioner,³⁹ the President may have acted *ultra vires* his mandate as Head of State, because these appointments were allegedly concluded without input from the Cabinet as required by Article 31 of the Constitution.

The *ultra vires* doctrine, which is a subset of the principle of legality, is central to the determination of the lawfulness of the exercise of any public power.⁴⁰ This demands, of every exercise of public power, a consistent compliance with the bounds set for the exercise of that power as provided for by the applicable law and the Constitution. The Namibian Judiciary has described the doctrine as follows:⁴¹

The ultra vires doctrine in simple terms means that a functionary has acted outside his or her powers and as a result the function performed becomes invalid. The rule forms part of the principle of legality, which is an integral component of the rule of law. The South African Constitutional Court in the matter of Affordable Medicines⁴² affirmed the principle in these terms:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.’”

Generally, and in line with the rule of law,⁴³ the appointment of a commissioner in Namibia is regulated by various statutes depending on the type of commissioner and the line ministry that the commissioner serves. For instance, the appointment of a commissioner of police is regulated by the Police Act 19 of 1990. The commissioners relevant to green hydrogen are the Environmental Commissioner and the Commissioner for Petroleum Affairs, who are appointed by the relevant line ministers in accordance with the Environmental Management Act 7 of 2007 (Part V, section 16) and the Petroleum (Exploration and Production) Act 2 of 1991 (Part II, section 3(1)) respectively. The relevant ministries have already filled these vacancies and cannot appoint subsequent commissioners under the same Acts.

³⁹ Jemima Beukes “James Mnyupe: Namibia’s green hydrogen midwife”, *Namibian Sun*, 11 August 2023.

⁴⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

⁴¹ *Namibian Employers’ Federation and Others v President of Republic of Namibia and Others* [2020] NAHCMD 248 (23 July 2020).

⁴² *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49.

⁴³ “Laws are a system of rules that everyone in a country or society recognises as regulating the actions of its members and which can be enforced by the imposition of penalties. The purpose of laws is to maintain peace and order within a country. The Constitution of the Republic of Namibia is the supreme law in the country. No Namibian law may contradict the Namibian Constitution.” – Excerpt from Parliament of the Republic of Namibia, “How is a Law Made” (<https://www.parliament.na/how-is-a-law-made/>).

While the appointment of the then President's economic advisor in September 2020 may have been a legitimate one regulated by the Special Advisors and Regional Governors Appointment Act 6 of 1990,⁴⁴ the appointment of the same person as Green Hydrogen Commissioner may not have been entirely in accordance with the current legal procedures in Namibia. In the absence of a legal framework specific to green hydrogen, the then President, personally and without prior input from the Cabinet,⁴⁵ appointed his economic advisor as Green Hydrogen Commissioner, to be directly overseen and controlled by the Office of the President. The Commissioner then led the appointment of the seven executives who constitute the Green Hydrogen Council, which is tasked to oversee the planning, procurement and management of upcoming green hydrogen projects situated on state-owned land.⁴⁶

Although the Namibian Constitution mandates the President to “*constitute any office in the public service of Namibia not otherwise provided for by any law*”,⁴⁷ the appointment of any person(s) to such office may happen only in consultation with the Cabinet and on the recommendation of the Public Service Commission.⁴⁸ Due to the lack of transparency regarding the appointment of the Green Hydrogen Commissioner and setting up of the Council, it is not known whether the Public Service Commission recommended the creation of a public office and appointments thereto, and whether the Cabinet was consulted in this regard.

Moreover, neither the appointment of a Green Hydrogen Commissioner nor the establishment of a Council to oversee the hydrogen production projects have been gazetted. Generally, the *Government Gazette* is the official publication in which such appointments are announced. For transparency and accountability, gazetting ensures that the public is informed about key appointments within the government and related bodies. The failure to gazette the appointment and establishment of this Commissioner and Council could be interpreted as a means to avoid legal expectation as well as secure protection of these entities – thereby undermining the country's democratic processes, and creating opportunities for conflicts of interest and ways to avoid checks and balances for accountability purposes.

As the Head of State, the President is not exempt from following legal provisions. Although these decisions are judicially reviewable in principle, guidance as to who has the legal capacity to challenge such decisions is lacking. In conjunction with the lack of legal standing, the fact that the Green Hydrogen Council was directly controlled by the late President's Office would tend to inhibit any person from interfering, for fear of recrimination from the President or his Office. Furthermore, once the country's highest office has taken a decision, government ministers tend to be reluctant to raise pertinent issues that may have a bearing on that decision.

⁴⁴ According to this Act, the President has the authority to appoint any person deemed fit as a Special Advisor to the President, the Cabinet or the Minister designated by the President. The appointment is made by proclamation in the *Government Gazette*, and conditions of service, including remuneration, are determined by the President (<https://www.lac.org.na/laws/annoSTAT/Special%20Advisers%20and%20Regional%20Governors%20Appointment%20Act%20of%201990.pdf>).

⁴⁵ Namibian Constitution, Article 31(1).

⁴⁶ Monasa Advisory & Associates, “National Strategy on Green Hydrogen” (<https://www.monasa.org/wp-content/uploads/2023/09/National-Strategy-on-Green-Hydrogen.pdf>).

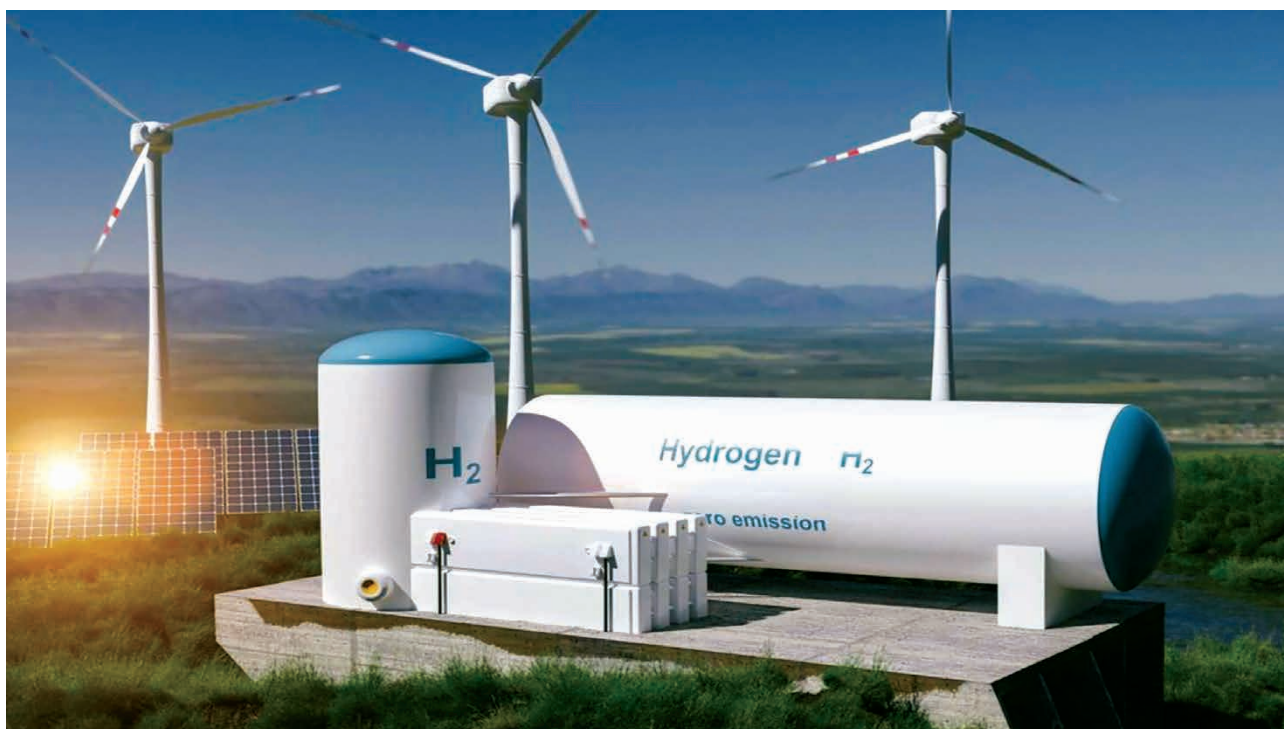
⁴⁷ Namibian Constitution, Article 32(7)(a).

⁴⁸ Namibian Constitution, Article 32(7).

As a result of the direct enforcement of the green hydrogen project, it appears that the President, despite his good intentions, may have acted *ultra vires* in respect of the appointment of a public office directly under his control and without any regulatory mechanism in place. His powers can be considered influential, and they have created an opportunity for not honouring checks and balances. The Green Hydrogen Council is operating without a legal framework that regulates its existence, powers and functions. As a result, this body cannot be held accountable for irresponsible or irrational decisions made subject to the lack of proper legal terms, unless brought before judicial review. The decisions already made are not open for scrutiny, and laws implemented afterwards cannot rectify decisions made retrospectively. Who is to be held accountable for any loss of land, resources or livelihoods?

4. CONCLUSION

It is evident from the preceding discussions that the Executive may have exploited the uncertainty and shortcomings that exist in respect of existing laws, as well as the fact that some laws may be outmoded, to push ahead with the hydrogen projects. Permitting foreign companies to operate without a legal framework in place that complies with international standards creates an environment where foreign companies control the narrative of Namibia's natural resource management with impunity. This despite the fact that such companies in their own countries may comply with international standards. Part 3 of this article will therefore discuss in more detail the seemingly neo-colonial approach that has emerged in the wake of the hydrogen hype.



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