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Agenda 21 and Climate Protection: The Development of Global and Local Governance for Environment and Development – Observations from Research in Namibia

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Abstract

It was due in particular to the difficulty experienced with achieving tangible results in the worldwide efforts to deal with the deterioration of the climate that challenged scholars in political science, legal sociology and related disciplines to brainstorm what is called the *architecture of governance for sustainable development in a globalising world*. Various attempts at using the architectural approach to re-determine the role and function of sub- and suprastatal social levels and institutions have been submitted, leading to theoretical consequences with respect to the role and function of the state and its relationship to the said non-statal levels and institutions. In practical political terms, the architectural approach results in the empowerment of the non-statal levels and institutions, de facto through the recognition of the pertinent role and function these levels and institutions hold, de jure by calls to extend the existing recognition through legal reforms.

In exploring and employing the architectural approach, this chapter relies on research done in Namibia. The focus is on findings from empirical research done within the legal component of the Biodiversity Monitoring Transect Analysis in Africa (BIOTA) and its successor The Future of Okavango (TFO) Projects, both administered under the University of Namibia's Faculty of Law.

A. *The Architecture of Governance for Sustainable Development in a Globalising World*

The difficulty experienced with achieving tangible results in the worldwide efforts to deal with the deterioration of the climate[1] challenged scholars in political science, legal sociology and related disciplines to brainstorm what is called the *architecture of governance for sustainable development in a globalising world*.[2] In exploring and employing the architectural approach, empirical research done in Namibia will be used to illustrate special components in the description of the said architecture of governance. The research was conducted within the legal component of the Biodiversity Monitoring Transect Analysis in Africa (BIOTA) and its successor The Future of Okavango (TFO) Projects, both administered under the University of Namibia's Faculty of Law.[3]

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1 The 1992 Earth Summit adopted the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC entered into force on 21 March 1994, with 194 parties having signed it. The UNFCCC was one of three so-called Rio treaties – along with the Convention on Biological Diversity and the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa. In implementing the interest to protect climate, the Kyoto Protocol emerged within the UNFCCC and was adopted at the Third Conference of the Parties of the UNFCCC. With 192 members, the Kyoto Protocol came into force on 11 December 1997. The Protocol set a target to reduce gas emissions by a certain level by the end of 2012, the date on which the Protocol was to expire. For the African implications of the Protocol, see Ruppel (2011). After long negotiations, the Protocol was extended in November 2012 to 2020.

2 Cf. here Biermann et al. (2010); Winter (2006b; 2012).

3 Both sub-projects are under the direction of the author. On the BIOTA Project, see Jürgens et al. (2010). The TFO Project succeeded the BIOTA Project. The TFO Project started in 2010 and will end in 2015. In the words of a TFO document on file with the author, the Project is "dedicated to support sustainable land use and resource management in the Okavango river basin. The Okavango River, connecting the countries Angola, Namibia and Botswana, is a global hydro-political hotspot, a large-scale indicator for climate change and a benchmark for the success of sustainable management. A multitude of different factors make the Okavango basin a trans-boundary study region of high international visibility and high potential transferability of results to other tropical and sub-tropical regions". The following article summarises observations developed in the author's lecture entitled "Sustainable Development: Political Concept and Legal Implications" offered in the Spring semester of 2012 at the Jacobs University of Bremen as part of its Integrated Environmental Studies Programme. The observations were guided by an earlier publication, co-edited by the author, entitled *Biodiversity and the Ancestors* (Hinz & Ruppel 2008). A previous version of this

The orientation towards an architecture of governance for sustainable development in a globalising world denotes more than an enquiry into the functioning of international law, international policies, and their transformation into political and legal instruments of the state. *Architecture* denotes a comprehensive, multilevel construct in which the various levels are interlinked, like the storeys of a building. Frank et al. introduce the concept of *global governance architecture* as follows:[4]

> There is no commonly agreed definition of the term 'global governance architecture'. We define the term in this book as the overarching system of public and private institutions – that is, organisations, regimes and other forms of principles, norms, regulations and decision-making procedures – that are valid or active in a given issue of world politics. Architecture can thus be described as the meta-level of governance.

This would be *governance*, indeed, in the broadest possible manner; and this without any normative focus on public institutions such as the state or what is normally given the centre of attention – the law of the state. The reference to "architecture" is – in this sense, for the authors of the quoted definition of *architecture*, and different from what the reference to international order would be – value-neutral.[5] This specifically allows one to take note of the fragmentation of governance without judging such fragmentation to be negative and/or dysfunctional for the society concerned only because of the fragmentation's existence. According to Biermann et al., "all global gover-

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chapter appeared as the author's introduction to *Knowledge lives in the lake* (Hinz et al. 2012), entitled "Agenda 21 – or: The Legal Obligation to Strengthen Local Levels of Societies (including Traditional Authorities) in Support of Sustainable Development". For this publication, the text has been partly rewritten, amended in order to take note of more recent international developments, and enlarged by incorporating parts of an article by Hinz & Mapaure (2012) and a public talk by the author at the Jacobs University in December 2012. Special words of thanks go to my friends and colleagues Senator Councillor Gunther Hilliges, the former Director of the State Office for Development Cooperation of the Free Hanseatic City of Bremen (who, as the long-standing promoter of the international Towns and Development movement, shared his inexhaustible experience and knowledge in the field of local authorities and development with me) and Prof. Gerd Winter of the University of Bremen's Faculty of Law (who spent time commenting on an earlier version of the text).

4 Biermann et al. (2010b:16).

5 (ibid.:17).

nance architectures are fragmented to some degree; that is[,] they consist of distinct parts that are hardly ever fully interlinked and integrated."[6]

Non-fragmented structures of governance are conceivable, but they most probably do not exist in practice. Biermann et al. distinguish between governmental fragmentations that may be synergistic, cooperative or conflictive.[7] In other words, fragmentation is not bad per se: it may be either good or bad, depending on the repercussions involved.

The architectural approach to global governance as a consortium of governmental entities that extends from public and private international regimes to public and private local actors is very close to what emerged from the work by scholars of legal and political pluralism, which is informed by the, again, basically globally prevailing existence of interwoven (semi-) autonomous social fields. These various (semi-)autonomous social fields have their own systems of governance, including arrangements with the other fields to which they are linked.[8]

In a recent publication on the architecture of global governance with regard to the planet's protection against the harsh effects of climate change, Winter submitted a diagram showing the various levels involved.[9] He places international state organisations at the top of the hierarchy, followed by contractual or non-contractual interstate arrangements. Below that we find state law. Next to state law we see public actors. Transnational public and private governance also appears in the structure, while private actors are located at the base of the diagram. Parallel to this formalised structure of governance, we are informed that the orientation of the various levels will differ as to whether they consume or protect resources.[10]

The sociological functional or legal-normative question in view of architectures of this kind is to what extent the plurality (or fragmentation) contributes to the functioning of the interwoven set of rules and institutions. Philipp Pattberg, one of the co-editors of *Global climate governance beyond 2012*,[11] notes the following in his chapter therein:[12]

6 (ibid.).
7 (ibid.); cf. also Fischer-Lescano & Teubner (2006).
8 Cf. Moore (1978:54ff.) and generally, Menski (2006:82ff.). The chapter will address legal pluralism again in Section F.
9 Winter (2012); cf. also Börzel & Risse (2005); Sand (2006); Winter (2006b).
10 Winter (2006b:114ff.).
11 Biermann et al. (2010a).
12 Pattberg (2010:147).

> Recent scholarly debate within the discipline of international relations has focused on the transformation of the global order from a territorial-based one to one of multiple spheres of authority in flexible and issue-specific arrangements.... Reflecting debates about the organisational transformation of the modern nation state, theorists of international relations have begun to reflect on the changing nature of the Westphalian system itself.... One central empirical observation is the emergence of networked forms of organisation that operate under a different logic compared to other types of social organisations, such as markets and hierarchies. Whereas network governance has been discussed as a complementation and gradual innovation of older forms of policy-making (for example[,] corporatism) within the domestic context, networks at the transnational and global level have been largely conceptualised as new forms of governance that potentially overcome the limitation of more traditional approaches.

In his focus on networked climate governance, Pattberg analyses three distinct types of networked climate governance: public non-state governance, public private networks, and private networks.[13] For the purposes of this article, the first type is of particular importance.[14] In looking at the first type, Pattberg refers to two initiatives of local authorities which became most remarkable in networking for climate change and protection, namely the Cities for Climate Protection Programme initiated by Local Governments for Sustainability, and the C40 network initiated by the Large Cities Climate Leadership Group.

These climate-specific initiatives by local authorities, started in 1991 and 2006 respectively,[15] are part of the earlier global movement to engage local authorities in matters of development. The organisation Towns and Development entered the scene and became an international initiative of far-reaching importance.[16] The Cologne Appeal, adopted in 1985, called for charity to be replaced by justice.[17] The Towns and Development Conference

13 (ibid.:149ff.).

14 As will become apparent as the arguments of this chapter develop further.

15 Cf. here also Bulkeley & Betsill (2003); C40 (2008).

16 A Local Authorities Conference held in Florence, Italy, in 1983, gave rise to what became the international organisation now known as Towns and Development; see Shuman (1994:6). See further Gold et al. (2001); Krenzer-Bass (1988); Kussendrager (1988).

17 See Towns and Development (1985); Shuman (1994:5ff.). The Cologne Conference was initiated by Gunther Hilliges from the State Office for Development Cooperation in Bremen, Germany, and Paul van Tongeren from the Dutch National Commission for Development Education in Amsterdam, The Netherlands. From a jurisprudential point of view, it is noteworthy that a certain German tradition was instrumental in

in Cologne launched a process that engaged the linking of local authorities not only among developed and developing countries, but also between the two country categories.[18] After Cologne, the Charter of Berlin was agreed in 1992 by local authorities from developed and developing countries.[19] "Joint Action for Sustainable Development" was chosen as the document's title. With the establishment of the International Council for Local Environmental Initiatives (ICLEI) at the World Congress of Local Governments for a Sustainable Future at the United Nations (UN) in New York in 1990, a world structure emerged that has remained active ever since.[20] Today, ICLEI has more than 1,000 members from 70 countries, representing more than 500 million people.[21]

The political way to the 1992 Rio Conference was, on the one hand, facilitated by movements of this nature; on the other, the broad governmental and non-governmental support for the Earth Summit and its messages, culminating in Agenda 21, was also instrumental for strengthening these movements. Chapter 1.1 of Agenda 21 offers an insight into its vision:

> Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can – in a global partnership for sustainable development.

Chapter 1.3 adds the following:

> Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century. It reflects a global consensus

designing the approach to local authorities within the wider political structure and, based on this, to matters of development in a world perspective; cf. Schefold (2011).

18 Cf. Hilliges (1994; 1995a; 1995b; 2001; 2005, 2012); Hilliges & Nitschke (2007).

19 The Charter is contained as Appendix II in Shuman (1994:150ff.). The Berlin Charter was adopted by the German Bundestag in June 1994 (see Servicestelle 2009), calling on the local authorities in Germany to go ahead with efforts to implement Agenda 21. Appendix II (Shuman 1994:144ff.) also contains an African and an Asian Towns and Development document, namely "The Bulawayo Appeal: From Dependence to Justice", which was adopted by the Bulawayo Towns and Development Conference in 1990, and the Sevagram Declaration (India).

20 See http://www.iclei.org; last accessed May 2012.

21 (ibid.).

> and political commitment at the highest level on development and environment cooperation. Its successful implementation is first and foremost the responsibility of Governments. National strategies, plans, policies and processes are crucial in achieving this. International cooperation should support and supplement such national efforts. In this context, the United Nations system has a key role to play. Other international, regional and sub-regional organisations are also called upon to contribute to this effort. The broadest public participation and the active involvement of the non-governmental organisations and other groups should also be encouraged.

At the end of Chapter 1,[22] Agenda 21 is said to be a "dynamic programme":

> It will be carried out by the various actors according to the different situations, capacities and priorities of countries and regions in full respect of all the principles contained in the Rio Declaration on Environment and Development. It could evolve over time in the light of changing needs and circumstances. This process marks the beginning of a new global partnership for sustainable development.

In its first chapter, Section I of Agenda 21, entitled "Social and Economic Dimensions", focuses on international cooperation, states' role in such cooperation, and the expected consequences from these levels of governance for the promotion of sustainable development. Section III, which is devoted to "Major Groups", addresses how to strengthen them and achieve sustainable development. For the purpose of the current discussion, some quotations from Section III are pertinent here. For example, its Preamble states the following:

> 23.1. Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and genuine involvement of all social groups.
> 23.2. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organisations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organisations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.

22 Chapter 1.6.

Nine "Major Groups" are identified by Agenda 21 as playing a special role on the road towards sustainable development:

- Women (Chapter 24)
- Children (Chapter 25)
- Indigenous peoples and their communities (Chapter 26)
- Non-governmental organisations (Chapter 27)
- Local authorities (Chapter 28)
- Workers and trade unions (Chapter 29)
- Business and industry (Chapter 30)
- The scientific and technological community (Chapter 31), and
- Farmers (Chapter 32).

In view of the special interest of the current discussion in the role of local structures and their placement in the overall governmental architecture, the position of indigenous communities and of local authorities is of particular relevance. As to indigenous peoples, the statements from Agenda 21 cited above can be referred to; as to local authorities, Agenda 21 has the following to say about the basis of action for these bodies:[23]

> Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilising and responding to the public to promote sustainable development.

The Programme for the Further Implementation of Agenda 21 adopted by the UN General Assembly in 1997 – the Rio+5 meeting – took special note of the so-called major groups, as borne out by the following:[24]

> The major groups have demonstrated what can be achieved by taking committed action, sharing resources and building consensus, reflecting grass-roots concern and involvement. The efforts of local authorities are making Agenda 21 and the pursuit of sustainable development a reality at the local level through the implementation of 'local Agenda 21s' and other sustainable development programmes. Non-governmental organisations, educational institutions, the scientific community and the media have increased public awareness and discussion

23 Chapter 28.1.
24 UNGA A/RES/S-19/2, paragraph 12.

of the relations between environment and development in all countries. The involvement, role and responsibilities of business and industry, including transnational corporations, are important. Hundreds of small and large businesses have made 'green business' a new operating mode. Workers and trade unions have established partnerships with employers and communities to encourage sustainable development in the workplace. Farmer-led initiatives have resulted in improved agricultural practices contributing to sound resource management. Indigenous people have played an increasing role in addressing issues affecting their interests and particularly concerning their traditional knowledge and practices. Young people and women around the world have played a prominent role in galvanising communities into recognising their responsibilities to future generations. Nevertheless, more opportunities should be created for women to participate effectively in economic, social and political development as equal partners in all sectors of the economy.

The World Summit for Sustainable Development (Rio+10) held in Johannesburg in 2002 also took note of Agenda 21's major groups in its Plan of Action. In the section on strengthening institutional frameworks for sustainable development at national level, the Plan of Action calls for the following:[25]

162. States should:
    (a) Continue to promote coherent and coordinated approaches to institutional frameworks for sustainable development at all national levels, including through, as appropriate, the establishment or strengthening of existing authorities and mechanisms necessary for policy-making, coordination and implementation and enforcement of laws;
    (b) ...
163. Each country has the primary responsibility for its own sustainable development, and the role of national policies and development strategies cannot be overemphasised. All countries should promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development. All countries should strengthen governmental institutions, including by providing necessary infrastructure and by promoting transparency, accountability and fair administrative and judicial institutions.
164. All countries should also promote public participation, including through measures that provide access to information regarding legislation, regulations, activities, policies and programmes. They should also foster full public participation in sustainable development policy formulation and implementation. Women should be able to participate fully and equally in policy formulation and decision-making.

25 The following is quoted at length as the Johannesburg Plan of Action has – in addition to the decisions of the Rio Conference of 1992 – remained a document of frequent reference in the debate on sustainable development.

165. [States should] [f]urther promote the establishment or enhancement of sustainable development councils and/or coordination structures at the national level, including at the local level, in order to provide a high-level focus on sustainable development policies. In that context, multi-stakeholder participation should be promoted.
166. [States should] [s]upport efforts by all countries, particularly developing countries, as well as countries with economies in transition, to enhance national institutional arrangements for sustainable development, including at the local level. That could include promoting cross-sectoral approaches in the formulation of strategies and plans for sustainable development, such as, where applicable, poverty reduction strategies, aid coordination, encouraging participatory approaches and enhancing policy analysis, management capacity and implementation capacity, including mainstreaming a gender perspective in all those activities.
167. [States should] [e]nhance the role and capacity of local authorities as well as stakeholders in implementing Agenda 21 and the outcomes of the Summit and in strengthening the continuing support for local Agenda 21 programmes and associated initiatives and partnerships and encourage, in particular, partnerships among and between local authorities and other levels of government and stakeholders to advance sustainable development....

The following section of the Plan deals with the participation by major groups, stating that they should –

168. [e]nhance partnerships between governmental and non-governmental actors, including all major groups, as well as volunteer groups, on programmes and activities for the achievement of sustainable development at all levels.
169. [a]cknowledge the consideration being given to the possible relationship between environment and human rights, including the right to development, with full and transparent participation of Member States of the United Nations and observer States.
170. [p]romote and support youth participation in programmes and activities relating to sustainable development through, for example, supporting local youth councils or their equivalent, and by encouraging their establishment where they do not exist.

ICLEI played a special role in the preparation of the Johannesburg Summit. In fact, a survey carried out by ICLEI served as an official background paper for the Summit.[26]

26 The ICLEI survey and a related summary report are available at www.iclei.org/la21survey, last accessed 20 June 2012. The ICLEI website also offers information on Rio+20. See also Servicestelle 2002.

The UN Conference on Sustainable Development of 2012 (the Rio+20 conference) reconfirmed in a special chapter of its final paper the need for "engaging major groups and other stakeholders".[27] The Conference expressed this in the following words:

> 43. We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national and subnational legislatures and judiciaries, and all major groups: women, children and [the] youth, indigenous peoples, non-governmental organisations, local authorities, workers and trade unions, business and industry, the scientific and technological community, and farmers, as well as other stakeholders, including local communities, volunteer groups and foundations, migrants and families, as well as older persons and persons with disabilities. In this regard, we agree to work more closely with the major groups and other stakeholders, and encourage their active participation, as appropriate, in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels.

Agenda 21 is the first comprehensive, internationally sanctioned document that describes the basic framework of global governance – or, more succinctly put, the architecture of global governance with respect to environment and development. This point deserves special emphasis. Agenda 21 has not really been acknowledged as a document of authority that indeed reflects what has been described and analysed as *the architecture of global governance for sustainable development*.[28]

B. Traditional Authorities: A Major Group in Terms of Agenda 21?

In southern Africa, in countries such as Botswana, Namibia and South Africa, traditional authorities perform the functions and tasks of local authorities. They are, using the words of Agenda 21, "the level of governance

27 Cf. the final declaration of the Conference: A/Conf.216/L.1 at C.

28 This is true for academic writing in the specific sense, e.g. if one takes the collection of papers on global climate governance beyond 2012 (Biermann et al. (2010a)), but also for action-oriented writing, such as the background paper for Rio+20 by Martens (2012), in which one will search in vain for references to work of the major groups in terms of Agenda 21, particularly that of local authorities.

closest to the people".[29] In many areas of the countries mentioned, local authorities are either remote or non-existent. Thus, the functions of local authorities are taken care of by traditional authorities.[30] In Namibia, the Traditional Authorities Act[31] takes note of the substatal government functions of the various traditional authorities. The Act recognises the overall responsibility of traditional authorities to "promote peace and welfare amongst the members of... [the traditional] community".[32] The responsibility of traditional authorities for environmental matters is provided for in section 3(2)(c) of the Act:

> A member of a traditional authority shall in addition to the function referred to in subsection (1) have the following duties, namely –
>
> (a) ...
> (c) to ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia; …

Although certainly modelled after Article 95(l) of the Constitution, the environmental obligation of the Traditional Authorities Act is – in legal terms – stronger than the constitutional obligation, which is only one of the principles of state policy and, thus, has limited legal relevance.[33]

The normative translation of the responsibility for environmental matters is special in the sense that it maintains a holistic approach. Customary law follows broadly what Agenda 21 summarises as the holistic approach to land by what it calls "indigenous people":[34]

> Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands.... [T]he term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy.... They [the indigenous people] have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.

29 Cf. Agenda 21, Chapter 28.1.
30 Cf. here Hinz & Gatter (2006); Hinz & Katjaerua (1998); Keulder (1997).
31 No. 5 of 2000.
32 See the chapeau of section 3(1) of the Act; cf. Hinz (2009). There are large geographical areas in Namibia which are not under a local authority, meaning that all local authority functions are either under traditional authorities or are administratively facilitated by the latter.
33 See Article 101, Namibian Constitution.
34 See Chapter 26.1, A/CONF.151/26/Rev. 1.

Although the majority of the traditional communities in Namibia are not *indigenous* in terms of the Declaration on the Rights of Indigenous Peoples,[35] their concept of *land* does not differ from that understood by indigenous peoples in terms of Agenda 21.[36] The holistic understanding of *land* is, in a more general sense, particularly true with respect to the holistic ecological cosmologies that are shared by indigenous and traditional communities. These cosmologies are at the foundation of indigenous/traditional environmental ethics and contribute to the very special relationship between indigenous/traditional communities and their environment.[37] As Mary E. Tucker and John Grim state in their Foreword to the publications of the Religions of the World and Ecology Project:[38]

> ... most indigenous peoples have environmental ethics embedded in their worldviews. This is evident in the complex reciprocal obligations surrounding life-taking and resources-gathering which mark a community's relations with the local bioregion. The religious views at the basis of indigenous lifeways involve respect for the sources of food, clothing, and shelter that nature provides. Gratitude to the creator and to the spiritual forces in creation is at the heart of most indigenous traditions. The ritual calendars of many indigenous peoples are carefully coordinated with seasonal events such as the sound of the returning birds....

While the politico-legal discourse has accepted having to deal with indigenous communities, the discourse on traditional authorities is still in its infancy.[39] Although even international organisations have begun to acknowledge that traditional authorities cannot be ignored when it comes to development in rural areas,[40] the conceptual side of this acknowledgment has not

35 UNGA Res. 61/295 and other international instruments on indigenous people, such as the International Labour Organization's Conventions 107 of 1957 and 169 of 1989. For more on the concept of *indigenous people*, see Niezen (2010:105ff.).

36 See Hinz (2008).

37 However, the subproject on Indigenous Traditions and Ecology of the Religions of the World Ecology does not distinguish between *traditional* and *indigenous*. For the subproject, *traditional* is synonymous with *indigenous*.

38 Tucker & Grim (2001:XXVIf.). This Project was conducted by the Centre for the Study of World Religions of the Harvard Divinity School and led to a number of conferences and subsequent publications on the studies of religion and ecology.

39 However, see Hinz & Gatter (2006); Hinz & Ruppel (2008); Ray (1997).

40 Cf. Mapaure (2010); UNDP (2004). The climate debate has, however, opened another avenue for the debate on the role and function of traditional authority. The research on the responses to climate change asks what forms of adaptation societies and communities have in dealing with the consequences of climate change. See here e.g. Kpadonou et al. (2012).

advanced much. The basic obstacle in advancing conceptualisation is that traditional authorities have developed from some kind of sovereignty into systems of integration governed by states – which see themselves as the sole and overall representatives of sovereignty.[41] Before colonialism and in the years of colonial subjugation, the kings and queens of communities were the sovereign holders of authority over such communities. Their authority is not delegated by the state but original, entrusted to them by their ancestors. Modern state centralism would like to see traditional authorities as part of the administration of the state. To date, traditional authorities have seen themselves as bearers of ancestral authority. The different statutory models which the various states have pursued in dealing with traditional authorities[42] point to the unsolved political question as to how to deal with political plurality represented by such indigenous bodies.

Whether observations of this kind were also behind the fact that Agenda 21 did not explicitly consider traditional authorities is worthy of speculation,[43] but be that as it may: the aforementioned fact that traditional authorities share many criteria described by Agenda 21 with indigenous communities prompts the suggestion to include traditional authorities in the list of Agenda 21's major groups. The de facto closeness of traditional authorities to local authorities prompts a step further forward: allowing traditional authorities to be interpreted as falling under local authorities in terms of the Agenda 21 classifications.[44]

C. *Ekongoro Owns the River, or: The Question of Ownership under Customary Law*

The founder of African law as a distinct academic area of research and teaching, Antony Allott, from the Law Department of the School of Oriental and African Studies, University of London, advised legal scholars many years ago not to use the term *ownership* when it came to land and related matters in Africa.[45] Allott's point was that the use of the term *ownership*

41 Here and in respect of what follows, cf. Hinz (2009:61ff.).
42 Cf. e.g. Keulder (1998).
43 See Hinz (2008:221ff.).
44 With this view, this paper corrects the more cautious approach expressed in Hinz (2008).
45 Personal experience.

would mislead the understanding of the status and function of land in the African approach. The research in Namibia nevertheless asked the *ownership* question, namely *Who owns the land, the wild animals, the trees, the water, the minerals?*

The people themselves used "ownership", but not in the sense of common law to denote the right to do with that which is owned as the owner wishes to do, including the right to dispose of that which is owned. *Ownership* for the ordinary person in rural Namibia stands for "having authority over, being the guardian and custodian". In relation to the Kavango River, therefore, *Who owns the Kavango River? Who owns its water?* were the questions asked.

The interest behind these questions was to establish who has the right to access water, and who is responsible for its control and protection. The interest was to find out how the people – the factual and potential users of the water – would determine their relationship to water. The expectation from the answers was to gain facts that would also lead to consequences in informing policies with respect to the sustainable management of natural resources.

Interviews conducted in several parts of Namibia led to a high percentage of voices who at least implicitly denied the ownership of water by the state. For these voices, water belonged to authorities close to them, to the community, the water point committee, to God, or to an entity called *Ekongoro*. In the area of the Mbunza traditional community of the Kavango Region, out of 31 subjects interviewed in 2009,[46] only 8 held that the state owned the river and its water, while 18 noted ownership close to the local level. One respondent put it as follows: "The Creator is our Creator, the water point committee is our committee; we are the community."

Prompted by this result, the scope of the fieldwork was extended to different places in the Kavango Region. More than 100 interviews were conducted.[47] Wherever the questions touched on the ownership of the Kavango River and its water, many people responded by referring to *Ekongoro*. Listening to and analysing the information collected, the references to *Ekongoro* as the owner of the river and its water appeared to be of much greater

46 Clever Mapaure – research assistant in the BIOTA Project and now reading for his PhD in the Faculty of Law of the University of Namibia – conducted this research; cf. Mapaure (2012b).

47 These interviews were done under the TFO Project by Christian Mukuve and the author.

importance than the references to the Creator, the community and the water point committee.

So what is *Ekongoro*? *Ekongoro* "is similar to a very big snake, it is very long, about 15 to 20 m, it pushes and pulls water...."[48]

Ekongoro (as recorded from another interview) –[49]

> … attacked my friends and me once. [In the river], our canoe was [stopped]... we realised that we were held by [*Ekongoro*]. We started talking to it as we had been directed by our elders. We said, *Fumu* [King], what have we done to you? We did nothing to hurt you, we are just passing by. Won't you please release us to go on?
> ... Those who were with me fell out of the canoe and I was left alone... [*Ekongoro*] took me back to the deep water... me, the canoe and all our belongings... I lost my mind... I felt a very bad smell... my mind was off. I was walking around under the water but managed to breathe. It took me almost six hours before [*Ekongoro*] eventually released me. I strongly believe that this [*Ekongoro*] is still around in the place where it attacked my friends and me.

People who live along the Kavango River believe that the way they use the water is closely monitored by this mystical creature called *Ekongoro*, which can punish polluters and abusers of the water resource. People believe that while the (Christian) God created water, *Ekongoro* holds more power in controlling its conservation and utilisation. Because humans are less powerful in comparison with this mystical creature, there is general deterrence regarding potential abuse or pollution of the waters of the Kavango River. It is believed that *Ekongoro* sends messages to water users that they have to manage and utilise water resources in a proper and sustainable way.

One of the researchers in the TFO Project[50] reported to the TFO team that one of his uncles had been 'taken away' by a Zimbabwean *Ekongoro* and had disappeared for years. When he was 'released', he came back with mystical powers on how to heal people using herbs, i.e. traditional healing. As he reported back to his people, he had received immense knowledge on the utilisation of natural resources – including water resources. The knowledge he had received allowed him to advise his community on where best to water their livestock, where to dig a well or drill a borehole in the river basin. In other words, local knowledge had received a spiritual blessing and, with this blessing, had gained a protected status within the customary order of the community.

48 According to one of the interviewees; interview on file with the author.
49 Interview on file with the author.
50 Clever Mapaure.

What has been exemplified with reference to the Kavango River and its water, i.e. the ownership of both, could also be shown with respect to other natural resources. The question *Who owns them?* is answered in very comparable terms: the animals, the trees, plants minerals are owned by "the Chief", "God", "the community", "the ancestors".[51] All the answers have one point in common: the animals, trees, etc. are not fragmented items but are part and parcel of one central item – land – and, thus, fall under the same customary rules as the land itself.

D. Statutory Responses to the Customary Law Concept of Ownership

It is well-established practice in the general law of many countries to have separate laws for animals, trees, plants, mineral resources and water.[52] It is, therefore, of great interest to look not only at the question of ownership of communal land under general law, but also at how the various Namibian statutes handle the accessories to land: animals, trees, plants, mineral resources and water.

Whenever the question *Who owns communal land in Namibia?* is put to legally minded persons, the answers usually point to Article 100 of the Namibian Constitution, which states the following:

> Land, 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.

Sometimes, the answers also refer to Schedule 5 of the Constitution, which, in particular, decrees in Sub-Article 1 that –

> [a]ll property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth,.... shall vest in or be under the control of the Government of Namibia.

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51 See in particular Mapaure (2012b) and (2012c), but also already Hinz (1998, 2003a).

52 So it is for Namibia as well; see the Nature Conservation Ordinance 4 of 1975, as amended; the Water Act, 1956 (No. 54 of 1956), as amended; the Water Resources Management Act, 2004 (No. 24 of 2004); the Forest Act, 2001 (No. 12 of 2001); and the Minerals (Prospecting and Mining) Act, 1992 (No. 33 of 1992). Cf. here also Ruppel (2012).

Legal work was developed to trace Namibia's communal land legislation back to the time when the land was occupied and used by the various indigenous communities of the territory that became the colonial (German) South West Africa. Apart from early colonial decisions, such as the Crown Land Disposal Ordinance of 1920,[53] which extended the Transvaal Crown Land Disposal Proclamation of 1903 to Namibia, and the Development Trust and Land Act of 1936,[54] the socio-political transformation enacted in accordance with the Representative Authorities Proclamation of 1980[55] attracted the interest of lawyers in order to find out what happened to the land in the so-called self-governing territories of Namibia.[56] While the customary law regime that had existed up to that point remained basically in place in the various areas designed to be the 'homelands' of the various population groups,[57] a change with far-reaching consequences took place in the Rehoboth *Gebied*.[58] Here, the Rehoboth Government decided to register the land of the Basters in its name. This led to the still ongoing political controversy about communal land in Rehoboth; the Supreme Court decision based on the quoted Schedule to the Constitution led to a confirmation that ownership of Rehoboth communal land vested in the Namibian Government[59] – a decision that has not been accepted by many Basters. Attempts to register the communal land, e.g. of the Owambo communities, in the name of the then second-tier Owambo administration, did not take place, thus leaving communal land under the full administration and control of those communities, as was also the case in the other self-governing territories of the then South West Africa.[60]

After Namibia's Independence in 1990, the debate about land in general and communal land in particular started with the intention to address the land issue. The discussions focused on commercial land, i.e. the land that had lost its communal quality and was now, as a result of many interventions in the

53 Proclamation 13 of 1920.
54 No. 18 of 1936.
55 Proclamation AG 8 of 1980.
56 Cf. Hinz (1998:191ff.).
57 (ibid.).
58 "Territory".
59 *Rehoboth Bastergemeente v The Government of Namibia & Others*, 1996 NR 338 (SC). Cf. here Harring (2012).
60 Pers. comm., Dr. Kuno Budack.

colonial period of the country, privately owned, as well as on communal land that was under the authority of indigenous communities.[61]

The attempt by some Namibian government officials to push through a position whereby the government would own communal land was rejected by various traditional authorities.[62] What we find today in the Communal Land Reform Act[63] is the result of the negotiations between the government and the traditional authorities. In line with the Namibian Constitution, which recognises communal land at least by its more incidental reference to the concept in Article 102(5),[64] the Communal Land Reform Act accepted the inherited communal land tenure system in principle. Section 20 of the Act confirms the allocation of communal land rights under customary law. The primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests either in the Chief of that traditional community or, where the Chief so determines, in the traditional authority of that traditional community.

This provision has to be read together with section 17(1) of the Act, which provides as follows:

> Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

Although the Act *vests* communal land in the state, the Act avoids any reference to *ownership*. Even if one interpreted the *vesting in* as an indication

61 Cf. here, in particular, the Land Conference of 1991; Republic of Namibia (1991a, 1991b, 1991c).

62 Cf. the proceedings of the Communal Land Conference of 1997; Hinz & Malan (1997).

63 No. 5 of 2002.

64 Article 102(5) reads as follows: "There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilisation of communal land and on all such other matters as may be referred to it by the President for advice". With this, the Constitution has taken note of the legal principle *communal land*. Read together with Article 66(1) of the Constitution, one could conclude that communal land and the customary law related to it have been constitutionally confirmed. Article 66(1) states the following: "Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law".

of ownership,[65] such ownership would remain limited to an *entrusted* ownership, meaning that the rules of handling such ownership will not be the rules of general private law, but the rules that apply to trusts, as specified by the Communal Land Reform Act.

Therefore, the quoted sections of the Act appear to be acceptable to the customary law system of land tenure as it leaves operational the authority to administer the rights on communal land by the responsible structures under traditional governance. Ownership of land is not really an issue to customary law as long as the reference to *ownership* does not result in what is understood as limiting the customary law authority over communal land. This is because customary law does not know ownership of land as general law knows it, i.e. as encompassing the right of almost free disposal of the object of ownership.[66]

The way communal conservancies were introduced into the nature conservation law further illustrates the problem that statutory law has with communal land. The policy that led to the 1996 Nature Conservation Amendment Act[67] was driven by the intention to restore rural communities' rights to wildlife. The policy was informed by anthropological evidence which showed that traditional communities had a balanced approach to the use of animals as part of their natural resources, which appeared to be in support of the conservation policy of the state. Why not, therefore, use the societally grounded traditional conservation ethos as a potential contribution to conservation as an overall state-wide conservation policy? The positive answer to this question led to the following provision in section 3 of the Nature Conservation Amendment Act:[68]

> Any group of persons residing on communal land and which desires to have the area which they inhabit, or any part thereof, to be declared a conservancy, shall apply therefor to the Minister in the prescribed manner, and such application shall be accompanied by ….

Leaving aside that the Nature Conservation Amendment Act continued to be based on the premise that the state owns wildlife on communal land,[69]

65 Cf. here Mapaure (2012b:220ff.).
66 Cf. here Hinz (1998:186ff.).
67 No. 5 of 1996, amending Nature Conservation Ordinance 4 of 1975.
68 Section 24A, amended Nature Conservation Ordinance.
69 Cf. here Hinz (2003a:28ff.).

who is "any group of persons" in communal areas?[70] What is the relationship between "any group" and the traditional authority in place? The establishment of a communal conservancy means a change in the existing land tenure system. Giving the administration and management a special place in the overall administration of land in a given area will mean that certain modes of production will be excluded or, at least, limited. Most probably, the common practice of cattle husbandry would not be possible in core areas designated for wildlife. Such a change in the tenure of customary land affects not only customary rights holders, who would be part of "any group", but also the overall responsibility of traditional authorities over the communal land in their jurisdictions. The Nature Conservation Amendment Act did not provide any role for traditional authorities in the process of establishing communal conservancies. However, research has shown that in most – if not all – cases, the relevant traditional authorities have played a role in the establishment of such conservancies. Most – again, if not all – of the Conservancy Committees required by the Nature Conservation Amendment Act have formalised links with the traditional authority in whose territory the conservancy is located.[71] In this sense, traditional authorities have developed a type of customary amendment to the Nature Conservation Amendment Act and, thus, have provided a remedy for the Act's shortcomings in this respect.

Subsequent legislation on other aspects of matters related to land expresses comparable difficulties in dealing with ownership of natural resources on communal land. The legislation on minerals, for example, provides that exercise and control of "any mineral or group of minerals vests, notwithstanding any right of ownership of any person in relation to land in, on or under which any such mineral or group of minerals is found, in the State."[72]

Forest legislation claimed ownership of trees as belonging to the state. As with the Nature Conservation Amendment Act, the possibility of establishing community forests was offered to traditional communities as an option, but, in this case as well, without recognising the authority of traditional au-

70 To this and the following, see Hinz (2011a, 2011b), but also Anyolo (2012:29ff., 41ff.).

71 Cf. Hinz (2003a:82ff.).

72 The Minerals (Prospecting and Mining) Act, 1992 (No. 33 of 1992). A PhD thesis in progress and under the supervision of the author (Renkhoff, Forthcoming) will address questions with respect to minerals.

thorities over communal land.[73] The same eventually happened to water: this resource in communal land is also under the authority of the state.

The water law of Namibia has been in the process of reform for quite some time. New legislation – the Water Resources Management Act,[74] which was to replace the pre-Independence law – was passed by Parliament in 2004. However, the new Act is still awaiting the status of enforceable law because the required notice by the competent Minister to bring the Act into force has not yet been issued. Whether or not the 2004 Act will become law is not known. It is nevertheless interesting to note how this post-Independence Act deals with water matters at the local level, how it deals with the local water law, and how it deals with customary water law.

The Act recognises customary law in general terms, but there is not much follow-up to this recognition. All water resources belong to the state. Section 4 reads as follows:

> Subject to this Act –
>
> (a) ownership of water resources in Namibia below and above the surface of the land belongs to the State;...

The bodies responsible for the administration of customary law, its custodians, the traditional authorities, have no place at all in the Act. The responsibility for managing water at the local levels is regulated in section 16 of the Act, which sets out the details for the establishment of water point user associations and water point committees. The water management structure is not accountable to authorities in place at the local level, namely the traditional authorities, but to the Ministry of Agriculture, Water and Forestry through government-appointed agricultural extension officers.

It is certainly possible for water point user associations to elect traditional leaders as members, but whether such elections will be accepted as recognition of traditional authority in such associations remains to be seen. Indeed, research done in an area to the west, that is, in the Ohangwena Region, supports this scepticism. The traditional authority that has jurisdiction in this area does not recognise the water point committees as they exist. The traditional authority has voiced that water point committees have no legitimacy: they are called "puppets" of the Ministry of Agriculture, Water and Forestry, the water point committees are viewed as being "abused" by the central

73 Cf. sections 13, 14 and 15 of the Forest Act; cf. Mapaure (2012a).
74 No. 24 of 2004.

government to impose the rules of the state on the traditional management of water.[75]

E. What does Ekongoro Stand for? Or: The Challenge of Legal Pluralism

The Namibian Constitution reflects a substantial jurisprudential change by confirming customary law as one branch of the land being at the same level of validity as the colonially inherited common law (Article 66(1)), and by recognising the right to culture (Article 19). As the previous section herein has shown, the post-Independence legislator, in its attempts to provide Constitution-inspired law with respect to the administration and management of natural resources, has not really honoured the existing customary law. How can this fact be assessed in legal, but also political, terms?

Article 66(1) of the Namibian Constitution has this to say about the customary law of the various communities that uphold such traditions:

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

Article 19 reads as follows:

> Every person shall be entitled to enjoy, practise, 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.

When enacted in 1990, Article 66 reflected a revolutionary approach to the African law inherited in the various so-called traditional communities of Africa. The African traditional law was confirmed; it was recognised as law at the same level as the received Roman–Dutch common law. African customary law was not subjected to this common law, but was accepted as having the same level of validity as common law and, like the latter, subject only to the Constitution and to statutory inroads into it by an Act of Parliament.

In more general terms, what are the options a state has to regulate the relationship between the law of the state and African traditional law? Five models are possible:[76]

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75 Cf. Mapaure (2012b, 2012c).
76 Cf. Hinz (2009:61ff.).

- Model 1: Abolish African traditional law (strong modern monism)
- Model 2: Leave African traditional law unregulated (unregulated dualism)
- Model 3: Regulate African traditional law (regulated – weak or strong – dualism)
- Model 4: Integrate African traditional law into the modern structures (weak modern monism), and
- Model 5: Make the traditional level the overarching level of governance (strong traditional monism).

The Namibian approach follows Model 3, which, incidentally, is the model applied by many African states. Whether the Namibian approach is strongly or weakly regulated could be debated; however, the fact that the Traditional Authorities Act, the quasi-constitution of traditional governance, even accepts that traditional communities – in the words of the Act – "make customary law",[77] in other words, they have legislative power independent from the supreme lawmaker of the country, Parliament, indicates that the Namibian legal system accepts the quasi-sovereignty of traditional communities.

Although the matter has not been considered by the courts of Namibia, one can, with good reason, hold that, by virtue of the right to culture and the confirmation of customary law, the traditional governance – the traditional authority as an institution with an associated legal framework – enjoys constitutional protection. This means that there are, again with good reasons, limits to parliamentary inroads into traditional governance and its legal framework. Indeed, any inroads will require reasoning that is informed by constitutional requirements, e.g. the reasoning that a particular rule of customary law violates the fundamental rights and freedoms guaranteed in the Constitution.

With these provisions, the Namibian legal system can be seen as having accepted lessons as they were offered by the theory of legal pluralism, but is also facing some of the challenges as they became apparent by the research on legal pluralism. Hence, what does the theory of legal pluralism say?[78]

Legal pluralism has occupied many researchers who have studied the law in the colonies of Africa and elsewhere, but also the legal situation in the post-colonial set-up in former colonies. The research shows that legal plurality is found basically everywhere, even in legal orders which adhere to a

77 See section 3(3)(c) of the Traditional Authorities Act.
78 To the following, see Menski (2006:82ff.).

strong Kelsenian concept of *law*, according to which there is no law apart from the law of the state and all law originates in the state. John Griffiths put it as follows: "Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion."[79]

For the proponents of legal pluralism, legal centralism is a powerful ideology that has dominated the understanding of law by lawyers and social scientists. Sally Falk Moore added to the discussion on legal pluralism by generalising the findings of legal empirical research in her concept of "semi-autonomous social fields".[80] All human beings live in different, sometimes overlapping, social fields, which are run in accordance with their own rules – the "living law" as described by Eugen Ehrlich[81] – generated by the actors in these fields. The social fields are autonomous – at least to some degree. The degree of such autonomy depends on the degree of (exercised and/or accepted) authority of other, neighbouring fields, but also the state.

Referring to legal pluralism as 'fact' focuses on legal pluralism as a theory that interprets the findings of empirical work. Apart from this, the discourse on legal pluralism has added a normative dimension to it. As shown elsewhere,[82] it was in particular the increase in international recognition of the rights of indigenous peoples (in the specific language of the International Labour Organisation and the UN bodies concerned with indigenous peoples) that supported the development of indigenous peoples' "right to one's own law"[83] within the broader context of states in whose territories these peoples settle. Although the extent of the right to one's own law may vary from jurisdiction to jurisdiction, it will encompass the community's right to their own forms of governance, including their own courts, as well as their own –

- family law
- inheritance law
- land law, and
- law dealing with wrongs.

Namibia is not alone: many African countries have accepted traditional governance and their legal frameworks by setting out the duties and functions of traditional authorities and describing (limiting) the competence of African

79 Griffiths (1986:4).
80 Moore (1978:54ff.).
81 See Ehrlich (1967:11ff.).
82 Hinz (2006).
83 Cf. Hinz (2006).

traditional law.[84] They have done so without explicitly recognising the mentioned right to one's own law. The numerous conflicts between traditional stakeholders and their states illustrate that the right to one's own law is part of the living law of traditional stakeholders and their communities, but not necessarily part of the respective legal system.

This article is not the place to argue whether or not the Namibian statutory inroad into inherited customary water law is tantamount to an expropriation with legal consequences in accordance with the constitutional protection of property, which is provided for in Article 16 of the Namibian Constitution.

However, even if we conclude that a constitutional case would not have merit, there are good political reasons for reconsidering the statutory inroads into customary law. The holistic approach of traditional[85] communities to land is certainly in contrast to the fragmenting approach of governments, but, at the same time, also very close to the concept of *sustainable development*, which is said to be equally holistic[86] – although the translation of sustainable development into law is still far from reflecting the holistic nature of such development.[87] This is a challenge for law reform![88]

The statutory inroads into the customary law as noted above are unhealthy, and lead to frustration on the ground. They are dysfunctional, as they do not appreciate the local understanding of water and water supply.

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84 Cf. Hinz (2003b:142ff.).

85 Grim (2001) does not distinguish between indigenous communities in terms of the special law of indigenous peoples, e.g. in terms of the aforementioned UN Declaration on the Rights of Indigenous Peoples and other communities called *traditional*.

86 Cf. Gärditz (2008:141).

87 If one looks at an attempt to compile sustainable development law (Cordonier Segger & Khalifan 2004), one sees such law structured in line with categories drawn from the discussion on sustainable development. Further jurisprudential reflections that also go into the jurisprudential foundation of sustainable development (see Ekardt 2005; Jonas 1984; Kahl 2008; Schönherr-Mann 2010) will be needed to shed more light on this.

88 The quoted statutes dealing with land or aspects related to land from a customary law perspective not only differ in the way they do or do not take note of traditional authorities: their administration is also formally fragmented as they fall under the ambit of different Ministries. These are the Ministry of Agriculture, Water and Forestry; the Ministry of Environment and Tourism; the Ministry of Lands and Resettlement; and the Ministry of Mines and Energy; with the Ministry of Regional and Local Government, Housing and Rural Development bearing overall responsibility for implementing the Traditional Authorities Act, while the Ministry of Justice is responsible for traditional courts in terms of the Community Courts Act, 2003 (No. 10 of 2003).

By ignoring the legal folk concepts, the inroads have bypassed local potential for the responsible and sustainable management of water. The seriousness of this circumvention becomes apparent when one goes beneath the surface of the folk philosophy of the concept of *water ownership*.

The British anthropologist Tim Ingold used one of the many recorded nature-related folk concepts according to which the rainforest was understood to be the 'parent' of the community that lived close to it:[89]

> To speak of the forest as a parent is not, then, to model object relations in terms of primary intersubjectivity, but to recognise that at root, the constitutive quality of intimate relations with non-human and human components of the environment is one and the same.

Generalising this, Ingold draws the following conclusion:[90]

> For hunter-gatherers as for the rest of us, life is given in engagement, not in disengagement, and in that very engagement, the real world at once ceases to be 'nature' and is revealed to us as an environment for people. Environments are constituted in life, not just in thought, and *it is only because we live in an environment that we can think at all*. [Emphasis added]

Ekongoro, like all other animated parts in the environment, are also 'others' in the sense of the quoted concept. *Ekongoro* represents water, and more so the right of the water to be respected in its created form. With respect to the conceptualisation of *Ekongoro*, there is more than *the right of*, *the right to* and *respect for*, there is also an element of fear: the fear that *Ekongoro* may swallow somebody despite the fact that the swallowed person will be released to life after a period in the *Ekongoro*'s belly. This element of fear leads to what the philosopher Hans Jonas stated in *Imperative of Responsibility: In Search of an Ethics for the Technological Age* – up to now one of the most important philosophical reasonings on sustainable development:[91]

> ... moral philosophy must consult our fears prior to our wishes to learn what we really cherish. And although what is most feared is not necessarily what most deserves to be feared, and still less so is its opposite the thing most deserving our desire, that is, the highest good... – although, in consequence, the heuristics of fear is surely not the last word in the search for goodness, it is at least an extremely useful first word and should be used to the full of its helpfulness in a sphere where so few unlooked-for words are vouchsafed us.

89 Ingold (1996:129).
90 (ibid.:151).
91 Jonas (1984:27).

F. Obligations to Strengthen Agenda 21's Major Groups 21 in Support of Sustainable Development?

Noting what has been analysed and described as the *architecture of global governance for sustainable development* leads to the fundamental question as to whether or not Agenda 21 contains a normative obligation with respect to the said architecture, and if so, what form that obligation takes. A second and more specific question would be whether or not there is any legal or quasi-legal obligation to strengthen the major groups listed in the Agenda.

The Kyoto Protocol did not deliver what was expected of it.[92] The world is still largely behind the level of emissions reduction the Protocol anticipated; one of the world's biggest emitters, the United States of America, refused to sign the Protocol; Canada, another major industrialised country, withdrew from it; and there is no mechanism in sight for dealing with the level of emissions by the leading developing countries, China and India. This already shows that sustainable development as such, and as a principle, is far from being part of generally applicable international law. Moreover, although sustainable development has entered the field of international and state law, it also does not mean that the concept of *sustainable development* has achieved the goal of binding international law.[93]

The same applies to Agenda 21. In formal terms, it is no more than a resolution; and, like any other UN General Assembly Resolution, it does not achieve the quality of law – irrespective of the number of members of the General Assembly who may vote for it.[94] Nevertheless, even the strongest opponents to giving sustainable development a place in the law have to accept that the amount of effort that has been and is being made in international, regional, national and subnational forums to substantiate the meaning of *sustainable development* have added to the concept a quality which allows it and Agenda 21 to be called *soft law*.[95] The Rio+10 Conference in Johannesburg in 2002 was an important event in this respect. Although the Johannesburg Summit broadened the approach to development, as understood by developing countries and as adopted ten years earlier, the principle of

92 Here and to that which follows, cf. von Bassewitz (2011).
93 See Gärditz (2008).
94 Cordonier Segger & Khalifan (2004:21).
95 (ibid.).

sustainable development and Agenda 21 remained the overarching points of reference.[96]

What is *soft law*?[97] The category of *soft law* was developed in order to have a characterisation of norms which had not yet received the quality of law, but which enjoyed wide support by all who were dealing with a specific matter with authority. This new category of law injected parts of that authority into documents whose content was normative but not legally binding.

States are not obliged to implement existing soft law, but they may be confronted with critical questions as to why they have ignored it. The fact that something has the quality of soft law changes the burden of proof to the deviating authority to give good reasons why certain rules equipped with high authority have been ignored.

Although there is no legally binding rule to translate the architecture of governance of Agenda 21 into state law, there is a clear indication that states would be well-advised to consider such a translation. However, it will be particularly difficult for states that have achieved their independence – and with this, their statehood, after long anticolonial struggles and the loss of many lives – to accept that their newly acquired sovereignty will be limited by a structure of governance in which the Westphalian model of statehood and sovereignty has been overcome. The globalising world had its input everywhere and *sovereignty*, as it used to be defined, is a thing of the past. The focus today is increasingly on participation, local empowerment, supporting local responsibility, and accepting existing local structures.

In other words, Agenda 21 is not only the political anticipation of what researchers have described as the architecture of global governance with respect to sustainable development: it is also a normative, quasi-constitutional political charter of good governance in matters of sustainable development, demanding not only that the structures already reflecting the global

96 (ibid.:25ff.).

97 See Paech & Stuby (2001:482ff.); Thürer (1985). Paech & Stuby (ibid.) refer to Agenda 21 in their deliberations on soft law. They observe in this context another result of the Rio Summit of 1992, namely the one that deals with the conservation of forests. The Rio Conference adopted a document that was originally meant to be a Convention, but it did not achieve that status. The document is entitled *A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, in short, the Forest Principles (A/CONF.151/26 (Vol. III). The combination of "non-legally binding" and "authoritative" as qualities of one and the same element is as contradictory as the combination of *soft* and *law*.

architecture of governance be respected, but also that their extension and strengthening be supported.[98]

In the early days of the Towns and Development movement,[99] German officials from the central level of government raised their concern about local authority activities in the field of development cooperation. The concern was that such activities would interfere with the competence of the central government. Meetings were held, negotiations took place, and, eventually, legal scholars took it upon themselves to show that their concerns had no foundation in Germany's constitutional law.[100]

In southern Africa, one finds discourses comparable to those prevailing in Germany on the legal status and place of traditional authorities – government entities that are usually not elected in accordance with the rules applied to democracy at the level of state. But how can a traditional authority have government functions which it has not been properly delegated by Acts of Parliament? How can traditional authorities "make customary law", as it is stated in section 3(3)(c) of the Traditional Authorities Act of Namibia? The proponent of Kelsenian centralism may wish away the existence of the rule that traditional authorities "make law", but even the Kelsenists will at least suggest that the quoted phrase from section 3(3)(c) implies a delegation of authority from the state to the traditional authority. Such a delegation could even be challenged because it does not set any framework in which the delegation can be used. Legal pluralism will instead observe what traditional authorities do when making use of their authority, and will – with empirical evidence, if so wished – assist in enhancing the required jurisprudential reflections on what is being observed.[101]

The multilayered architecture of globalised environmental governance requires new approaches to legitimacy. Only new approaches can provide answers to the new questions that are being raised by the new dispensation. Since the discovery of 'living law', we know that the demands for unrestricted priority of state law lose their power where people insist on their own ways of doing things. In view of this, the issue on the table is how a society will deal with the realities in which such living law is applied.

98 By doing so, also providing input as to the interpretation and further development of (human) rights; cf. Gärditz (2008:159ff.).

99 As described above.

100 Here and to what follows, cf. Hinz (1985); Von Schwanenflügel (1993).

101 For example, this is what Namibia's Customary Law Ascertainment Project does; cf. Hinz (2010).

This is a political issue to which basically two answers are possible. One would be to go the easy route, i.e. to reject the results of the non-statal/non-official formations of governance as not legitimised by Parliament. However, research on legal pluralism has shown that decisions of this kind will not end the matter, but rather lead to conflict.[102] The other answer is to open up not only space for negotiation, but also for remedies within the parameters set for a specific legal environment.[103] The Agenda 21 Preamble declares that the document is a "dynamic programme".[104] Its dynamism requires political creativity. The challenge of the architecture of global environmental governance is to overcome inherited concepts that are unable to respond to changing demands over time.

Legal and legal anthropological research shows that traditional authorities take their environmental responsibility seriously. The research shows where traditional authorities experience very practical limits in pursuing action to support the sustainable maintenance of their resources.[105] The research also shows that some of these limits result in statutory deficits and related, politically motivated reluctance to accept the dynamics in traditional communities. The need to accept the dynamics of traditional authorities led the introduction to this paper to focus on legal problems originating in the described tensions and contradictions between statutory and customary law, including the fragmentation in the administration of matters which, at the local level, are under the power of traditional authorities.

Law reform is called for to address these issues. The attempt followed in this paper could be an additional stimulus for law reform, namely to place the operation of traditional authorities within a wider governmental framework. The construction of this wider framework would be guided by the call to reconsider the various actors relevant to sustainable development and their place in the architecture of global governance in support of sustainable development. Managerial reasons support this attempt, but so do legal ones that refer to recognising and confirming customary law and traditional governance as provided for in the Namibian Constitution. The reference to suggestions to improve the architecture of global governance in support of sustainable development will also more adequately expose the nature of frag-

102 Which one finds, for example, where African states have tried to abolish customary law!

103 See Winter (2012:145).

104 Chapter 1, section 1, paragraph 1.6.

105 See here the research assembled in Hinz & Ruppel (2008) and in Hinz et al. (2012).

mentation in the architecture. Thus, transforming traditional authorities into subnational administrative units of the state will not meet the very special legitimacy of traditional governance; providing for better state responses to traditional governance will enhance local ownership and, with this, strengthen local responsibility.

Apart from this, it also has to be noted that the area under research in the TFO Project is occupied with special international arrangements which contribute important aspects to the very concrete architecture of governance that go beyond the borders of states. In addition to general public international law that binds, in 1994, Angola, Namibia, and Botswana entered into an agreement concerning the Kavango River Basin,[106] by means of which they want to set rules that take note of the interests of the three countries and, in particular, the people who depend on the water of the river. According to the agreement, the objective of the Permanent Water Commission made up by these three countries and known as *OKACOM* is –

> … to act as technical advisor to the Contracting Parties on matters relating to the conservation, development and utilisation of the resources of common interest to the Contracting Parties (basin member states)....

OKACOM's mandate is as follows:[107]

- Determine the long-term safe yield of the river basin;
- Estimate reasonable demand from the consumers;
- Prepare criteria for conservation, equitable allocation and sustainable utilisation of water;
- Conduct investigations related to water infrastructure;
- Recommend pollution prevention measures;
- Develop measures for the alleviation of short[-]term difficulties, such as temporary droughts …

On 7 December 2006, the Governments of Angola, Botswana, Namibia, Zambia and Zimbabwe signed a Memorandum of Understanding to establish the Kavango–Zambezi Transfrontier Conservation Area (KAZA

106 Agreement between the Governments of the Republic of Angola, the Republic of Botswana and the Republic of Namibia on the Establishment of a Permanent Okavango River Basin Water Commission (OKACOM), concluded in Windhoek on 15 September 1994; available at www.okacom.org, last accessed 15 January 2013.

107 See Article 4 of the Agreement.

TFCA).[108] The relevant treaty was concluded on 18 August 2011 and states as its purpose the following:[109]

> By this Treaty, the Partner States establish the Kavango Zambezi Transfrontier Conservation Area... for the primary purpose of harmonising policies, strategies and practices for managing shared Natural Resources that straddle the international borders of the five... Partner States and deriving equitable socioeconomic benefits through the sustainable use and development of their natural and cultural heritage resources.

OKACOM and the KAZA TFCA have overlapping jurisdiction and many goals in common. The analysis of both these international arrangements, their policies, the implementation of the policies, and their effects on the various societal levels, including the input of the sub-international levels in the formulation of those policies and their implementation, will contribute further to the understanding of the architecture of governance for sustainable development in a globalising world.

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108 Treaty between the Government of the Republic of Angola, the Government of the Republic of Botswana, the Government of the Republic of Namibia, the Government of the Republic of Zambia, and the Government of the Republic of Zimbabwe on the Establishment of the Kavango–Zambezi Transfrontier Conservation Area; available at www.kavangozambezi.org, last accessed 15 January 2013.

109 See Article 2(1) of the Treaty.

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