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The Emerging Constitutional Indigenous Peoples Land Rights in Tanzania

Kennedy Gastorn*

The pastoralists and hunter-gatherer indigenous peoples in Tanzania continue lobbying their recognition as such and protection of their land rights. This article discusses the extent to which the indigenous peoples are legally recognized and the state of their security of land tenure. With the hindsight of the UN Declaration on the Rights of Indigenous Peoples 2007 and the 2003 Report of the African Commission Working Group of Experts on Indigenous Population, this article probes the emerging indigenous land rights within the broader understating of the minority rights in the Draft Constitution of Tanzania 2014 as well as the Draft Policy Framework on Indigenous Persons 2011 of the Tanzania Social Action Fund. It is submitted that the provision on rights of minorities in the Draft Constitution is a commendable milestone upon which further actions may be pursued towards a specific recognition and the protection of indigenous land rights.

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http://www.alps.syr.edu/journal/2016/11/JLPS-2016-11-Gastorn.pdf.

I. Introduction

This article discusses the state of the indigenous land rights in Tanzania and how the struggles of indigenous peoples have influenced the ongoing constitutional reform processes in the country and project the milestone achieved as well as the challenges ahead. Tanzania hosts a number of indigenous peoples within the wider understanding of the term as per the United Nations (UN) Declaration on the Rights of Indigenous Peoples of 2007 as well as the 2003 African Commission on Human and Peoples' Rights Report on Indigenous Communities. Tanzania has long been at the forefront of conflict between the indigenous communities' claims to their ancestral lands and the demand for land created by the county's free market oriented economy coupled with emerging strong conservation interests. The country hosts indigenous communities that not only identify themselves as culturally depend-

ent on their lands but have, to a larger extent than in any other African countries, chosen the judiciary as one of their main means of action to protect their ancestral lands.[1]

The choice of Tanzania is made not only because the country voted for the adoption of the UN Declaration on the Rights of Indigenous Persons in 2007, but also the choice is warranted by the fact that Tanzania has just celebrated its 50th independence anniversary and the government of Tanzania has appreciated that there should be a new Constitution instead of amending the existing Constitution. Consequently, in 2011 the government enacted the Constitutional Review Act[2] to guide the review process and in December 2013 the Constitutional Review Commission drafted the New Constitution which was then passed on to the Constituent Assembly for discussion before being subjected to a Referendum. The Constituent Assembly issued a final draft of the proposed Constitution on October 08 2014 when it was presented to the Presidents of the United Republic of Tanzania and the Revolutionary Government of Zanzibar. The Referendum is expected in 2015.

It is therefore an opportune moment to examine how long standing claims to land by indigenous communities are safeguarded in the constitution as the supreme law of the land. In the premises, this article presents the major claims of the indigenous people made to the Constitutional Reform Commission and how such claims have been enshrined in the draft Constitution issued by the Constituent Assembly but also how the same rights can be achieved on ground. Additionally, the government through the Tanzania Social Action Fund

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[1] A.K. BARUME, LAND RIGHTS OF INDIGENOUS PEOPLES IN AFRICA: WITH SPECIAL FOCUS ON CENTRAL, EASTERN AND SOUTHERN AFRICA 12 (2010).

[2] Chapter 83 of the Laws of Tanzania.

(TASAF) is working with the World Bank to develop a policy framework on indigenous peoples despite the absence of any law or policy regarding indigenous peoples.

This article takes on concerns of security of land tenure as the most fundamental issue for the indigenous peoples culture, spiritual life, integrity and economic survival in Tanzania. Additionally, land is among the most controversial issue in human rights and constitute element upon which most violent conflicts and to human rights violations have been committed by governments and other institutions.[3] The unique life of indigenous peoples is always based on their close relationship with land. This life may be expressed in many ways such as "traditional use or presence, maintenance of sacred or ceremonial sites, settlements or sporadic cultivation, seasonal or nomadic gathering, hunting and fishing, the customary use of natural resources or other elements characterizing indigenous or tribal culture."[4]

II. The Concept of Indigenous Peoples in International Law

Recognition of indigenous communities at the international level occurred within the last fifty years. According to Lillian Aponte Miranda, their recognition owes to the convergence of four factors, namely, (a) the shifts in ideological conceptions of indigeneity;

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[3] P. Manus, Sovereignty, *Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553 (2005), at 554.

[4] Inter-American Commission on Human Rights, *Special Feature: Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263 (2011), at 265.

(b) local affronts to indigenous peoples culture and greater opportunities for transnational coalition-building under globalization; (c) international law promotion of ideals of participatory democracy; and (d) advocacy by indigenous peoples for greater recognition of participatory rights.[5] At the international level, the term indigenous peoples is mainly used to describe beneficiaries, and interchangeably with other terms such as aborigines or tribal peoples, first peoples, native Americans (USA) and First Nations (Canada).[6] As such, to date, the concept of indigenous peoples is both a static and an evolving concept as it lacks a universal strict definition. However, key features are generally used to describe indigenous peoples. Interestingly, both indigenous organizations, the African Commission on Human and Peoples' Rights and the UN system, are against a very strict definition of who is indigenous because the diversity of peoples and situations is such that a universal definition would inevitably exclude some peoples and many governments may use this strict definition as an excuse for not recognizing indigenous peoples within their own territories.[7]

The key features used to describe indigenous peoples are (a) a priority in time with respect to the occupation and use of a specific territory; (b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, reli-

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[5] L.A. Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203 (2010), at 219.

[6] J. Firestone, J. Lilley & I.T. de Noronha, *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219 (2005), at 224.

[7] S. Saugestad, *The Indigenous Peoples of Southern Africa: An Overview*, in INDIGENOUS PEOPLES' RIGHTS IN SOUTHERN AFRICA (R.K. Hitchcock & D. Vinding eds., 2004), at 34.

gion and spiritual values, modes of production, laws and institutions; (c) self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and (d) an experience of subjugation, marginalization and dispossession, exclusion or discrimination, whether or not these conditions persist.[8] For instance, the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights (ACHPR) presents the key features of a group or a community to qualify as indigenous in the context of human rights, namely, (a) their cultures and ways of life must differ considerably from the dominant society, (b) their cultures must be under threat of extinction;(c) the survival of their particular way of life must depend on access and rights to their lands and the natural resources thereon; (d) they suffer from discrimination as less developed advanced than other more dominant sectors of society; (e) they often live in inaccessible regions, often geographically isolated; and (f) they suffer from various forms of political and social marginalization.[9]

In 2007, the General Assembly overwhelmingly adopted the Declaration on the Rights of Indigenous Persons by a vote of 144 to 4 and 11 abstentions. Countries with the largest indigenous populations such as Canada, USA, Australia and New Zealand (settler nations), who initially voted against the Declaration, finally adopted it in

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[8] BARUME, *supra* note 1, at 30; R.K. Hitchcock & D. Vinding, *Indigenous Peoples' Rights in Southern Africa: An Introduction*, in Hitchcock & Vinding, *supra* note 7, at 8.

[9] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa." Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session 2005, at p. 89, retrieved from http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf (accessed Aug. 22, 2016).

2010.[10] This Declaration adopted after almost a quarter century in the drafting process "acknowledges rights common to humanity - such as non-discrimination, equality, and property - and contexts for the enjoyment of those rights that may appear more particular to indigenous peoples, such as spiritual attachment to traditional lands and a focus on community rights".[11] Article 26 of the Declaration makes clear that indigenous peoples have the right to own, control, use and develop the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Also, the government is required to give legal recognition and protection to these lands. At the international level therefore, the legal basis on indigenous people is perhaps the 2007 UN Declaration on the Rights of Indigenous as well as the ILO Convention No. 169 of 1989 on Indigenous and Tribal Peoples which, inter alia, provide that indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance of discrimination, as the only binding statement about indigenous peoples although none of the African countries has so far ratified it.[12] Indeed, other human rights instruments include the UN Charter, the 1948 Universal Declaration of Human Rights, the 1966 Covenant on Economic, Social and Cultural Rights and the 1976 International Covenant on Civil and Political Rights are often resorted to in protection and defense of rights of indigenous peoples. All human rights equally apply to

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[10] K.A. Carpenter & A.R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 176 (2014); J.M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009), at 55; S. VENKATESWAR & E. HUGHES, THE POLITICS OF INDIGENEITY: DIALOGUES AND REFLECTIONS ON INDIGENOUS ACTIVISM 3 (2011).

[11] Carpenter & Riley, *supra* note 10, at 192 *et seq*.

[12] Saugestad, *supra* note 7, at 34.

indigenous people without exception. However, as Robert B. Porter puts it, the major problem with all international instruments, apart from the ILO Convention No. 169, is the absence of specific protection of the distinctive cultural and group identity of indigenous peoples as well as the spatial and political dimension of that identity, their way of life, and more importantly they do not expressly recognize and declare that indigenous peoples possess a right to self-determination.[13]

The 2007 UN Declaration on the Rights of Indigenous Persons fills the above vacuum of human rights instruments that focuses more on individual, by focusing on collective rights and making clear demands for recognition of the collective rights of indigenous polities for self-determination. According to Gelya Frank and Carole Goldberg, the core theme for the 2007 UN Declaration "concerns the rights of indigenous peoples at the sub-state level to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state".[14] The biggest limitation of the 2007 UN Declaration on the Rights of Indigenous Persons is that it is unenforceable hence not legally binding.

Resultantly, the concept of indigenous is relational and largely used to denote the inequality between the state and indigenous minority, or inter-communities in a given state hence a tool to change

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[13] R.B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE H.R. & DEV. L.J. 123 (2002), at 154.

[14] G. FRANK & C. GOLDBERG, DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES 6 (2010).

this inequality.[15] According to Barume, from a human rights perspective in the African context, indigenous groups in Africa are those communities, whose ways of life were not taken into account by post-colonial African policies, a historical injustice that has led to their particular severe marginalization, including dispossession of ancestral lands and inaccessibility to several rights and freedoms enjoyed by the rest of their fellow citizens.[16]

As a tool for change against inequality, the concept of indigenous has also been used by the World Bank for economic empowerment of some marginalized or economically disadvantaged sections of a society. The World Bank uses the term indigenous peoples generically to refer to distinct, vulnerable, social and cultural group with (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (b) collective attachment to geographically distinct habitats or ancestral territories in a given area; (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region.[17] Within its overall mission of poverty reduction and sustainable development, the World Bank conditions the borrowing countries wishing to engage in such a project, to first have a free, prior and informed consultation with all stakeholders especially the concerned indigenous peoples based on their potential benefits and impacts.[18]

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[15] Saugestad, *supra* note 7, at 35.
[16] BARUME, *supra* note 1, at 10.
[17] UNITED REPUBLIC OF TANZANIA, DRAFT TASAF III INDIGENOUS PEOPLES POLICY FRAMEWORK 5 (2011).
[18] *Id.* at 5-6 *et seq*.

III. The Concept of Indigenous Peoples in Land Laws of Tanzania

The first colonial land law in the history of Tanzania was introduced in the country in 1895 by the German colonial rule, namely, the Imperial Ordinance on the Creation, Acquisition and Conveyance of Crown Land and Alienation of Real Estates in German East Africa, 1895 (*Kaiserliche Verordnung über die Schaffung, Besitzergreifung und Veräußerung von Kronland und über den Erwerb und die Veräußerung Von Grundstücken in Deutsch-Ostafrika im allgemeinen vom 26. November 1895*).[19] By then, Tanzania was called the German East Africa. During German rule, there was no specific legislation on indigenous land rights. However, indigenous land rights were well recognized through decrees which recognized land rights of chiefs among the natives, created protected areas for African peasants and reserved areas for pastoralists such as the Maasai for the purpose of preventing the nomadic herdsmen from disturbing the rights of pasture of European and Boer farmers. This never prevented Germans from alienating any native lands as these were viewed as reserves awaiting proper allocation and exploitation.[20] As Miranda puts it, 'during the colonial period, indigenous peoples were, for the most part, ideologically constructed as irrational and uncivilized' and

[19] For detailed discussions on land laws in German East Africa, see H. Sippel, *Aspects of Colonial Land Law in German East Africa: Germany East Africa Company, Crown Land Ordinance, European Plantations and Reserved Areas for Africans*, in LAND LAW AND LAND OWNERSHIP IN AFRICA: CASE STUDIES FROM COLONIAL AND CONTEMPORARY CAMEROON AND TANZANIA (R. Debusmann & S. Arnold eds., 1996), at 3-38.

[20] K. GASTORN, THE IMPACT OF TANZANIA'S NEW LAND LAWS ON THE CUSTOMARY LAND RIGHTS OF PASTORALISTS: A CASE STUDY OF THE SIMANJIRO AND BARIADI DISTRICTS 24-25 (2008).

even the post-World War II decolonization project, grounded in human rights precepts, promoted the right of peoples to self-determination that by passed indigenous peoples.[21]

German rule enacted various forest and game laws that alienated indigenous people from their land, which from then on "the collection of fuelwood became wood theft, the hunting of animals became poaching, and pasturing cattle became grazing trespass".[22] However, German rule was short-lived as Germany's loss in World War I forced her to surrender her foreign possessions, including the German East Africa, to the victors, the allied powers.[23] German East Africa was renamed Tanganyika and placed under the British mandate of the League of Nations. Under the Foreign Jurisdiction Act, 1890, the British rule immediately issued the Tanganyika Order in Council of 22 July 1920 which declared all land in Tanganyika as public land vested in and exercised by the Governor in trust for His Majesty and gave the Governor the power to make laws in the territory as if it was a British colony or possession.[24] On 19 January 1923, the Land (Law of Property and Conveyancing) Ordinance, Cap 114 (Cap 114) was enacted to import English land laws in the territory and seven days later, on 26 January 1923, the Land Ordinance, Cap 113 (Cap 113) was enacted to regulate land tenure within the territory.

These laws, which remained in power in Tanzania until 1st May 2001, introduced the right of occupancy as the only recognized tenure in the country and declared all land as unowned vested in the colonial governor with power to make grants to individuals. Right

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[21] Miranda, *supra* note 5, at 218.
[22] G. Goldstein, *The Legal System and Wildlife Conservation: History and the Law's Effect on Indigenous People and Community Conservation in Tanzania*, 17 GEO. INT'L ENVTL. L. REV. 481 (2005), at 493.
[23] In accordance with Article 119 of the Peace Treaty signed at Versailles on June 28th, 1919.
[24] §§ 13 & 14 of the Tanganyika Order in Council of 22 July 1920.

of occupancy was of two categories, the granted right of occupancy issued by the Governor and the customary or deemed rights of occupancy. The latter simply means a title to land held by natives according to their customs and tradition. Right of occupancy, like freehold, is another form of private ownership associated with the capitalist system in which land is a marketable commodity or alienable.[25]

The term indigenous was used synonymously with the term 'natives'. In Tanzania, the origin of the concept of 'native and non-native' is the British Mandate for Tanganyika 1922 and the Trusteeship Agreement for Tanganyika of 1946, which concerned the prospects and consequences of large-scale alienation from natives to non-natives. Article 6 of the Mandate and Article 8 of the Trusteeship provided that the interest in land of natives should be paramount and safeguarded. Accordingly, the Land Ordinance prohibited any transfer of land to non-natives without the consent of the governor, who basically served as the custodian and the manager of native lands.[26] In this sense, all people found in the territory, except colonizers, became both the natives and the indigenous not because they were natives of a land on which they were born (first inhabitants) but because they were under foreign domination.[27] This was consequential to the existing ambits of self-determination principle that

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[25] A. Lyall, *Consent to Dispositions of Land in Tanzania: Socialism or the Extension of Private Property?*, 4 E. AFR. L. REV. 247 (1971), at 248-250. On the difference between right of occupancy and other modes of holding land see, among others, *Director of Lands and Mines v. Sohan Singh* (1952) 1 TLR 631; *Patterson v. Badrudin Mohamed Saleh Kanji* (1955) 23 EACA 106; *Premchand Nathu v. The Land Officer* (1960) EA 941.
[26] K. Gastorn, *Judicial Articulation of the National Land Policy and Land Legislation on Access to Land by Foreigners in Tanzania*, 3 J. AFR. & INT'L L. 227 (2013), at 229.
[27] BARUME, *supra* note 1, at 23.

'applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of indigenous peoples existing within the colonial territories and colonizing states'.[28]

Until 1970, a native was defined as any native of Africa not being of European or Asiatic origin or descent, and including Swahili but not Somali people. By an amending Act to the Land Ordinance, Act No. 28 of 1970, the definition was amended to mean any person who is a citizen of the United Republic and who is not of European or Asiatic Origin or descent. Customary tenure could be held by natives only.[29]

The National Land Policy of 1995 introduced for the first time the distinction between citizens and non-citizens in relation to land tenure instead on native and non-natives.[30] Accordingly the existing land laws, namely the Land Act 1999 and the Village Land Act 1999, no longer use the term 'native'.

It needs to be emphasized that the colonial laws, such as the Cap 113, disowned indigenous people of their land by declaring all land as public under the control and subject to the disposition of the Governor, as no title to the occupation and use of any such lands was valid without the consent of the Governor. Even with the amendment of Cap 113 in 1928[31] which recognized customary titles as

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[28] Miranda, *supra* note 5, at 218.

[29] *National Agricultural and Food Corporation v Mulbadaw Village Council and Others* [1985] TLR 88. Africans of Somali origin were also categorized as non-natives under the Somalia (Miscellaneous Provisions) Ordinance, which came into operation in 1949, until 1994 when the Ordinance was repealed by the Laws Revision (Miscellaneous Repeals) Act No.8 of 1994.

[30] The Express Newspaper (Tanzania), April, 6-8, 1995, at 12.

[31] Land (Amendment) Ordinance No. 7 of 1928. Also see Report by His Britannic Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of League of Nations on the Administration of Tanganyika Territory for the Year 1928, His Majesty's Stationery Office, London, para, 116, at 69-70.

deemed right of occupancy was only declaratory, could not safeguard the customary rights of the indigenous people and the occupation of land under customary law was legally construed by courts as permissive in the nature of licences.[32] Grazing lands or rangelands became vulnerable to encroachment and remained insecure against land alienation in favour of the establishment or expansion of the commercial farming, wildlife reserves, or conservation schemes.[33]

IV. The Indigenous Peoples in Independent Tanzania

Tanzania became independent and a republic on 9 December 1961 and 9 December 1962, respectively. It however retained the existing colonial land laws subject to minor modifications mainly the administrative and management set up but not in terms of land tenure. In terms of land laws, the major changes were perhaps the fact that the term 'Governor' was replaced with the term 'President' wherever it appeared in the law books, and natives or indigenous peoples was then defined as any person who is a citizen of Tanzania not of European or Asiatic origin or descent, could hold both the granted and customary rights of occupancy. Also, the application of

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[32] G.M. FIMBO, LAND LAW REFORMS IN TANZANIA 4 (2003), at 4. Also see *Amadu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399; *In re Southern Rhodesia* (1919) AC 211; *Muhena Bin Said v. Registrar of Titles* (1948) 16 EACA 399; *Mtoro Bin Mwamba v. A.G.* (1953) TLR 327; K. Gastorn, *Squatters' Rights and the Land Laws in Tanzania*, 3 VERFASSUNG UND RECHT IN UEBERSE 349 (2010), at 354.

[33] R.E. Richter, *Land Law in Tanganyika since the British Military Occupation and under the British Mandate of the League of Nations, 1916-1946*, in Debusmann & Arnold, *supra* note 19, at 75-77.

customary law was no longer subject to 'English justice and morality" but subject to the Constitution of Tanganyika and any other statutory laws.[34]

The national building project embarked on by the independent government had serious impacts on the recognition and the protection on indigenous peoples in the country. It was clear that all citizens of Tanzania of African origin or descent were natives without any distinctions. By upholding equality of treatment among all citizens, the government was opposed to claims of collective land rights as incompatible with true equality among the citizenry. It was felt that any recognition of indigenous groups would have placed them outside the national people whose existence legitimizes the government and the state, and whose bounds define a limit of the equal rights-bearing community.[35] The government wanted to pursue an explicitly non-ethnic and non-tribal form of nationalism.[36] As shown below, the national building initiatives affected the aspects of the voluntary perpetuation of cultural distinctiveness as well as the self-identification with recognition by other groups or by state authorities, as a distinct collectivity from other communities.

At independence, Tanzania had only one national park, namely, Serengeti. It later started the process of gazetting many other national parks, including upgrading protected areas to national park status, which caused the relocation of indigenous peoples who lived

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[34] *Maagwi Kimito v. Gibeno Werema* (1985) TLR 132; Judicature and Application of Laws Act, Cap. 358 [R.E 2002]. Also see K. Gastorn, *The Dynamics of Continuity and Change of British Colonial Legacy in Land Laws of (Mainland) Tanzania*, 1 OPEN U. L.J. 149 (2013), at 161.

[35] B. Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189 (2001), at 193.

[36] VENKATESWAR & HUGHES, *supra* note 10, at 94-95.

in those areas. National parks were seen as a potential source of foreign income.[37]

In the 1960s through the 1970s, the government embarked on hatched strategies of achieving development through transformation and development approaches, villagisation, Ujamaa policies, and World Bank-oriented investment schemes. This resulted in a countrywide resettlements schemes and mass relocations of all citizens in newly created villages. This seriously disrupted the concept of ancestral lands to many communities as well as much customs and traditions. Most customary lands fell victim of the increased conservation areas such as the national parks and game reserves that were expanded to cover village lands. Government, para-government institutions, parastatals, and statutory corporations also took a lot of previously ancestral and village lands.[38]

The nomadic pastoral societies were the most affected communities as villagisation, for instance, meant to discourage and end their rotational grazing systems. For the pastoral Maasai, there was clear intention of settling them in livestock development villages; this process took full swing as *Operation Imparnati* (i.e. permanent habitations).[39] It has now been established that in Arusha, a leading region with many pastoral communities such as *Maasai* and *Barabaig,* the

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[37] Goldstein, *supra* note 22, at 499.

[38] UNITED REPUBLIC OF TANZANIA, REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO LAND MATTERS, VOL. I – LAND POLICY AND TENURE STRUCTURE (1992), at 152.

[39] K. ARHEM, Pastoral Man in the Garden of Eden: The Maasai of the Ngorongoro Conservation Area, Tanzania 23-25 (1985); L.M. Parkipuncy, *Some Crucial Aspects of the Maasai Predicaments*, in AFRICAN SOCIALISM IN PRACTICE: THE TANZANIAN EXPERIENCE (A. Coulson, ed., 1979), at 153-156; D.K. Ndagala, *Operation Imparnati: The Sedentarization of the Pastoral Maasai in Tanzania,* 10 NOMADIC PEOPLES (1982).

villagization programme was dramatic both in its implementation and effects, compared to other parts of the country.[40]

The Native Authorities under traditional chiefs as tribal rulers created by British colonial rule[41] in terms of the indirect rule to bolster the colonial authority in opposing the growing popularity of nationalist movements were replaced by newly created local government authorities in 1962/3.[42] This seriously undermined the existing internal structures within indigenous communities, as most tribal chiefs were absorbed in the government structures. Tanzanians were seriously encouraged to live and settle in any part of the country, and education and employment systems were organized and mobilized to achieve diversities and relegate ethnicities.

In 1967, statistics based on religion and tribes were removed as denominators for national census by the government as they were perceived to be divisive elements that can easily be politicized and manipulated, jeopardizing the national building processes.[43] Indeed,

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[40] A.K. Tibaijuka et al., THE IMPLICATIONS OF THE 'REGULATION OF LAND TENURE (ESTABLISHED VILLAGES) ACT, 1992' FOR PEASANT LAND TENURE SECURITY AND NATURAL RESOURCE MANAGEMENT AND CONSERVATION IN TANZANIA 3-4 (1993).

[41] Under the Native Authority Act Cap 72 of 1926.

[42] L. Juma, *Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives*, 13 MICH. ST. J. INT'L L. 417 (2005), at 489.

[43] In 2012, several Muslim leaders with their followers boycotted the national census with some escaping and staying with their families in mosques, forcing the government to have 'religion denominator' included in the census. Some clerics and followers were arrested and charged for obstructing the national census. See for instance, Tanzania: Religious Tensions Mar Census, retrieved from http://allafrica.com/stories/201209180078.html (accessed Aug. 22, 2016); Tanzania: Bakwata - We Are Not Against Census, retrieved from http://allafrica.com/stories/201206260636.html (accessed Aug. 22, 2016). Tanzania: Muslims Threaten to Boycott National Census, retrieved from http://www.namnewsnetwork.org/v3/read.php?id=MjAyNTk0 (accessed Aug. 22, 2016).

Tanzania, with more than 120 ethnic communities based on vernacular languages,[44] has so far avoided political scenes to be mobilized on the basis of ethnic extractions hence absence of tribal clashes.

In 1967, in supporting the socialist Ujamaa (family-hood) and self-reliance policies, Kiswahili was promoted as the lingua franca and became the official language and medium of instruction at all primary school levels, with English becoming a single subject taught in schools. This seriously undermined the relevance of tribal or vernacular languages as an element of a group identity.

In the premises, Tanzania demonstrated clearly that all her citizens are indigenous and abolished any governance structure based on tribal or ethnic lines as a criterion for participation in the state affairs or claiming any special rights. This denial of the existence of indigenous peoples is not unique to Tanzania but common to all African countries. This is arguably due to the fact that the continent is endowed with the longest history of human occupation and the greatest range of human genetic and cultural diversity hence difficult to precisely determine antecedence as people have moved into and out of local areas over time.[45] Moreover, the government of Tanzania after independence pursued no policy of indigenization perhaps for the fear of confronting the reality that colonization had imposed that ultimately became barriers from doing so. Like elsewhere, colonialism eroded many attributes to the distinctiveness

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[44] C.S.L. Gahnström, Ethnicity, Religion and Politics in Tanzania: The 2010 General Elections and Mwanza Region (Development Studies Master's Thesis, University of Helsinki, 2012), at 6; List of ethnic groups in Tanzania, retrieved from https://en.wikipedia.org/wiki/List_of_ethnic_groups_in_Tanzania (accessed Aug. 22, 2016); People and Culture, retrieved from http://tanzaniaembassy-us.org/?page_id=100 (accessed Aug. 22, 2016).

[45] Hitchcock & Vinding, *supra* note 8, at 8.

necessary for indigenous as it promoted the assimilation of indigenous peoples into the colonizing or immigrant.[46]

V. The Case for the Presence of Indigenous Peoples in Tanzania

There is a fairly agreed upon consensus that indigenous communities exist in Tanzania, casually referred to as marginalized, minority or special groups who are economically disempowered and whose livelihood is still strongly attached to their cultural practices in comparison to the main groups in the country.[47] According to the 2014 Year book of the International Work Group for Indigenous Affairs, although many ethnic groups may identify themselves as indigenous peoples, four groups in Tanzania have been organizing themselves and their struggles around the concept and movement of indigenous peoples, namely, the hunter-gatherer Akie (estimates to be 5,268) and Hadzabe (1,000)[48] as well as the pastoral groups of Barabaig (87,978) [49] and Maasai (430,000) in a country of over 45 million people.[50] Indigenous peoples claim to land in Tanzania is a subject that has received many scholarly attention and writings.[51]

The following are some of the reasons that make them marginalized hence indigenous communities in the context of Tanzania:

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[46] Porter, *supra* note 13, at 132.
[47] S.E.A. Mvungi, *Land Rights of Minorities and Indigenous Peoples*, 20-27 E. AFR. L. REV. (2000), at 88-99.
[48] Also see A. MADSEN, THE HADZABE OF TANZANIA: LAND AND HUMAN RIGHTS FOR A HUNTER-GATHERER COMMUNITY (2000).
[49] Also see C. LANE, PASTURES LOST: BARABAIG ECONOMY, RESOURCE TENURE AND THE ALIENATION OF THEIR LAND IN TANZANIA (1996).
[50] IWGIA, The Indigenous World (2014), at 416, retrieved from http://www.iwgia.org/regions/africa/tanzania (accessed Aug. 22, 2016). Also see BARUME, *supra* note 1, at 26, 40.
[51] For instance, see BARUME, *supra* note 1, at 123-151 *et seq*.

A. Priority in Time

The question of antecedence in respect of the perceived indigenous people in Tanzania is difficult to substantiate. What can be proved is that certain communities, like Maasai, have settled and lived in a given area for so long prior to colonization that their way of life and traditions are critically dependent on such lands without which they are unable to survive as cultural distinct entities. For instance, the Maasai in the northern part of Tanzania came to the area in around 15th century and their originality therefore cannot be based on immemorial occupation of such lands.[52] The same argument can be made to the remaining hunter-gatherer, the Hadzabe community living around Lake Eyasi near Serengeti Plateau in Central Rift Valley, Mbulu district, Manyara region, in the Northern Tanzania.

B. Voluntary Perpetuation of Cultural Distinctiveness

These communities have considerably demonstrated resilience to their way of life in comparison to other communities. Their way of life has remained unchanged ever since, making them proudly attractive to the rest of other communities but also social researchers, tour firms, filmmakers, non-governmental organizations and world communities. While other communities, to a large extent, have received and adopted religions like Christianity and Islam, majority of the members of these communities practice their own religion and spiritual values. In the 21st century, Hadzabe and Akie remain the surviving hunter-gatherer societies in Tanzania. Over 120 vernacular languages existing in the country may be classified into four groups of Khoisan (hunter-gatherers), Cushitic (pastoralists), Nilotic (like

[52] *Id.* at 46-47 *et seq.*

Maasai) and Bantu (farmers). Bantu is the majority group and constitutes more than 80% of all people in Tanzania.[53] Clearly therefore, hunter-gatherers and the nomadic people are minority numerically and their languages are not widely spoken. To a large extent, by default or design, these communities have low, if any, inter-marriages outside their communities.

C. Self-identification and Recognition

Because of their unique way of life, these groups have been able to unequivocally identify themselves by deeds and words, as distinctive entities within the larger community of Tanzania. And the rest of the communities including the government, through its policies, recognize their presence without officially creating any hierarchy among the communities contrary to the egalitarian philosophy of Tanzania. As alluded to above, these communities have organized themselves, nationally and internationally, as indigenous peoples with special attachment to their traditional lands.[54]

D. Experience of Subjugation, Marginalization and Dispossession

In terms of land tenure, the nomadic and hunter-gatherer communities have suffered most of the land insecurity in Tanzania. Their customary land tenure has been either misunderstood or deliberately ignored by the colonial and independent governments to the extent of having special policies and laws to transform their way of life into the mainstream society. Accordingly, they suffered twice, by

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[53] The Tribes of Tanzania, retrieved from http://www.tanzaniaodyssey.com/blog/cadogan-guide-to-tanzania-people-culture-and-religion/ (accessed Aug. 22, 2016).

[54] See G.N. Tarayia, *The Legal Perspectives of the Maasai Culture, Customs, and Traditions*, 21 ARIZ. J. INT'L & COMP. L. 183 (2004).

the same predicaments suffered by other customary tenure holders against the statutory tenure as well as specific measures targeting them. For instance, both colonial and post-colonial governments attempted to forcefully to change their nomadic way of life perceived as a reason for their non-integration into the mainstream social life. This was done through resettlement schemes and legislating livestock movements. The British rule tried for a while in 1927 and 1939 to settle nomadic Hadzabe but the policy failed and was then abandoned causing Hadzabe to return to their homelands.[55] The villagisation schemes of 1960s/70s relocated hundreds of thousands of these communities into the newly created villages with serious impact on their traditional lands but still their distinctiveness was not lost even on their new home as much as most of them again returned to their lands. The Range Management and Development Act 1964 meant, inter alia, to stop nomadic grazing and the ranching associations destabilized and extinguished all pastoral customary land rights and traditions wherever they were applied.[56]

Today the government policy is clear that nomadic pastoralism must be transformed into a modern livestock keeping as nomadism is associated with land degradation, conflicts with farmers, spread of animal diseases and lack of proper use and management of land as well as underutilization of land. The National Land Policy of 1995 revised in 1997, the Land Act and Village Land Act of 1999 as well as the Grazing and Animal Feeds Resources Act 2010 restrict movements of livestock and seek to, inter alia, put an end to the nomadic pastoralism. Schemes under the land laws such the allocation of land for pastoral use, demarcation of grazing land, joint village land use

[55] BARUME, *supra* note 1, at 56.
[56] GASTORN, *supra* note 20, at 36.

agreements, land sharing arrangements and land associations focus on individuals and not community, thereby limiting nomadism.[57] As most of the grazing lands have already been parceled to the investors and conservation authorities, some pastoralists have been coerced to either abandon their traditional way of life or relocate to other parts of the country where land is perceived available.[58] They are now scattered throughout the country and no longer confined to their perceived ancestral lands.

Natural resource-based conflicts in Tanzania mostly center around the issue of land and water scarcity for pastoralist communities, farmers and investors.[59] For instance, in the year 2000 pastoralists clashed with farmers over land and water in Kilosa and the incident cost 38 farmers their lives.[60] At Ikwiriri, the same pattern of conflict led to the death of a 60-year old farmer, Shamte Seif, in an assault by the pastoralists who wanted to graze on his paddy field. In revenge, the village farmers killed five pastoralists.[61] Pastoralists are in conflict with conservation authorities such as the Ngorongoro Crater Authority where the Maasai have been forced out to give way to the investors to invest in tourism hotels and camps. The ongoing

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[57] *Id.* at 84-104 *et seq.*

[58] *Id.*

[59] FOOD & AGRICULTURE ORGANIZATION (FAO) & R.S. KNIGHT, STATUTORY RECOGNITION OF CUSTOMARY LAND RIGHTS IN AFRICA: AN INVESTIGATION INTO BEST PRACTICES FOR LAW-MAKING AND IMPLEMENTATION 204-205 (2010).

[60] "Hadithi" ya mauaji ya Kilosa mwaka 2000. Tujifunze kitu kwa siasa za sasa, retrieved from https://www.jamiiforums.com/threads/hadithi-ya-mauaji-ya-kilosa-mwaka-2000-tujifunze-kitu-kwa-siasa-za-sasa.1100687/ (accessed Aug. 22, 2016).

[61] *See* Tanzania: Ikwiriri Clashes - Red Flag or Smoking Gun?, retrieved from http://allafrica.com/stories/201205270217.html (accessed Aug. 22, 2016); Mkulima auawa na mfugaji, yazuka mapigano, retrieved from http://richard-mwaikenda.blogspot.in/2012/05/mkulima-auawa-na-mfugaji-yazuka.html (accessed Aug. 22, 2016).

investments in large sisal estates, biofuels and sugar cane has caused more demand for arable land which translates into a more struggle for land while at the same time conversion of land into national parks and game reserves contributes to further destabilization of the nomadic pastoral economy.[62] Many parts of the country are being affected by these conflicts.

The 2014 year book of the International Work Group for Indigenous Affairs reports that (a) since 2012 the Maasai and Barabaig pastoralists have been evicted from Kilombero valley in Morogoro region; (b) the Maasai who were evicted in 2006 from Ihefu district in Mbeya region and resettled in Rufiji district, are again being evicted in 2013 from some villages in the same Rufiji district where they were initially settled; (c) wildlife management areas (WMA) are increasingly being created out of the grazing lands bordering national parks, such as the Buruge and Randle WMAs in Manyara region; and (d) game reserves are still expanding into grazing lands, for instance the expansion of Gurumeti Game Reserve in Bunda district.[63]

The absence of certificates to prove ownership of land has relegated many pastoralists unable to defend their land whenever they are taken by governments for other development projects including granting to the investors. This was compounded by the lack of clarity on the status of customary tenure vis-à-vis the granted right of occupancy. Most cases challenging land acquisitions were lost because of legal technicalities, lack of admissible evidence that showed the pas-

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[62] F. MAGANGA, CONTESTED IDENTITIES AND RESOURCE CONFLICTS IN MOROGORO REGION, TANZANIA: WHO IS INDIGENOUS? (2007).

[63] IWGIA, *supra* note 50, at 418-19, 421. On conservation schemes and indigenous peoples in Tanzania, see Goldstein, *supra* note 22, at 481-515.

toralists owned or occupied the land prior to the gazettement or acquisition by the government, or the government radical title in the name of public interest.[64] Even where the pastoral communities won the case, enforceability of the court decrees became dramatic.[65] For instance in 1992, there was a thwarted attempt through the Regulation of Land Tenure (Established Villages) Act, 1992, to bar any claim for remedy relating to the extinction of the customary rights in question in any court of law in respect of villagization programme but also to extinguished, without compensation, customary land tenure rights in respect of land held prior to villagization.[66]

In general, most of pastoral lands as well as traditional lands held by hunter and gatherers were basically regarded as terra nullius and no consideration of their identity to that land was taken into account. It needs to be emphasized that Tanzania does not have a category of ancestral or tribal land. Basically all land other than that registered

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[64] For instance see I.H. Juma, *Extinction of Customary Land Rights in the Wildlife Conservation Areas of Tanzania: The Case of Mkomazi Game Reserve*, RECHT IN AFRIKA (2000), at 133-172; *Lekengere Faru Parut Kamunyu & 52 others v. Minister for Tourism, Natural Resources and Environment & 3 others*, Consolidated Civil Case No. 43 of 1994, High Court of Tanzania at Moshi (unreported); *Lekengere Faru Parut Kamunyu & 52 others v. Minister for Tourism, Natural Resources and Environment & 3 others*, Civil Appeal No. 53 of 1998, Court of Appeal of Tanzania (unreported); S.E. MCHOME, EVICTIONS AND THE RIGHTS OF PEOPLE IN CONSERVATION AREAS IN TANZANIA 96-136 (2002).

[65] Several cases on indigenous peoples land claims in Tanzania are discussed and narrated by Barume, *supra* note 1, at 123-51.

[66] *Attorney-General v. Lohay Akonaay and Joseph Lohay* (1995) TLR 80; R.W. Tenga, *Monstrous Land Bill to Make Most of Tanzanian Landless*, in Search of Freedom and Prosperity: Constitutional Reform in East Africa, (K. Kibwana et al. eds., 1996), at 95-100; I.G. SHIVJI, A LEGAL QUAGMIRE: TANZANIA'S REGULATION OF LAND TENURE (ESTABLISHMENT OF VILLAGES) ACT, 1992 (1994); S.E.A. Mvungi & H.G. Mwakyembe, *Populism and Invented Traditions: The New Land Tenure Act of 1992 and Its Implications on Customary Land Rights in Tanzania*, 29 AFRIKA SPECTRUM 327 (1994); S.E.A. Mvungi & H.G. Mwakyembe, *The Regulation of Land Tenure (Established Villages) Act, 1992 and Its Implications for Customary Land Rights in Tanzania*, in CHANGING RURAL STRUCTURES IN TANZANIA (D. Schmied, ed., 1996), at 73–84.

(general and reserve land) is regarded as village land under the mandate of the Village Councils. At the same time, all unused village land is regarded as general land under the mandate of the Land Commissioner.[67] In a way, as far as land law is concerned, Tanzania has no traditional authority or tribal authority or tribal lands but a village land and a village as the lowest administrative organ. Accordingly, in Tanzania, titles to land are grantable to individuals, jointly or privately, or to a legal person, such as an association, which has also been casually described to as a collective property rights. Neither the community nor the village can be granted a right of occupancy. Village Councils are granted 'Certificates of Village Land' as an administrative document for them to manage and administer lands in their administrative boundaries including issuing titles to land to their residents, namely the customary right of occupancy under the Village Land Act 1999. A village may also prepare a land use plan and thereby set aside part of its land as a communal land to be used collectively and exclusively for certain category of land use, e.g., grazing and so forth. This is the only form in which a community may be assigned land to use.

Resultantly, land laws of Tanzania focus on individuals and thereby undermine the paradigm of collective rights by integrating or assimilating indigenous peoples land rights into the mainstream system and society. Ultimately, land laws seek to create fully-fledged individualized land tenure. In Tanzania, the first attempt to create individualization of land tenure by conversion of customary communal tenure into freehold tenure dates back to the East African Royal Commission Report on Land and Population in East Africa, 1953-55. It was suggested that customary communal tenure inhibits

[67] § 2 of the Land Act 1999.

mobility and private initiative for economic progress, sense of security in possession and market on land.[68]

The absence of communal land as a category of land in Tanzania is one of the key difference between Kenya and Tanzanian land regime. Article 63 of the Kenyan Constitution of 2010 recognizes and protects communal land. It declares that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. In Kenya, community land includes land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; and ancestral lands and lands traditionally occupied by hunter-gatherer communities. It also includes land lawfully registered in the name of group representatives under the provisions of any law, land lawfully transferred to a specific community by any process of law, and any other land declared to be community land by an Act of Parliament.

VI. Existing Legal Inferiority of Indigene Tenure

Customary right of occupancy is defined as including a title to land created by a village council through a certificate under the Village Land Act 1999 as well a title of a Tanzanian or community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law.[69] Customary law is defined as 'any rule or body of rules whereby rights and duties are acquired,

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[68] EAST AFRICAN ROYAL COMMISSION REPORT ON LAND POPULATION IN EAST AFRICA, 1953-1955, H.M.S.O., chapter 22, para 77, at 323. This report was opposed by nationalist movements in Tanzania and was not implemented. *See* J.K. Nyerere, *Mali Ya Taifa* (1958). Also see Government Paper No. 6 of 1958; J.K. NYERERE, FREEDOM AND UNITY: *UHURU NA UMOJA*. A SELECTION FROM WRITINGS AND SPEECHES 1952-1965, 55-56 (1967).

[69] § 2 Village Land Act, 1999 & § 2 Land Act, 1999.

imposed or established by usage in any [Tanganyika African community/African Community in Tanzania] and accepted by such community in general as having the force of law'.[70] In terms of hierarchy of land laws, any customs, tradition or practices of any community is applicable as long as it does not deny women or persons with disabilities lawful access to ownership, occupation and use of lands; and would only apply when a matter is not otherwise provided for in any written laws and contrary to the fundamental principles of the national land policy.[71]

A land title of an indigene is therefore a deemed right of occupancy acquired through occupation, adjudication, and hereditary transfers by and amongst individuals or families made under valid local customs, and not granted by a village council under the Village Land Act 1999.[72] It is declared, but not legislated, for under the existing land laws. While the title created by the village council under the Village Land Act 1999 is in every respect of equal status and effect to a granted right of occupancy under the Land Act 1999,[73] deemed right of occupancy is subjected to any written laws, including the Village Land Act 1999, and policies.[74] Accordingly, deemed right of occupancy has no special legal protection.

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[70] § 3(1) Interpretation of Laws and General Clauses Act No. 30 of 1972 & § 85 of the Interpretation of Laws Act No. 4 of 1996, Cap. 1.

[71] Interpretation of Laws and General Clauses Act of 1972; the Judicature and Application of Laws Act, Cap. 358 [R.E 2002].

[72] G.M. Fimbo, *Customary Tenure in the Court of Appeal of Tanzania*, 31-34 E. AFR. L. REV. 16 (2004), at 17; ILD, The Diagnostic Report Volume III: The Legal Economy Its Institutions and Costs, (2005) (unpublished), at 50; FIMBO, *supra* note 32, at 24.

[73] § 18 of the Village Land Act 1999. See also the National Land Policy 1995, para 4.1.1(vi).

[74] It has also been argued that since the definition of customary right of occupancy includes deemed right of occupancy, § 18 of the Village Land Act does not purport to limit that definition only to the created right of occupancy by allocation made

This does not mean, however, that deemed rights of occupancy is not a protected right. It is a property right in the eyes of Article 24 of the Constitution of the United Republic of Tanzania.[75] Furthermore, section 4(3) of the Land Act 1999 provides that "every person lawfully occupying land, whether under a right of occupancy, wherever that right of occupancy was granted, or deemed to have been granted, or under customary tenure, occupies and has always occupied that land, the occupation of such land shall be deemed to be property and include the use of land from time to time for depasturing stock under customary tenure". This covers a land title of an indigene.

VII. Nascent Recognition of Indigenous Communities in Tanzania

Presently, the government has no law or clear policy on recognition of the existence of indigenous or minority groups within the meaning of international law in her boundaries. International human rights organizations and treaty bodies, including the Committee on Economic, Social and Cultural Rights (CESCR) and the African Commission on Human and Peoples' Rights (ACHPR) have been pushing for the government to recognize and protect human rights of these groups. For instance, the '*Shadow Report Concerning the Situation of Economic Social and Cultural Rights of Indigenous Pastoralists and Hunter Gatherers of the United Republic of Tanzania*' by the Coalition of Indigenous Pastoralist and Hunter Gatherer Organizations

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by village councils. Instead it caters for all incidents of customary right of occupancy. See F.K. Mutakyamilwa, Harmonisation of Land Markets Development with Tenure Security under the Land Act, 1999 and the Village Land Act, 1999 (LL.M Dissertation, University of Dar es Salaam, 2005), at 6.

[75] *Attorney General v. Lohay Akonaay and Joseph Lohay* 1995 TLR 80.

to the 48th Session of the Committee on Economic Social and Cultural Rights shows the reluctance on part of Tanzania to recognize the existence of such groups and contains several recommendations to Tanzania.[76]

For instance, recommendations of the UN Human Rights Commission Working Group on the Universal Periodic Review of 2011 recommends the government of Tanzania to recognize the notion of indigenous peoples with a view to effectively protect their rights and adopt measures to protect and preserve the cultural heritage and traditional way of life of indigenous peoples and undertake effective consultations with indigenous peoples based on free, prior and informed consent; launch a credible investigation of forced evictions and land conflicts and use the results of this investigation to help draft new legislation, which fully takes the rights of indigenous peoples into account; promote a legal framework giving land ownership and protection against forced evictions and recognition of the rights of indigenous people, pastoralists, hunters and gathering peoples.

As alluded to above, Tanzania is among UN members that voted for the adoption of the 2007 UN Declaration on the Rights of Indigenous Persons. In the last few years, there have been some important steps taken in Tanzania relevant to the rights of indigenous peoples as follows:

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[76] Shadow Report Concerning the Situation of Economic Social and Cultural Rights of Indigenous Pastoralists and Hunter Gatherers of the United Republic of Tanzania, http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCESCR%2FShared%2520Documents%2FTZA%2FINT_CESCR_NGO_TZA_14000_E.doc&ei=MyzIU-ikF4ycyATc8YDQBw&usg=AFQjCNG0D7pc5AfsQzaCP8Ba6XzX1iq4XA&bvm=bv.71198958,d.aWw (accessed Aug. 3, 2016).

A. Draft Indigenous Peoples Policy Framework 2011

The Draft TASAF Policy Framework on Indigenous peoples issued in 2011 (the IPPF) indicates that the process of determining indigenous peoples in Tanzania is underway under the auspices of the World Bank and already the Hadzabe and Barabaig have been initially listed for purposes of the IPPF.[77] The IPPF is designed to operate within the context of the Product Social Safety Net (PSSN) designed to support the poorest and the most vulnerable households through a series of interventions aimed at (a) protecting households from seasonal and unexpected shocks affecting their income and assets, (b) providing them with tools to mitigate current poverty and vulnerability, and (c) promoting them to improve their living standards and get out of food poverty. At the core of the PSSN is therefore the provision of cash transfers to eligible households as its primary goal.[78]

In ensuring that it fully respects the dignity, rights, economies, and cultures of indigenous peoples, any project under IPPF will be developed in agreement with the respective indigenous peoples in the selected villages as the lowest governance structure at the community level.[79] Based on consultation, participation and information disclosure to the targeted indigenous peoples, it is not expected that the hatched projects will displace indigenous peoples from traditional or customary land, or commercially develop natural resources within customary lands under use that would impact their livelihoods or the cultural, ceremonial, or spiritual uses that define their

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[77] UNITED REPUBLIC OF TANZANIA, *supra* note 17, at 1.
[78] *Id.* at 5-6 *et seq*.
[79] *Id.* at 14 *et seq*.

identity.[80] However, since the IPPF seeks to support indigenous peoples through enhanced and diversified livelihoods, there is likelihood of loss of core cultural values by adopting new livelihood opportunities. Accordingly, the IPPF categorically provides that all projects will be made culturally appropriate in strengthening the existing customary livelihoods sources.[81]

The IPPF is a demand-driven project and will not be imposed on any community as much as it is a government's hatched initiative within the Local Government Authorities under TASAF. It is therefore a poverty reduction tool by enhancing capabilities, assets and livelihoods at household level in a given area. It is not a tool to recognize the notion of indigenous peoples with a view to effectively protecting their rights and adopt measures to protect and preserve their cultural heritage and traditional way of life through effective consultations based on free, prior and informed consent. The IPPF does not seek to secure land rights, to say the least. It is however a courageous emerging step by the government to partly embrace the concept of indigenous peoples in the spirit of the 2007 UN Declaration on the Rights of Indigenous Peoples as well as the 2003 African Commission on Human and Peoples' Rights Report on Indigenous Communities.

B. Draft Constitution of the United Republic of Tanzania 2014

The Draft Constitutions issued by the Constitution Reform Commission (CRC) in 2014 and the Constituent Assembly in 2014 contains a new provision on the rights of minorities that may significantly be used to support the course of the indigenous peo-

[80] *Id.* at 11 *et seq*.
[81] *Id.* at 8-9 *et seq*.

ples. The official version of the Draft Constitution is in Kiswahili language but the unofficial translation of Article 46 of CRC draft on the rights of minorities in society reads:

> Article 46:
>
> (1) The country authority shall put in place a legal procedure that will enable minority groups in society (a) to participate in leadership of the country authority; (b) are afforded special opportunities of education and economic development and job opportunities; and (c) allocated with land, which traditionally the groups have been using for their livelihoods and obtaining food.
>
> (2) The Government and the country authorities shall take deliberate steps to promote and sustain economic activity and set up infrastructure for housing, education and health for the present and future generations of the people in minority communities.
>
> (3) For the purpose of this Article, "minority groups" shall mean in societies that live depending on natural vegetation cover and the environment surrounding them for their food, shelter and other life needs.[82]

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[82] "*Haki za Makundi Madogo Katika Jamii*

(1) Mamlaka ya nchi itaweka utaratibu wa sheria utakaowezesha makundi madogo katika jamii: (a) kushiriki katika uongozi wa mamlaka za nchi; (b) kupewa fursa maalum za elimu na fursa za kujiendeleza kiuchumi na fursa za ajira; na (c) kutengewa maeneo ya ardhi ambayo kwa desturi makundi hayo huitumia kama eneo la kuishi na kupata riziki ya chakula.

(2) Serikali na mamlaka za nchi zitachukua hatua za makusudi za kukuza na kuendeleza shughuli za kiuchumi na kuweka miundombinu ya makazi, elimu na afya kwa ajili ya kizazi cha sasa na vijavyo vya jamii ya watu walio katika makundi madogo.

(3) Kwa madhumuni ya Ibara hii, "makundi madogo" maana yake ni jamii za watu wanaoishi kwa kutegemea uoto wa asili na mazingira yanayowa zunguka kwa ajili ya chakula, malazi na mahitaji mengine ya maisha."

Article 46 has essentially been retained and renumbered as Article 53 in the draft issued by the Constituent Assembly. The Constituent Assembly, unlike the CRC, has subjected the entire provision to the 'present government resources and ability'.[83] This derogative clause has a potential of limiting obligations of the government towards the minority rights' claims.

Cautiously, one needs to appreciate that the above provision is not without controversy as the term 'indigenous' is not always same as the term 'minorities'. Minorities primarily seek equality and require neither a community to have a relationship with particular lands nor priority in time as it is the case with indigenous.[84] Also indigenous peoples organizations, on their identity and philosophy, have distinguished themselves from minorities saying that classifying them as minorities is belittling and missing what is distinctive about being indigenous and being a people. On the other hand, both terms lack a universal definition and contextually in Tanzania, as the two terms—indigenous and native—have been used interchangeably. Moreover, existing human rights instruments provide no special rights to minorities beyond prohibitions of discrimination. This includes Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which remains "the principal general minority rights treaty text of global application… worded as an individual rights provision phrased with an aspiration to avoid encouraging the appearance of new minorities and seeking to impose only modest duties on states".[85] Various human rights lawyers including the Human

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[83] *"kwa kuzingatia rasilimali na uwezo wa nchi."*

[84] Firestone et al., *supra* note 6, at 228.

[85] Kingsbury, *supra* note 35, at 204. Article 27 of the International Covenant on Civil and Political Rights provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the

Rights Committee have expansively defined Article 27 of the International Covenant on Civil and Political Rights as a basis and justification for addressing indigenous issues such as holding failure of the state to protect indigenous land and resource bases, in certain circumstances as amounting to a violation of the right to culture protected in Article 27.[86]

According to the CRC, the above article was included in the draft constitution on the account of two categories of views and recommendations received by the CRC. First, it was in response to the general concern by people regarding the security of land tenure.[87] People recommended zoning pastoral grazing land and land for cultivation to avoid ongoing clashes between pastoralists and farmers over land but also a protection of land for the hunter-gatherers communities against encroachments.[88] Second, minority groups who gave their views to the CRC clearly showed their dissatisfaction as they perceived to have been economically marginalized in comparison to the mainstream society, forcing them to depend on the natural vegetation cover and the environment surrounding them for their survival. In appreciating the existing cultural diversity, it was recommended that these groups should be recognized, protected and economically empowered without affecting their cultural heritage

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right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[86] Kingsbury, *supra* note 35, at 204-205 *et seq*.

[87] Also see D. Kimaro et al. eds., Land Justice for Sustainable Peace in Tanzania (Report of the International Consultative Conference held at the Bank of Tanzania Conference Centre, Dar es Salaam, 9-13 September 2013 organized by Sebastian Kolowa Memorial University & Evangelical Lutheran Church in Tanzania).

[88] *Tume ya Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania, Maoni ya Wananchi Kuhusu Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania* (Dec. 2013), at 231.

and traditional way of life.[89] Groups that submitted their views to the CRC include pastoralist and hunter/gatherer organizations coordinated by the indigenous peoples umbrella organization, Pastoralists Indigenous Non-Governmental Organizations (PINGOS) Forum.[90]

The CRC seems to have been inspired by the Kenyan experience of associating indigenous peoples claim to those of minority and marginalized communities in her Constitution. Article 56 of the Kenyan Constitution of 2010 provides for indigenous peoples as minorities and marginalized groups.[91] It urges the state to put in place affirmative action programmes designed to ensure that minorities and marginalised groups (a) participate and are represented in governance and other spheres of life, (b) are provided special opportunities in educational and economic fields, (c) are provided special opportunities for access to employment, (d) develop their cultural values, languages and practices, and (e) have reasonable access to water, health services and infrastructure. Marginalized community include an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; pastoral persons and communities (nomadic or sedentary) that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole; as well as a traditional community that, out of

[89] Para. 46 *Tume ya Mabadiliko ya Katiba ya Jamhuri ya Muungano wa Tanzania, Randama ya Rasimu ya Katiba* (Feb. 2014): *Makundi Madogo Madogo katika Jamii*.
[90] IWGIA, *supra* note 50, at 422.
[91] J. Gilbert, *Constitutionalism, Ethnicity and Minority Rights in Africa: A Legal Appraisal from the Great Lakes Region*, 11 INT'L J. CONST. L. 414 (2013), at 436.

a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole.[92]

It is also important to note that the draft Constitution has proposed an expanded, enforceable Bill of Rights that includes a right to property.[93] This might likely be used by customary landholders such as indigenous peoples to claim and protect their ancestral lands against the threat of dubious land acquisitions and consequently evictions.[94] For instance, principles of land tenure have been contained in the new proposed constitution. Article 22(2)(c) of the draft constitution provides for the right of farmers, pastoralists, fishermen and minorities to own land to be protected.[95] Furthermore, one of the nations' economic goals is to ensure that farmers, pastoralists and fishermen are given land and necessary tools for their activities in promoting sustainable environment and private sector, among others. However, hunters-gatherers, who constitutes indigenous communities in Tanzania, are not mentioned among groups to be given land within the nations' economic goals.[96] In terms of political participation, article 209(2)(d)(iii) requires all elections and referenda to

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[92] Article 260 of the Constitution of Kenya 2010.

[93] Chapter V of the Draft Constitution 2014. Also see C.M. Peter, The Draft Constitution 2013: A Silent Revolution, University of Dar es Salaam School of Law (2014) (unpublished), at 4.

[94] More on land acquisitions laws in Tanzania see K. Gastorn, *Constitutionality of Compulsory Land Acquisitions and Compensation Practice in Tanzania: The 2009/10 Kipawa Land Eviction and Road Sector Compensations Dispute as Prototype*, 2 ST. AUGUSTINE U. TANZANIA L.J. 14 (2011).

[95] Article 22(2)(c) "*Haki ya kumiliki, kuendeleza na kuhifadhi ardhi kwa ajili ya makundi mbalimbali ya jamii wakiwemo wakulima, wavuvi, wafugaji na makundi madogo itatambuliwa na kulindwa kwa mujibu wa Ibara hii.*"

[96] Article 13(2)(d) "*Kuhakikisha kuwa wakulima, wafugaji na wavuvi wanakuwa na ardhi na nyenzo kwa ajili ya kuendeleza shughuli zao katika kukuza mazingira yaliyo bora kwa ajili ya kuhamasisha sekta binafsi katika uchumi, upangaji na usimamizi wa mizania ya bei za mazao na pembejeo.*"

be free from any abusive or derogatory statements targeting minorities.[97]

However, given the fact that much of the needed land for indigenous communities such as the nomadic pastoral communities have already been engulfed and acquired for other uses including investment and conservation schemes, the remaining land is under pressure to meet the need of the growing number of indigenous population and livestock. Yet, restitution of acquired land is not feasible in the proposed constitutional dispensation. Because of limited land and transhumant grazing, pastoralists are now vulnerable to climatic changes than ever. For instance, in 2008/2009, pastoralists in Arusha and Manyara region lost about 800,000 livestock to drought. In response, the government of Tanzania in 2012 initiated cattle replenishing project of about $ 8.2 million, in which 1,500 cows per month were to be given to the pastoralists.[98] Hadzabe are often given food handouts by the government to curb hunger, as their remaining habitats are no longer viable to sustain them.

As said by the IWGIA, although the draft Constitution is not comprehensive especially with regard to the rights of pastoralists, it does recognize pastoralists and the hunter-gatherers as among groups whose rights to land and natural resources have to be protected.[99] This is a commendable milestone which calls for further actions in its realization.

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[97] "*Hauna matamshi au vitendo vinavyoashiria ukabila, ukanda, udini, dharau na kashfa kwa jinsi au unyanyapaa kwa watu wenye ulemavu au makundi madogo katika jamii.*"
[98] See Tanzanian herders get free cows to cope with drought, retrieved from http://www.forumcc.wordpress.com/tag/cattle/ (accessed Aug. 22, 2016).
[99] IWGIA, *supra* note 50, at 423.

VIII. Conclusions and Recommendations

Tanzania demonstrates a clear case of resilience of indigenous communities in terms of land rights as a critical aspect of their identity and survival against the most of government policies that have, by default and design, been precarious to the concept of indigenous peoples. After 50 years of independence, there is a need for the policy and decision makers to change their attitudes on the concept of indigenous peoples. The concept of indigenous peoples reinforces the principle of egalitarianism in any political orientation. It is not a divisive concept that seeks to balkanize or elevates one section of the society over the other. To the contrary, it is a human right and an economic empowerment concept that respects territorial integrity of a state, empowers and thereby elevates the marginalized to the deserved or same level with the mainstream society. Article 46(1) of the 2007 UN Declaration on Rights of Indigenous Persons is clear that "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". [100] It is therefore instructive to note the emergence of the recognition of the concept through its attributes of the concept of indigenous peoples is slowly being integrated in the country through TASAF as well as the draft Constitution of 2014. The adoption of the Constitution with guarantees on minority rights may in future give rise to reparation cases by

[100] This Article was a "product of political horse-trading to secure the necessary votes from participating nations, especially those in Africa." See FRANK & GOLDBERG, *supra* note 14, at 7.

indigenous peoples for loss and injuries done on their traditional land. Reparations may include restitution of land and compensation.

The TASAF's IPPF, however, does not have express condition on the need to have a "Prior Informed Consent" before deciding to develop and implement any project. It only states that any project will be developed in agreement with the affected communities based on the free, prior, and informed consultation. Since consent and consultation are two distinct terms, it is important for the IPPF to have express condition that the State shall have a duty not only to consult the indigenous communities but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.[101] Tanzania voted for the 2007 UN Declaration on the Rights of Indigenous Persons, and the call for states to obtain "free, prior and informed consent before adopting and implementing legislative or administrative measures" affecting indigenous peoples is one of the key provisions under Article 19 of the Declaration.[102] Furthermore, Article 10 of the Declaration provides that "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return". As much as the Declaration is not a legally binding instrument, some of its provisions are enforceable as they are at the same time the existing principles of international customary law.

The Draft Constitution and the IPPF are a key emerging milestone achieved upon which a robust strategic advocacy, lobbying and awareness are required that would ultimately reform the exist-

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[101] For experience from elsewhere, see: Inter-American Commission on Human Rights, *supra* note 4, at 461.
[102] Carpenter & Riley, *supra* note 10, at 191.

ing hostile laws and policies to the prosperity of indigenous peoples/communities in compatible with the 2007 UN Declaration on Rights of Indigenous Persons for which Tanzania proudly voted. Moreover, in the context of Tanzania, this is not impossible to achieve because most of perceived indigenous communities are very much politically integrated in the government from independence to date and have occupied high positions in the civil service. For instance, the pastoral communities have proudly produced several Ministers for Land and Livestock as well as three Prime Ministers in power cumulatively for over 17 years, to say the least. As such, indigenous communities in Tanzania seek no political sovereignty of self-governance (or cessation) but simply claims the cultural sovereignty based on their traditional land. However, much of their traditional land tenure and way of life remain incompatible with the mainstream government policies.