EXAMINATION OF THE LEGAL FRAMEWORK FOR SAFEGUARDING CUSTOMARY LAND RIGHTS IN TANZANIA

RAMADHAN SHABAN NKUNYA

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT FOR THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN LAND ADMINISTRATION AND MANAGEMENT (LL.M LAM) DEPARTMENT OF PRIVATE LAW OF THE OPEN UNIVERSITY OF TANZANIA

2023

CERTIFICATION

The undersigned certify that they have read and hereby recommend for acceptance by the Open University of Tanzania a dissertation entitled, "**Examination of the Legal Framework for Safeguarding Customary Land Rights in Tanzania**" in partial fulfillment of the requirements for the award of Degree of Master of Laws in Land Administration and Management (LL.M LAM).

……

Dr. Abdallah Mrindoko

(Supervisor)

……

Date

……

Dr. Doreen Mwamlangala

(Supervisor)

……

Date

COPYRIGHT

DECLARATION

I **Ramadhan S. Nkunya,** do hereby declare that this dissertation is my original work, and it has not been submitted for a similar degree in any other University.

Signature ……

DEDICATION

This dissertation is dedicated to my lovely sons and daughters.

ACKNOWLEDGEMENT

I am profoundly grateful to numerous individuals whose counsel, motivation, and backing were instrumental in the planning and completion of this research. I extend my heartfelt appreciation to my advisors, Dr. Abdallah M. Ally and Dr. Doreen Mwamlangala, for their unwavering patience, guidance, and support throughout my academic journey.

I would like to extend special recognition to all my dearest friends for their valuable insights and assistance across various aspects of this endeavor. Their financial assistance and suggestions have broadened my perspective and contributed significantly to the successful completion of this dissertation. While it is not feasible to enumerate them all here, I would like to acknowledge a select few, although my gratitude extends to every one of them.

My eternal love and gratitude are reserved for my beloved wife, Fatuma K. Mrisho, as well as my daughters, Ayra R. Nkunya and Salama R. Nkunya, and my sons, Anwar R. Nkunya and Saamir R. Nkunya, for their unwavering love and moral support throughout my academic journey.

Lastly, I would like to express my gratitude to God for His protection and blessings throughout my studies.

LIST OF STATUTES

Tanzania

The Constitution of the United Republic of Tanzania, 1977, [Cap 2 R.E 2019]

The Judicature and Application of Laws Act, 1961, [Cap 358 R.E 2019]

The Land Act, 1999 [Cap 113, R.E 2019]

The Land Acquisition Act, [Cap 118 R.E 2019]

The Land Disputes Courts Act, [Cap 216 R.E 2019]

The Land Registration Act, [Cap. 334 R.E 2019]

The Law of Contract Act, [Cap 345, R.E.2019]

The Local Customary Law (Declaration) Order, No. 4 of 1963, GN. 436 of 1963

The Village Land Act, [1999 Cap 114, R.E 2019]

The Land (Land Compensation Claims) Regulations, GN 79/2001

Tanzania Investment Act, 2022

Foreign Legislation

The Constitution of the Republic of Uganda,

The Constitution of South Sudan, 2015 (South Sudan)

The Land Act, 2009 (South Sudan)

The Land Act, 2009 (Uganda)

International and Reginal Instruments

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* 1981

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948

LIST OF CASES

Local Cases

Attorney-General v. Lohay Akonaay and Another, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994, Reported in [1995] 2 LRC 399 236

Bernado Efraim vs Holaria Pastory and Gervazi. Kaizilege, (2001) AHRLR 236 (TzHC 1990)

Maagwi Kimito v. Gibeno Werema, [1985] T.L.R 132

Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation, High Court of Tanzania at Arusha, Civil Case No. I 0 of 1981 (Unreported),

Mtumwa Shahame, Baya Kondo & 111 others v Principal Secretary, Ministry of Works and The Attorney General,

Victor Robert Mkwavi v. Juma Omary, Civil appeal No. 222 of 2019, CAT Mwanza (Unreported)

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
Cap	Chapter of the Law of Tanzania
CCRO	Certificate of Customary Right of Occupancy
ICESR	International Covenant on Economic, Social, and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
LRCT	Law Reform Commission of Tanzania
TLR	Tanzania Law Report
UDHR	Universal Declaration of Human Rights
V	Versus
VLA	Village Land Act
Vol.	Volume

ABSTRACT

Ensuring the safeguarding of customary land rights is of utmost importance in Tanzania and other developing nations. This is because most rural residents rely on customary norms to claim and occupy land, often lacking written documentation to validate their land ownership. A robust and comprehensive legal framework is indispensable to secure these rights effectively.

Despite the Village Land Act's declaration in section 18(1) that customary and statutory rights hold equal status, customary land rights are frequently perceived as weaker and subordinate. With this perspective in mind, this study aims to examine the current legal framework governing the protection of customary land rights in Tanzania.

This study utilizes a combination of doctrinal and comparative legal research methods. In the comparative legal research approach, we have considered best practices from South Sudan and Uganda. The findings of this study reveal that although Tanzania has made significant strides in protecting customary land rights through its existing laws, certain deficiencies persist, undermining the security of these rights.

Consequently, this study recommends amendments to certain land laws that are incongruent with the protection of customary land rights, thereby enhancing the legal framework to better uphold the rights of those who rely on customary land tenure systems.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction

Customary land rights refer to the enjoyment of rights relating to use of land that arises through customary, unwritten practice rather than through written codified law.[1] The system regulating customary land rights is called customary land tenure. Customary land tenure has been a peak of both rural and urban economies in most African countries and yet the most vulnerable. As the urban population grows, the interaction of people from different traditions and customs results. Cultural interaction and enhanced commercialization inhibit the survival of the customary land tenure system. The customary land tenure system is treated by partisans as a darling of the entire land-holding system and yet a bastard in practice[2]. This type of landholding existed even before the colonial era when the land was owned communally and privately based on tribal customs. Regularization of land rights through formal means started after the coming of colonialists in Africa and Tanzania in particular.

Though customary land rights have been codified and legally recognized in Tanzania under the Village Land Act, of 1999, its protection is not so strong and adequate as compared to statutory rights. This study seeks to conduct a thorough analysis of the

[1] https://landportal.org/voc/landvoc/concept/customary-land-rights
[2] https://landportal.org/voc/landvoc/concept/customary-land-rights

existing legal framework regulating and governing customary land rights in Tanzania with the view to see whether it is effective or not.

1.2 Background to the study.

The background of the land tenure system in Tanzania can be divided into three phases, namely the pre-colonial period, colonial and postcolonial period. During all periods, land has been managed administratively and through various forms of legal tenure systems.[3] During the pre-colonial era, ownership of land in Tanzania was primarily governed by customs of the particular community and tribes from time immemorial even before the coming of colonialists. These customs were not codified but were multiple and different from one community to another. This system was disrupted by colonialists who initiated their legal system to effectively control the economy.[4]

During this era, the right of occupancy was based on traditions and customs in each respective family, clan, or tribe, through local leadership. At this time, the land was governed and held by chiefs, headmen, and tribal elders as trustees of all community members. These local leaders had administrative power over land for the community.[5] Newcomers in their area first approached local leaders to be allocated an area to build a

[3] Ngereza E, https://www.lawbay.co.tz/right-of-occupancy-in-tanzania

[4] **Tenga**, W.R, (2008), Manual on Land Law and Conveyancing in Tanzania. University of Dar es salaam, p. 112

[5] Wily A. L, (2012). "Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa- Brief #1 of 5," *The Rights and Resources Initiative Website*, 1–14. p. 5

house, plant crops, and graze their animals. The rights of the first settlers were locally considered to be as secure as private title deeds.[6]

These powers of local leaders continued through the colonial period though they were limited by the newly introduced German and later British land tenure system under which all lands were declared to be crown and public lands respectively.[7] The Germans issued the first law (an Imperial Decree in 1985) which declared that all land was unowned crown land and vested in the crown except claims of ownership by private persons, or native communities which could be proved permanent occupation and use. Thus, the decree introduced the new concept of a right of occupancy as a distinctly different form of land ownership. It further placed the requirement of written evidence as a means of proving land ownership.[8]

However, there was a distinction between the claims of ownership and rights of occupancy. The only means to prove the claim of ownership was through documentary evidence while a claim of occupation was to be proven by fact of cultivation and possession.[9] In practice, only settlers engaged in plantation agriculture such as sisal, coffee, rubber cotton, etc, because they were able to prove their title and enjoyed security of tenure. Most of the indigenous people could not prove ownership. Hence,

---

[6]Knight R. S, (2010). 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation,' Geneva, *Fao*, [online]. available at: http://www.fao.org/3/i1945e/i1945e00.pdf (Accessed: 25th December 2022)

[7] Hayuma & Conning, Tanzania land policy and genesis of land reform sub-component of private sector competitivess project, p. 1: Available at https://www.oicrf.org/-/tanzania-land-policy-and-genesis-of-land-reform-sub-component-of-private-sector-competitivess-project accessed on [11th February 2023]

[8]**Tenga**, W.R (2008). Manual on Land Law and Conveyancing in Tanzania. University of Dar es salaam, p. 112

[9]*Ibid,* p. 2

they were left with permissive rights of occupancy through occupation and use of the land.[10]

Thus, occupation of land was recognized only if the land was under cultivation or used for dwelling purposes and some buildings were erected on it. [11]A native individual or community lawfully occupying land by native law and custom was deemed to have a right of occupancy. Despite recognition of customary or native land ownership, clans, and tribes were deprived of ultimate control and ultimate title to land. Such control and such title were altogether vested in the Crown.[12]

This situation continued up to late 1919 after the end of the First World War, when Tanganyika became a Trust Territory. Thus, Tanganyika was placed under the British Administration which by International Agreement was required to take into consideration native laws and customs in framing laws relating to the holding or transfer of land or natural resources and to respect the rights and safeguard the interests of the present and future native population.[13] Native land or natural resources were restricted from being transferred to non–natives without prior consent of the governor. To affect this, the British passed the first land tenure legislation in 1923 called the Land

[10]Knight R. S, (2010), Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation,' Geneva, *Fao*, [online]. available at: http://www.fao.org/3/i1945e/i1945e00.pdf (Accessed: 25th December 2022)

[11]Wily A. L, (2012), Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa- Brief #1 of 5," *The Rights and Resources Initiative Website*, 1–14. p. 5."

[12]Komu F, (1999), 'Land Management at Crossroads in Africa : Impact of the Tanzania Village Land Act No . 5 of 1999 on the Fate of Customary Land Tenure ,' : 6–10.

[13] Hayuma and Coning, note 6 at p. 2

Ordinance Cap. 113 which declared all lands (whether occupied or unoccupied) as public lands, except for the title or interest to land which had been lawfully acquired before the commencement of the Ordinance.[14]

The said Land Ordinance vested all public land and interest under the control of the Governor on his behalf and behalf of all natives for the common benefit of the natives.[15] The concept of right to occupancy as introduced by Germans, was also adopted and enshrined in the Land Ordinance.[16] The right of occupancy was either granted or deemed a right of occupancy. The granted right of occupancy was statutory and could be proved by written evidence of title while the deemed right was customary which is a title of a native or a native community lawfully using or occupying land by native law and custom.[17]

Its recognition was just a paper-based recognition since it has never enjoyed the same security as the granted rights under the statute. In practice, the customary rights were governed by customary laws and administrative policy, while the granted rights were governed by statutes. In the 44 years of the British period, some 3.5 million acres were alienated from the native lands in favor of settlers (foreigners) for the colonial economy.[18]

---

[14] Section 2 of the Land Ordinance, No 3 of 1923
[15] *Ibid*, section 3
[16] *Ibid*, section 5
[17] *Ibid*, section 4
[18] Urassa J. A, (2022), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p. 3

The approach of the colonial regimes to vest land in the State as the ultimate landlord was fundamental to enable them to alienate such land easily in favor of settlors for supporting the colonial economy. They used to alienate suitable and fertile land from natives because of public interest. The same spirit was inherited unmodified by the independent Government of Tanganyika for 38 years. Under the colonial period, the land was vested into the hand of the Governor as a trustee on behalf of all natives, but after independence, the radical title was shifted to the President. The land was declared to be the public and vested in the President who holds the radical title as a trustee on behalf of all citizens. The basic principle of customary land tenure is that land is held for use, and as long as it is used, the occupier maintains control over it. Through such land title, the President has the power to compulsorily acquire any land from the citizens for the public interest.

The Tanzania Government, after the independence of Tanganyika, maintained more or less the same colonial land policy and practices with a few reforms till 1995. In January 1991, the Presidential Commission of Inquiry into Land Matters was established by the President to conduct an inquiry on land laws and come out with recommendations for reform. It worked for almost two years concluding its work in November 1992. The commission visited several areas especially those heavily affected by resettlements and relocation. Peasants in that area reported massive dislocation and expropriation of their land forcefully under the auspices of party leaders, state instruments, and even court orders. Despite recommendations by the Commission, the government in desperation

sent to the parliament and enacted an ill-conceived piece of legislation that aimed at extinguishing customary tenure without compensation.[19]

The implication of the statutory systems was to remove land tenure from the domain of customary law and assimilate it in the statutory system of right of occupancy through replacement theory. The land tenure was to be administered through a centralized system instead of local or customary leaders. Unfortunately, the participation of peasants and pastoralists in the use, planning, administration, and management of land was virtually non-existent.[20] This situation invited several disputes and land conflicts. As a result of the persistence of the conflicts, a new presidential commission was established in 1994.

The works of the commission led to the delivery of the national land policy in 1995 which serves as a major guide to local authorities on land use. The policy however declined to take on board the recommendations of the commission to a large extent despite its usefulness and resourcefulness on land use. [21]The birth of the National Land Policy paved the way for the enactment of two major pieces of legislation to regulate among other things land tenure which are the Land Act[22] and Village Land Act[23] which came into force in May 2001.

[19] The Regulation of Land Tenure (Establishment of Villages) Act, 1992
[20]Shivji I, (1998), 'Not Yet Democracy: Reforming Land Tenure in Tanzania,' p. 6
[21] Tenga, note 2 at p. 125
[22] Act No. 4 of 1999
[23] Act No 5 of 1999

The enactment of the Village Land Act[24] and Land Act[25] was thought to alleviate the problem; however, the story has remained to be the old wine in a new bottle. Although section 18(1) of the Village Land Act, 1999 declares that a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy, section 34(3) of the Land Act outlaws this position. Thus, the protection of customary rights provided in the Village Land Act of 1999 is more cosmetic than reality. Section 34(3) of the Land Act has been used as a weapon to displace people holding land under customary law when the government is implementing its projects.[26]

1.3 Statement of the Problem

Protection of land rights and rights on other natural resources is very necessary for the livelihoods of occupants. Customary land rights have been disregarded from the time of the colonial era. The situation continued to exist even after independence when some laws were enacted to extinguish customary land rights in Tanzania.

One of the recommendations of the President Commission on Inquiry on land matters was to recognize and secure long outstanding occupation and use of land under customary law that was regarded as deemed right of occupancy. Consequently, the Village Land Act was enacted among other things, to provide for recognition and protection of customary land rights which was incorporated under section 18(1) of the Act.

---

[24] Cap 114 [R.E.2019]
[25] Cap 113 [R.E.2019]
[26] R.W James, Op.cit p. 2

Nevertheless, such protection has been outlawed by the Land Act, particularly section 34(3) which provides for room for customary rights to be displaced in favor of the granted rights. Still, other laws affect the protection of customary land rights such as the Urban Planning Act and Land Acquisition Act. Thus, the protection provided by the current legislation seems to be questionable as to whether it is effective in protecting customary land rights in such.

Therefore, this study is aiming at examining the existing legal framework regulating customary land rights in Tanzania with the view to test its effectiveness regarding the security of customary land rights protection.

1.4 Objectives of the Study

1.4.1 General Objectives

The general objective is to examine legal framework for safeguarding customary land right in Tanzania.

1.4.2 Specific Objectives

i. To identify the existing legal gaps in the laws regulating and governing customary land rights protection in Tanzania;

ii. To learn the experience of the International Legal framework and best practices on the protection of customary land rights.

iii. To propose for the amendment or enactment of new land law regarding the protection of customary land rights in Tanzania.

1.5 Research questions

To examine the efficiency of the existing legal and institutional framework regulating customary land rights in Tanzania, the following research questions were used as guiding of the study; -

i. What are the existing legal gaps in the laws regulating and governing customary land rights in Tanzania?

ii. What lessons can be learned from the experience of the International Legal framework and best practices on the protection of customary land rights?

iii. What should be amended in the existing land law regarding the protection of customary land rights in Tanzania?

1.6 Literature Review

This section presents a summary of a review of different relevant literature relating to the protection of customary land rights in Tanzania with the view to establish what is known and what is not known regarding the protection of customary land rights. Different pieces of literature were reviewed to establish the research gap and focus of this study. The following are some of the pieces of literature reviewed;

Komu F defines Customary land tenure as a system through which most rural African communities express and order ownership, possession, access, and regulate the use and transfer of land through the use norms derived from the community itself rather than the state or state law (statutory land tenure).[27] He argues that while the land law recognizes the existence of the customary right of occupancy in villages, its existence as its founding customary law is either non-existent or continuously being diluted and polarized by the infiltration of intermarriages, migrations, and urbanization. It is to be reiterated that all laws do recognize customary tenure but not all accord it protection.[28] Thus, customs are not static and sometimes change due to social interaction between different communities. Therefore, there is a need to protect them through codification to regulate land ownership.

Kulwijira R, argues that land ownership in many African societies was and still is characterized by dualism in the sense that the co-existence of large-scale commercial farms, owned by the elite and the powerful through statutory provisions and small customary holdings mainly owned by poor local peasants who constitute the majority in all African countries and contribute the bulk of domestic food, cash crop and livestock production.[29] Customary law and practice govern most of the land owned by smallholder farmers.

---

[27]Komu F, (1999), 'Land Management at Crossroads in Africa : Impact of the Tanzania Village Land Act No . 5 of 1999 on the Fate of Customary Land Tenure ,' : 6–10.

[28]*Ibid.*

[29] Kurwijila R, (2005), Securing Right to land: A priority for Africa,' International Institute for Environment and Development, p. 15

He further argues that customary ownership was not legally recognized during the colonial era and post-independent Africa has done little to correct the situation. Some of the countries tried to abolish the customary means of land ownership after their independence. Consequently, land tenure remains a contentious issue and a challenge for the African member states including Tanzania.[30]

Quan J and Toulmin C argue that since the mid-1990s African nations including Tanzania have developed a variety of responses to the challenges of securing customary land rights in their jurisdictions. These approaches are not mutually exclusive and can be combined in various ways, with different elements assuming greater prominence according to the circumstances.[31] One option that was adopted by most of the African states, is through legislation to protect customary land rights that are considered socially legitimate, independently of any specific registration or documentation process through adaptive theory rather than replacement theory. Different countries adopt different approaches regarding the protection of customary land rights. Three schools of thought lay the basis for the protection of customary land rights namely conservative schools, adaptation schools, and replacement schools. Tanzania has adopted a hybrid mode of land reform with the view to provide recognition of some of the customary laws governing land rights while abandoning customary law which seems to be discriminatory and inconsistent with written law and justice. However, the existing legal framework seems to not adequately protect the customary land rights in Tanzania.

---

[30] *Ibid.*

[31] Quan J and Toulmin C, (2005), Formalizing and Securing Land Rights, (International Institute of Environment and Development), p. 17

Knox et al, argue that while there has been a growing trend to afford legal recognition of customary land rights in Sub-Saharan African countries, how these countries have done so is notably varied. Some countries have sought to codify dominant forms of customary tenure while either fully or partially replacing the role of traditional authorities in land administration with state-sanctioned administrative bodies such as Uganda, and Botswana. Tanzania. In Tanzania, particularly, village councils had been established to replace traditional authorities while maintaining the application of customary law on the management of customary land rights. In these three cases, land is most often certified or titled in the name of individuals or households, though Tanzania does provide for the delimitation of village boundaries as well.[32] However, he doesn't go further to discuss the extent of protection accorded by those statutes to customary land rights especially where the two conflict with each other.

Urassa J argues that in Tanzania, while progress has been made to strengthen property rights through legislation, some community members, particularly women, have lost their land rights. Her study was focused on discussing the changing customary land tenure regimes from communal to private in Tanzania while pointing to the existing policies and laws protecting property rights, and changes in social relations that determine customary land tenure in matrilineal and patrilineal communities. Recognition of customary land rights should be backed with sufficient protection of such rights against encroachment in whatever manner.

[32] Knox A et al, (2016), Integrating Customary Land Tenure Into Statutory Land Law, Property Rights And Resource Governance Project1, USAID, p. 10

Even though the land law in Tanzania guarantees that customary land rights are of the same status as statutory land rights, customary is deemed to be inferior to granted as in most cases, other laws allow extinguishment of it in favor of the granted right of occupancy. Sometimes, it is done so without full compensation to those persons who occupied it before it was appropriated.

Nyerere, J,[33] in his book, emphasizes inter alia that when a person uses his or her energy and talent to clear a piece of land for use or occupation, the efforts made by such a person in clearing that land enable him or to claim ownership over the cleared land when appropriated. By clearing the land a person adds value so that it may satisfy a human need. Whoever takes that piece of land must pay the owner for adding value to it. This is also backed by article 24(2) of the constitution the of United Republic of Tanzania which requires compensation once the property is appropriated by the law.

In this regard, good governance of land is vital to provide a balance of interest between the need of the government to acquire land promptly for public interest and protecting the rights of people whose land is to be acquired. Compulsory land acquisition cannot be fair if good governance and adherence to regulations that protect the individual interest over the land are avoided.

Kusiluka and others argue that unreliable and inadequate procedures for the compulsory acquisition of land further create opportunities for corruption in Tanzania.

[33] Nyerere, J. K. (1966), *Freedom and Unity,* Megarrys Manual of the Law of Real Property, 8th ed, London, Sweet &Maxwell Ltd, p. 12

Since the President is the custodian of the land and individual landholders have usufruct rights through statutory or granted rights of occupancy, the customary and other informal rights. The President is given overwhelming powers[34] to compulsorily acquire land for public use or interest whereas fair, adequate, and prompt compensation is to be paid to displace.[35]

Knights R. S, observes that the Village Land Act, of 1999 does a good job of addressing both the potential injustices inherent in an unregulated customary land system and the possible abuses of power that often emerge when villagers negotiate with outsider investors over land and natural resources. However, all existing and valid customary land claims are instantaneously transformed into formal and defendable land rights at the moment of the law's enactment, thus ensuring the protection of the poor's land claims.

Nevertheless, the recent increase in foreign land-based investment raises concerns about rural people's and communities' inadequate involvement in the decision-making process regarding the acquisition of land. In most cases, customary land rights are subjected to statutory land rights through schemes of regularization, urban planning, and compulsory acquisition which seems to affect its legal protection.

[34] (Land Act, No. 4 1999). The Land Act (1999), the Land Acquisition Act (1967) and the Urban Planning Act (2007)

[35] Kusiluka, M. M et al, (2011), 'The Negative Impact of Land Acquisition on Indigenous Communities' Livelihood and Environment in Tanzania, *Habitat International*, 66-73, p. 68

Further **Martina** observes that in Tanzania, land laws are considered to be comparatively progressive in terms of recognizing and protecting customary land rights. The law requires that the transfer of village land to an investor requires villagers' approval as a means of protecting customary land rights in land deals in Tanzania. She further emphasizes that unequal power relations between villagers and investors may lead to unequal recognition of customary and statutory law. The study concludes that even under comparatively favorable legal conditions, there is no guarantee that local land rights are fully protected in the global land rush.[36] However, the study focuses only on the transfer of village land while leaving other areas vulnerable to affect the customary land rights such as urban planning and regularization schemes which will be covered by this study.

Even though Tanzania's National Land Policy of 1995 requires that the existing land rights recognized as long-standing occupation or use of land must be clarified and secured by the law,[37] the protection of such long-standing occupation is not well documented in the land laws. The sentiments of the National Land Policy regarding the protection of customary land rights are well captured under section 18(i) of the Village Land Act.[38] Nevertheless, section 34(1) of the Land Act undermines the protection of customary land rights.

---

[36] Martina L, (2016), How come others are selling our land?' Customary land rights and the complex process of land acquisition in Tanzania, Journal of Eastern African Studies, 10:3, 393-412, DOI: 10.1080/17531055.2016.1250890

[37] Section 3(b) of the Land Act, 1999 [R.E 2019]

[38] Section 18(1) of the Village Land Act, 1999[R.E 2019]

Therefore, this study focuses on assessing to what extent the existing legal framework protect the customary land rights in Tanzania by viewing both the strength and weakness of the current legal regime in comparison with best practices adopted by other jurisdiction in the world.

1.7 Significance of the Study

The study highlights the existing legal gaps in the protection of customary land rights against the statutory land rights in Tanzania with the view to fill the gaps or loopholes that exist in our legal framework.

The study intends to draw the best practices and experiences from the selected countries regarding the protection of customary land rights while reconciling with the strength revealed by the selected countries and international best practices on the protection of customary land rights.

The study expects to propose the areas for amendment or modification in protecting customary land rights in the existing land laws and other laws regulating the protection and enjoyment of customary land rights in Tanzania. After reviewing the legal gaps in the existing legal framework, the study points out the key areas for amendment.

The study helps to point out the weakness of the existing legal framework and contradictions that exist regarding the protection of customary land rights in Tanzania and under an international legal framework. Best practices were regarded as benchmarking in proposing amendments to the existing legal framework.

1.8 Research Methodology

The term research methodology can be defined as a systematic and scientific way of solving a research problem.[39] It is a science because involves systematic steps and methods that a researcher needs to adopt in his investigation of a research problem along with the reason behind the election of such methods.[40] Therefore, it includes methods and justification for using certain research methods and the methods themselves.[41]

Legal research is carried out by utilizing one or more of several different techniques or methods. These include among others, doctrinal research, empirical legal research, comparative law methods, and socio-legal methods.[42] In this research, doctrinal legal research and comparative law methods were used in the analysis of legislative texts and jurisprudence of local and foreign laws regulating customary land rights.

1.8.1 Doctrinal Legal Research

Doctrinal research is the most common methodology concerning primary sources of law such as statutes and case law as well as secondary sources of law such as reports, journal articles, textbooks, and other forms of publications. Doctrinal research entails the use of various legal methods such as the canon of statutory legal interpretations and legal

---

[39] Kothari C, R, (2004), *Research Methodology: Methods and Techniques*, 2nd Ed, New Age International Publisher, New Delhi, p 8

[40] *Ibid.*

[41] Vibhute,K&Aynale,F, (2009), Legal Research Methods: Teaching material, p.26

[42] Singhal, A.K & Malik, I. (2012), Doctrinal and Socio-Legal Methods of Research: Merits and Demerits, *Educational Research Journal*, Vol. **2**(7), p. 252-256.

reasoning both inductive and deductive to critically analyze the materials collected against the backdrop of the research questions.

The study used doctrinal legal research to analyze the existing law relating to the protection of customary land rights in Tanzania, and secondly, to consider how the law ought to address the emergent issues associated with the security of tenure of customary land rights. The primary sources of legal information are statutes and case laws, thus there is no means legal protection can be assessed without going through a thorough analysis of the existing legal framework. This methodology was very useful in the present study due to its potential to contribute to the development, continuity, consistency, and certainty of law.

1.8.1.1 Primary Sources

Under doctrinal methodology, primary sources of data were used by analyzing different local, foreign, and international instruments relating to customary land rights. Through this method, the researcher managed to identify, analyze, and examine the stakeholders' perceptions of adequacy, fairness, and promptness of the compensation payments. In doing this, the focus was placed on revealing the strengths and weaknesses of the existing legal framework with the view to bridge the existing gaps.

1.8.1.2 Secondary Sources

In conducting this study, secondary sources were consulted such as reports, books, journal articles, theses, dissertations, and other publications relating to customary land

right protection in Tanzania[43] through the use of various legal methods and techniques such as canon of statutory legal interpretations and legal reasoning. Secondary sources of law are viewed as useful in the present study due to their potential to contribute to the development, continuity, consistency, and certainty of law. It is through this method that a research gap can be discovered by analysis of different pieces of literature relevant to the present study to identify what has been covered and what has not been covered in the present literature.

1.8.2 Comparative Research Method

The comparative method is a process in which the researcher takes several objects to study them within a given or recommended minimum standards. A comparative study is used where there are two or more two objects studied with the contrasting between the domestic and the other that generates knowledge progression. [44]It is the process of reviewing policy alternatives that have been effective in addressing similar issues in the foreign country and could be applied to a current problem in the other country.

A comparative method was used to determine the best practices to address the legal protection of customary land rights commonly used in some other common law countries. Regarding this study, Sudan and Uganda have been selected for comparative study to evaluate the protection offered to customary land rights in their jurisdiction. Determining the best practice is more helpful in evaluating which practice has worked

[43]*Ibid*

[44] Samuel G, (2014), 'An Introduction to Comparative Law Theory and Method,' p. 11

exceptionally well and why in some other countries and determining whether it can be applied in our country. This allows for a mix-and-match approach to making recommendations that might encompass pieces of many good practices.

A survey of two countries Uganda and Sudan with some remarkable evidence in the protection of customary land rights has been conducted in comparison to the Tanzanian legal context. The study analyzed legislative development, jurisprudence, and legal doctrines of a selected legal system which are perceived to be best in terms of protection of customary land rights for the sake of stimulating awareness of the legal framework and to gain insights and lessons that could be considered in addressing the same challenges in Tanzania.[45]

1.9 Data Analysis

To conclude, it is important to analyze the collected data from different sources. In the present study, collected data were analyzed through different legal techniques and methods such as inductive, deductive, and analogy techniques of legal reasoning and interpretation. In this regard, inductive and deductive methods were used to analyze different data that were collected from general to specific and vice versa, and analogy methods of data analysis were used to compare the law and best practice as applied in selected jurisdictions in comparison with the legal framework applicable in Tanzania.

1.10 Scope of the Study

[45] Paris M. L, (2016), The Comparative Method in Legal Research: The Art of Justifying Choices, p. 11

The study is focused on analysis of the legal protection accorded to customary land rights in Tanzania. It should be noted that land is not a union matter, therefore Tanzania and Zanzibar have separate legal regimes regulating land matters in their jurisdiction. However, this study is concerned with Tanzania's mainland.

1.11 Organisation of the Study

The study is organized into six chapters whereas chapter one presents the General Introduction to the Study. Chapter two deals with the Conceptual and Theoretical Framework of the Study. Chapter Three is concerned with International and Regional Legal Instruments on the Protection of Customary Land Rights. Chapter four covers A Survey from other Jurisdictions on the Protection of Customary Land Rights. Chapter Five covers the Legal and Institutional Framework of Customary Land Rights in Tanzania; and Chapter Six presents the Summary of Findings, Conclusion, and Recommendations.

1.12 Ethical Consideration

The study took into consideration ethical issues of confidentiality, informed consent, and privacy from the formulation of the research problem, and formulation of questions to data collection, analysis, and presentation of findings. The information collected was used for the purpose intended, which is research purpose and respondents were informed accordingly. The study was conducted under critical assurance of confidentiality to all individuals and groups who were consulted in this study. In the course of practice in the

study area, all respondents were fully respected and their views were taken into consideration.

In achieving ethical issues, the researcher acknowledged all documentary sources by citing information from other sources, informed respondents what the study was all about, and requested their consent to give information.

CHAPTER TWO

THEORETICAL AND CONCEPTUAL FRAMEWORK OF THE STUDY

2.1 Introduction

This chapter presents the key basic terminologies that are used in this study by defining them and giving the basic conceptual foundation of the study. The rationale of having a conceptual framework is to give the entire conceptualization of the research topic which represents all the thinking of cognitive process about the research topic, developing interest in it and defining it accurately.

Moreover, the chapter presents the key theories of land rights from which the study is founded. Different theories are discussed and analyzed with the view to revealing the most relevant theory regarding the protection of customary land rights. Therefore, the chapter discusses conservative theory, democratic theory, and replacement theory and establishes how they jeopardize customary land rights. Lastly, the chapter identifies and explains one of these theories and the reason for adopting it.

2.2 Definition of Key Concepts

This part presents the definition of key concepts used in the study to establish the conceptual framework of the study. The conceptual framework of the study lays a foundation for the study and clarifies the meaning of key legal terminologies used in the

study. Among other things, this part introduces the concept of customary land tenure and customary land rights.

2.2.1 Concept of Customary Land Tenure

Customary land tenure refers to the systems in which the communities and individuals with such communities order ownership, possession, access, and regulate the use and transfer of land. Customary land tenure is governed by norms and customs derived from the community itself through its customs and common practice rather than the state or state law (statutory land tenure). In other words, customary land tenure is the land ownership, possession, access, and transfer of the same which is primarily regulated and governed by customs of the particular community.[46]

Customs are not common throughout all communities which is why they are not binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Holders of land under customary land tenure enjoy the customary land rights accruing from their holding and possession.[47]

2.2.2 Concept of Customary Land Rights

Customary land rights refer to patterns of long-standing community land and resource usage by customs, tradition, and value of the local communities rather than formal legal

[46] Willy L, (2012),' Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa', - Brief #1 of 5, p. 5

[47] Urassa J. A, (2020) Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p.2

title to land and resources issued by the State.[48] Land ownership entitles the holder to a bundle of rights such as the right to occupy and use the land and, the right to transfer, lease, and pass it to his legatees. The right is also protected against unlawful appropriation or lawful appropriation with fair and adequate compensation.

Recognizing and protecting customary land rights is a critical component of protecting and defending the land rights of the rural poor. This study is founded upon the notion that even though customary land rights are now recognized and protected in statutory law, they are not adequately protected against intruders under the auspice of compulsory acquisition of land for public interest or planning purposes with or without adequate compensation.

2.3 Evolution of Customary Land Rights

Customary Land Rights can be traced far back before the colonial era when most of the communities held land under the customary law of the particular community. By then, there were no codified and fixed rules regulating land holding in Africa and Tanganyika inclusive.[49]

Customary land rights as they are known today, were deeply impacted by colonial policy.[50] Colonization was essentially a quest for land, a mission whose fulfillment necessitated the negation or marginalization of pre-existing property and property

[48] Willy L(2012), Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa,' - Brief #1 of 5, p. 5
[49] Urassa J. A, (2020), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p. 2
[50] FAO, (2015) Statutory Recognition of Customary Land Rights in Africa, p. 23

relations and the creation of new, capitalist-oriented property regimes through land alienation.[51]

During the colonial expansion throughout Africa including in Tanzania, the idea that African communities had their own family, clan, and tribal-based property claims stood in the way of colonial conquest and development. However, some of the colonialists chose to highlight and strengthen those parts of customary landholding that enabled the colonial agenda. Since such occupation was based on informal means without legal title of ownership, then all land was regarded as terra nullis (unowned), and free for the taking. They started by declaring the land to be public property vested in the hand of the ruler such as the governor. The only way to prove ownership was through a title deed which most Africans had not. Therefore natives were deemed to occupy and use the land under usufruct rights.[52]

Usufruct rights were subjected to compulsory alienation by the colonial master for the public interest. Most of the fertile and suitable land was taken for plantation and settlers. This notion continued till the independence of African states. The spirit of public land is still operative in Tanzania. Thus, land belongs to no one. It is the public property entrusted to the president as a trustee of all citizens.[53]

Colonial administrators argued that under customary law, all land was held communally and that private ownership and claims to land did not exist in Africa before such a

[51] *Ibid*, p. 25
[52]Tenga, note 3 at p. 15
[53]*Ibid.*

period. In this regard, colonialists prohibited the sale of land and restricted individual ownership.

The traditional or customary law promoted by colonizers was a law founded upon collective ownership overseen by the chief, or other local leaders in their areas with the colonial government acting as trustee of land. To strengthen colonial control over these areas, chiefs were often made into puppet leaders of the colonial state and forced to enact colonial policies against their communities' best interests. When standing chiefs refused to cooperate, new chiefs were appointed by colonial governments, regardless of any authentic claim of representation by the people they were expected to govern.[54]

By the end of colonial rule, more than a century of colonial control over land had impacted the customary land system. The statesmen who came to power at independence therefore had a peculiar task to reconstruct the land management and administration by enacting rural policies grounded in traditional African practices. Across the continent, most of the independent governments nationalized land, making it the property of the state and held in trust for citizens. The land continued to be the public land vested to the President as a trustee of all citizens. Through such trustees, compulsory acquisition of land continued to be carried out as a means for the government to acquire land freely or with less compensation from the citizens.

[54] Urassa J. A, (2020), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p. 2

Once Julius Nyerere wrote that land was always recognized as belonging to the community rather than to individual persons in most African societies. The African's right to land was simply the right to use it through long-standing occupation. Even a piece of family land was transferred to someone outside the family means of transfer as a gift, loan, or sale. The nature and strength of the social relationship between the two parties influenced the nature of the rights transferred.[55]

In addition to personal property allotments, there were communal lands open to all community members to use for hunting, grazing their animals, and gathering natural resources. The land was allocated to community members free of charge, but in practice, a facilitation fee was commonly charged. Tanzanians also access land through borrowed or rented land rights, in which various kinds of payments are exchanged for the use of the land, and renters are forbidden to make long-term investments that might solidify their claim to the property.[56] These customs are still practiced though in modified form throughout Tanzania. Studies have found that in many rural villages, 90 percent of village land is governed by customary laws.

2.4 Scope of Customary Land Rights

Customary land rights comprise the land owned by a person, family, clan, or corporation that is occupied based on the customary law of the community. It can be granted to a

[55] Daley, E. (2005a). Land and social change in a Tanzanian village 1: Kinyanambo, 1920s-1990. Journal of Agrarian Change, 5 (3), 363–404. P. 374

[56] Daley, E. (2005b). Land and social change in a Tanzanian village 2: Kinyanambo in the 1990s. Journal of Agrarian Change, 5 (4), 526–572, p. 564

person or group of persons residing in a particular village. Customary land rights can be subjected to registration and a certificate of customary right of occupancy can be issued upon registration. Persons who have occupied lands for a long period are entitled to deemed rights of occupancy and are eligible to register the right and obtain a Certificate of Customary Right of Occupancy (CCRO) as provided under the Village Land Act, 1999. Registration of such holding under customary law does not compulsorily require registration, though registration gives the owner the right to use the certificate as collateral for credit.[57]

The law applicable on any matter concerning customary rights and obligations of a person, or a right of a group of persons occupying land under the customary right of occupancy is customary law.[58] These customary laws include customs, traditions, and practices of the community concerned to the extent that they are by the provisions of the Judicature and Application of Laws Act.[59]

The customary law that applies to determine any matters concerning customary tenure is classified into four groups namely villages not established as a result of Operation Kijiji, they apply customary laws which has hitherto been applicable in that village; villages established as a result of Operation Kijiji, the customary law applicable in the village immediately before the extinguishing of customary rights in the land under any rules or

[57] USAID, Integrating Customary Land Tenure into Statutory Land Law: Property Rights and Resources Governance Project, U.S Agency for International Development, p.6

[58] No Act of the Parliament of the United Kingdom referred to in the JALO/JALA can apply to land held for a customary right of Occupancy or otherwise governed by customary law see section 20(3) of the Village Land Act.

[59] sections 9 and 9A of the Judicature and Application of Laws Act

regulations made thereto;[60] in the case for general land held under customary right, customary law recognized by those persons occupying the land will be applied and last, in the case of any land customarily used by pastoralists, the customary law recognized as such by those pastoralists.[61]

The application of customary law in governing land matters started before the colonial period when communities had no fixed and codified rules to govern their land relations. Customary laws are based on common practices and usage of the members of the community. It has been debated in general application because some customary law tends to infringe on written law and the morality of the community. Thus, the case of *Maagwi Kimito v. Gibena Werema* set the conditions to satisfy the customary law to apply in Tanzania.

2.5 Nature of Customary Land Rights

Customary land rights often apply, with some exceptions, to village lands as defined under the Village Land Act. They are accrued from customary law and pre-existing land holdings that existed before the colonial era in Tanzania. Furthermore, customary land rights may or may not be backed by a certificate or written document to evidence ownership of the holder. They are deemed from the long-standing occupation and use. They are also considered to carry the same weight and validity as granted rights of occupancy.

---

[60] the Rural Lands (Planning and Utilization) Act, 1973 or the enactment of Regulation of Land Tenure (Established Villages) Act, 1992

[61] Section 20(3) of the Village Land Act, 1999

Customary right of occupancy is an occupation of the land created using the issuing of a certificate of customary right of occupancy under section 27 of the Village Land Act and includes deemed right of occupancy[62] that is to mean must have been allocated by the Village Council. Whereby, deemed right of occupancy on the other hand refers to the title of a Tanzanian citizen of African descent or a community using or occupying land by customary law. It can be acquired under customary law through inheritance, clearing a virgin forest, or purchase.

Customary right of occupancy therefore includes land allocated by the village council and land acquired informally through purchase, clearing forest, gift inheritance) and held by villagers.[63] It is capable of being allocated by a village council to a citizen, a family of citizens a group of two or more citizens whether associated together under any law or not, a partnership, or a corporate body the majority of whose members or shareholders are citizens.[64]

Customary rights are permanent and perpetual. Those who have occupied lands for many years are entitled to customary rights of occupancy and are eligible to register the right and obtain a Certificate of Customary Right of Occupancy for an indefinite duration. [65]The law that governs any dealings in respect of customary land rights is customary law. Therefore, sale, lease, mortgage, and any disposition affecting

[62]See meaning under Section 2 of the Village Land Act, 1999
[63]Tenga, note 3 at p. 114
[64] Section 18(1) of the VLA and section 22 of the VLA
[65] S. 18(1) of the Village Land Act, 1999

customary land rights is governed by the customary law of the community where the land is situated.

2.6 Justification of Protection of Customary Land Rights

Based on the nature of the customary land rights being weak and lacking the legal status of customary land rights in many African countries including Tanzania. Since most customary lands are held under norms and customs with or without a certificate of title, governments often regard such lands as unoccupied or unoccupied public lands making them weak to involuntary appropriation and without any compensation. Most of these lands are rightfully the property of rural communities by their customary norms. This conflict of claim and interest directly affects most Tanzanians who greatly depend on off-farm natural resources. Just as importantly, many Tanzanian rural poor no longer have sufficient access to farmlands to compensate for the loss of their collective lands.[66]

Government intervention is needed to provide effective management of the land where customary land systems have been eroded by socio-economic, cultural, and political changes. Regardless of the status of the customary systems at the local level, government intervention is required as a powerful instrument to control outsiders such as urban elites and foreign investors who do not feel bound by those systems. In these cases, a lack of legal protection for customary land rights based on customary systems may result in local resource users losing land access.

[66] Urassa J. A, (2020), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University, p. 2

Since customary land rights are considered to be weak and vulnerable due to the absence of strong legal backup. Government intervention is often needed to secure the resource claims of weaker and more vulnerable groups of people who stand to lose out in ongoing processes of change in local land relations. The emphasis on the need for legislation to build on local practice is a major step forward compared to the past. Ongoing debates on the formalization of land rights through individualization must avoid the trap of appealing but simplistic one-size-fits-all solutions. Where resource access rights are multiple and overlapping, as is the case in much of rural Africa.[67]

Thus, the justification for legal protection is not only centered on the adequate protection of customary land rights but also on providing incentives for investment in land and sustainable resource management. In areas that are naturally suitable for arable cultivation, with low population densities, cultivators have no incentive to invest in soil fertility and instead will practice shifting cultivation. Societies adopt property rights when high population density requires land-related investment or if other factors increase the value of land. The increase in land value describes a virtuous cycle and leads to an increasingly precise definition of property rights that induces higher levels of investment. Thus, failure to establish the necessary property rights institutions may lead to conflict and resource dissipation rather than investments that would enhance resource

[67] USAID, (2006), The Role of Property Right in Natural Resources Management, Good Governance and Empowerment of the Rural Poor, p. 3

values and productivity. Both conceptual models and empirical evidence suggest that the broader economic impact of how property rights are secured will be significant.[68]

Governments play an important role in determining how property rights are defined and enforced in line with the changing economic conditions of the communities. This, in turn, provides a basis for the level of tenure security enjoyed by community and individual landowners as well as their ability to exchange such rights with others. All this suggests that property rights are a social construct. Property is not merely the assets themselves, but an agreement between people on how these assets should be held, used, and exchanged. Moreover, property rights to land are not static but evolve in response to changes in the economic and social environment.[69]

2.7 Land Rights Theories

Generally, customary land right protection is linked to land administration and land reform. To understand the role of legal reform in fostering protection n of customary land rights, it is important to understand theories governing customary land reforms. Thus, principles developed in these theories form an important part of determining the relevant principle tenets applicable to customary legal reform and protection of customary land rights. [70]Land administration and cadastral systems development are influenced by land policy and land-related theories. There has been a critical discussion

[68] Tenga, (*supra*)
[69] USAID, (2006), The Role of Property Right in Natural Resources Management, Good Governance and Empowerment of the Rural Poor, p. 3
[70]*Ibid.*

regarding the protection of customary land rights and land reforms. There are about eight theories regarding land reforms which can be broadly classified into three broad theories namely conservative theory, adaptation theory, and replacement theory. For clear discussion, all eight theories are presented herein below as follows;-

2.7.1 Conservative Theory

Conservative theory is based on living customary tenure as providing sufficient tenure security because land acts as a social, political, and economic tie between kinship groups. This viewpoint stems from a multi-functional, multi-generational understanding of land from a broadly African perspective in which land forms the foundation of socio-economic, religious, and political systems. The conservative position, historically derived from the writings of John Locke and more recently defended by modern writers such as Robert Nozick, understands property rights as historical entitlements that generate moral claims (natural rights) independent convention, and social agreement.[71]

First of all, these rights make structures of society and the state, constraining them to recognize. Secondly, because conservatives believe these historical property include rights to use, possess, destroy, transfer, and gain income the state cannot limit these rights without compromising the individual and his property. The government regulation

[71] Lea D. R, (1998), Aboriginal Entitlement and Conservative Theory, Journal of Applied Philosophy, Vol 15(1): 1-14, p. 1

of property has argued that ownership is necessarily a unified bundle of rights, and anything less than the full bundle should not seen as ownership at all.[72]

These customary tenure systems are based on social legitimacy through kinship and ethnicity of the community members. Land titling programs as a new measure introduced to secure customary land rights in these contexts may fail because titling breaks down the social structure of rural communities. Hence, de jure tenure security may erode pre-existing, socially embedded de facto tenure security. Conservative theorists thus advocate for the recognition and record of de facto customary tenure systems.

Thus, the profounder of this theory is not encouraging codification and modification of the pre-existing customary land tenure. They focus much on communal ownership and traditional land governance as opposed to statutory regulation. Traditional leaders are largely responsible for land allocation and administration. While a popular view of pre-colonial traditional leaders is that they were autocratic rulers who paid little heed to their subjects' wishes and equality.[73]

However, the nature of traditional leadership has changed considerably with the advent of colonialism and many traditional leaders now live up to such a prejudicial view of them. Conservatives argue that there is no truly indigenous tenure and that modern versions of customary tenure carry with them the stains of colonial administrations and,

[72] *Ibid*, p. 3
[73] *Ibid.*

it is contended, an associated feudal, anti-democratic version of customary land rights, tenure, and administration.[74]

Nevertheless, conservative theory as advocated by profoundest may only be applicable in situations of subsistence agriculture with land abundance rather than in plantation agriculture and limited suitable land. Tenure insecurity may arise for commercial farmers under customary tenure systems if they become targeted as sources of wealth and power and seen as a threat to traditional leadership. Tenure insecurity may also arise due to the abuse of power by traditional leaders due to unequal bargaining power and ineffectiveness as land administrators.

2.7.2 Democratic Adaptation Theory

Adaptation theory is also known as democratic theory or Liberal theory. It is called liberal theory in the sense that it maintains that the customary land system should be retained however must be made in line with some other factors. Liberals maintain that all property rights in any society are a matter of convention in the sense that they are derived from the social context and the rules of justice and distribution adopted by that society.

Liberalists emphasize that the state is entrusted to define rules of distributive justice to ensure that convention properly corresponds to the former understanding.[75] Among other things, they believe that major components of the economic structures of the state

[74] *Ibid.*
[75] *Ibid*, p. 3

must reflect policies that direct the distribution of goods and resources toward equality in society. Consequently, rights to possess, use, and transfer property, are not independently established moral givens but reflect conventions shaped by society, the state can only regulate these rights to correct distributive patterns in the community while considering the goals of equality without undermining the integrity of ownership.[76]

This theory focuses more on highlighting the need for democratization, and justice, particularly around gender equality, and accountability. In the face of a colonially-inspired, 'communal' land tenure system with concomitant abuses of power the goal is to clarify existing land tenure relationships through respecting existing land rights that are legitimate in the society and not inconsistence with justice and morality. States are empowered to provide clarity on what these existing land rights are the arrangement form of tenure in so far as these are recognized in African customary law and providing land tenure security where customary tenure systems are weak.[77]

It is noteworthy that much of recent liberal scholarship aimed at empowering aboriginal peoples and supporting their land rights has often unwittingly embraced the conservative tradition based on contingencies, rather than the tradition of left-leaning thinkers. Liberal supporters of Aboriginal land rights tend to view property rights as contingently

[76] John C, (1994), The Myth of Property (New York, Oxford University Press), p. 126
[77] Lea D. R, (1998), Aboriginal Entitlement and Conservative Theory, Journal of Applied Philosophy, Vol 15(1): 1-14, p. 2

determined historical entitlements that are established independently of the state's authority.[78]

In this regard, democratic theory stresses the need to strengthen customary land rights through recognizing social and off-register tenures that already exist 'in the shadow of' the dominant legal system of property rights term. This can be done by identifying the strengths of existing customary tenure and some non-conflicting elements of formal tenure concepts. The focus is placed on anti-eviction measures, democratic land administration and governance, gender equity in land allocation, and locally accepted evidence, that land rights-holders may be protected from human rights abuses at the hands of traditional leaders acting under the authority of the State.[79]

2.7.3 Hybrid Adaptation Theory

Another theory of customary land reforms is the hybrid theory. This theory allows communities to decide which rights are most important to be recorded and which rights are not important. The theory encourages participatory methods where community members are encouraged to participate in decision-making to create a sense of ownership of the process of formalization, as opposed to the top-down approach of the replacement theorists. It also allows for flexibility, innovation, and the adoption of fit-for-purpose technology and low-cost tools to record land tenure information. It is hybrid in the sense that it emphasizes the maintaining of some important and best practices of

[78] Ibid.
[79] *Ibid.*

customary land holding while adopting statutory holding. Thus, hybrid tenure is often established through a combination of statutory law, custom, or informal arrangements, rather than a single one.

The persistence of customary law alongside statutory law is evidence of its resilience, so that even where traditional leadership is absent, land administration may proceed according to customary norms. Where such local practices are ‘overwritten’ by official structures, the pre-existing norms and practices may persist alongside the official structures.

Hybrid adaptation stress to accommodate local and changing needs by renovating customary tenure acknowledges the worth of living customary tenure systems while suggesting that their defects can be addressed by a certain amount of creative tinkering and fine-tuning, rather than more dramatic reforms. This is the theory selected to form the basis of this study.

It has been selected because it has a sound argument that seeks to recognize the pre-existing long-holding of land rights in Tanzania. Based on section 3(1)(g) of the Village Land Act and Land Act, 1999 recognizes the pre-existing land rights by deemed right of occupancy. While acknowledging the pre-existing land rights, the land law also seeks to protect those rights against discriminatory customary law. In line with this provision, the theory will be used to examine the strength of the existing legal framework in regulating customary land rights.

2.7.4 Incremental Theory

The founders of the incremental theory reject the claim of land titling and registration programs as the solution to the economic problems in Africa including Tanzania, but instead support an incremental approach to tenure reform that places relatively few demands on resources and institutional capacities. The provision of registered titles is not entirely rejected but is considered to be a long-term objective. Extra-legal, off-register tenure practices may be made visible through recognition rather than replacement. An incremental adaptation approach focuses on promoting the adaptability of existing land arrangements while avoiding a regimented tenure model and relying on informal procedures at a local level. Thus, the approach is based on cooperation rather than confrontation.[80]

Royston et al propose a conceptual framework for incrementally upgrading tenure under customary administration. The starting point outlined by Royston is the recognition of land rights according to traditional norms and practices, or legal processes, whichever is most applicable on the ground. They further argue that failure to acknowledge these existing rules regulating land systems in the communities leads to interventions that lack significance for land rights-holders which may impact sustainability as people revert to their previous land tenure and administration practices.[81]

---

[80] Platteau, J, (1999), The evolutionary theory of land rights as applied to sub-Saharan Africa: A critical assessment. *Dev. Change, p. 75*

[81] Royston, L et al, 92015), *Informal Settlement Upgrading: Incrementally upgrading Tenure under Customary Administration*; Housing Development Agency: Johannesburg, South Africa.

Nevertheless, Incremental approaches are criticized because they may merely increase the time taken and the number of steps involved to arrive at a final result, which might only be a transitional solution.

2.7.5 Evolutionary Replacement Theory

A key belief of evolutionary replacement theory is that, under the joint impact of increasing population pressure and market integration in the community, land rights spontaneously evolve towards rising individualization and that this evolution eventually leads Rights-holders to press for the creation of duly formalized property rights.[82] The replacement theory implicates the land titling program to formalize private property rights once land becomes scarce to reduce conflict and promote efficiency, economic growth, and political stability.

The theory is based on the assumptions that evolutionary land rights require critique change is not always unidirectional and should not be valued more highly than other land tenure forms due to its nature and weak security. It does reflect the idea that land tenure arrangements are changing more or less autonomously under the pressure of growing population and land-based investment in the community. These changes lead to an increased value of the land and an intense need for the land for investment purposes, which in turn increases the transferability of land.[83]

---

[82] Platteau, J. The evolutionary theory of land rights as applied to sub-Saharan Africa: A critical assessment. *Dev. Change* **1996**, *p. 29*

[83] Ibid.

However, it fails at the point of formalization and registration of private property rights in the context of sub-Saharan Africa. In some contexts, land registration has led to improved credit access, higher land values, increased investments in land, and higher output/income. It also flies in the face of many customary norms and practices that would be recognized as legal and offer a high degree of tenure security when viewed from an African customary law perspective.

2.7.6 Collective Replacement Theory

Collective replacement theory draws on socialist ideologies and focuses on non-individualized outcomes of land tenure reform. It aims to address social and economic inequality through collective ownership rather than individualism. This can be achieved through the nationalization of all land for redistribution to beneficiaries in collectives via leasehold. And through improving production through collective farming villages, such as the Ujamaa in Tanzania.

Proponents of collective replacement theory draw their belief from the communal paradigm that assumes people will want to work and live together in communities while disregarding individual rights within customary land systems. Bruce concludes that

cooperatives are best seen as a transitional means for the rapid transfer of land title to groups of people but which should be followed by subdivision and individuation.[84]

2.7.7 Systematic Theory

De Soto proposes that the hat replacement of customary tenure through systematic titling will lead to increased economic activities to the benefit of the poor people. Such land titling theory proposes that a land title provides security of tenure which can then be used as collateral for mortgage finance, stimulating economic development, and rapidly reducing poverty.

Systematic theorists believe that land titling programs should only be adopted in situations where customary tenure is weak or absent to protect them where land becomes valuable due to urbanization or population growth, and when land is being redistributed as part of a land reform program. Systematic titling is not necessary in areas where customary land holding is not weak.

Replacement theorists consider living customary land tenure as an obstacle to the development of land markets and modernization of the economy. They, therefore, propose for replacement with a better-suited tenure system, namely statutory property rights. Replacement theorists argue that titling and registration can be used as means of solving land management and administration problems in Africa and elsewhere. This is

[84] Ibid

perceived to foster successful land development, increase credit opportunities, and promote the development of land markets.[85]

The replacement theorists support the substitution of customary land rights with statutory land rights to ensure tenure security. Hence, titling separates land held by individuals or groups from the greater community.[86]

The call for replacement is rooted in the point that customary tenure systems being on group rights, the tenure of *individuals* is insecure and does not promote investment and thus hinders development. Thus, to improve the security of tenure, it is imperative to substitute them with a titling system. Some scholars have strongly criticized the introduction of land titling and registration as a means to secure customary land rights, especially in sub-Saharan Africa.[87] They cite the failure of both market-oriented and state-imposed tenure reforms in sub-Saharan Africa, using as evidence the increased marginalization of the poor and vulnerable and their exploitation by elites.[88]

Therefore, comprehensive tenure reform programs in customary contexts are often ineffective and usually expensive. Attention must be given to community-based solutions to tenure insecurity and a state-facilitated evolution of indigenous land tenure

---

[85] Hull S et all, (2019), "Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa" *Land* 8, no. 11: 172. https://doi.org/10.3390/land8110172
[86] *Ibid.*
[87] Hull S, (2019), Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa" *Land* 8, no. 11: 172. https://doi.org/10.3390/land8110172
[87]*Ibid.*
[88]*Ibid.*

systems rather than a replacement for the customary land holding that existed.[89] Nevertheless, land titling is a questionable means of securing tenure and is thus not necessarily appropriate as a way to increase investment in land.

2.8 Conclusion

It is from this analysis the study lays its foundation to analyze the existing legal framework to integrate statutory and customary legal systems to most effectively strengthen tenure security, foster national and community prosperity, and take steps to extend all of the protections, rights, and responsibilities inherent in the national legal system to rural communities. Customary land rights theories have a direct impact on setting legal frameworks that regulate and foster customary land rights protection. Accordingly, there are agreements and disagreements about what should be improved to strengthen the protection of customary land rights.

For this study, hybrid adaptation has been selected as the benchmarking study because it has a sound argument that seeks to recognize the pre-existing long-holding of land rights in Tanzania. The theory advocates for incremental changes to the land tenure system while accommodating local and changing needs. The approach calls for renovating customary tenure and acknowledges the worth of living customary tenure systems while suggesting that their defects can be addressed by a certain amount of creative tinkering and fine-tuning, rather than more dramatic reforms. Basing on section 3(1)(g) of the

[89] Bruce, J, (1993), A Review of Recent Experience with Land Reform and the Reform of Land Tenure, with Particular Reference to the African Experience. In *Institutional Issues in Natural Resource Management*; Marcussen, H.S., Ed.; International Development Studies: Roskilde, Denmark, 1993; Volume 9, pp. 13–56

Village Land Act and Land Act, 1999 recognizes the pre-existing land rights by the deemed right of occupancy. While acknowledging the pre-existing land rights, the land law also seeks to protect those rights against discriminatory customary law. In line with this provision, the theory will be used to examine the strength of the existing legal framework in regulating customary land rights.

CHAPTER THREE

INTERNATIONAL LEGAL INSTRUMENTS AND BEST PRACTICES ON PROTECTION OF CUSTOMARY LAND RIGHTS

3.1 Introduction

This chapter discusses the different international and regional instruments regulating and governing customary land rights in Tanzania. International laws entail treaties, charters, conventions, protocols, or covenants, and are legally binding on the states parties to such specific instrument. That means, that when a state ratifies or domesticates a particular international instrument, the state commits to implement the rights set out in the agreement within its national laws and to abide by the legal obligation created by such instrument. The implementation and enforcement of international laws depend largely upon the continued political will and capacity of countries to implement and enforce the principles set out in such international agreements.[90]

They are discussed to establish a legal obligation of states from the international community and the significance of the international instruments in shaping the legal protection of property rights. The discussion is aimed at providing the relationship of these instruments with theories governing customary land rights and domestic laws.

3.2 International Legal Framework of the Customary Land Rights

[90] Pritichard J, et all, (2013), Securing community land and resource rights in Africa: A guide to legal reform and best practices, FERN, FPP, ClientEarth and CED, p. 17

The right to property as enshrined in different international and regional human rights instruments, often entails the bundle of rights associated with land ownership and use. Access to, use of, and control over land are strengthened by the individual or collective right to property in the particular state which may provide, protection against forced evictions or arbitrary deprivation. Those who rely on activities related to land for their livelihood may benefit from the secure enjoyment of the property right.[91]

Thus, the protection of land and land rights is not only enshrined under national statutes but also in international and regional instruments. Land rights are internationally recognized and protected by different international instruments. The instrument recognizes and protects land rights including customary land rights including but not limited to the Universal Declaration of Human Rights, the International Covenant of Social, Cultural, and Economic Rights, the African Charter on Human and Peoples' Rights, and others. All these instruments are discussed below.

3.2.1 Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (hereinafter referred to as UDHR) is a milestone document in the history of human rights development. It was drafted by state representatives with different legal and cultural backgrounds from all regions of the world such as Africa, Europe, Asia, and America. The said Declaration was proclaimed as a common standard of achievements for all peoples and all nations in the world.[92] It

[91] FAO,
[92] United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A)

sets out fundamental human rights to be universally accepted and protected and it has been translated into over 500 languages.[93]

The UDHR is widely recognized in different nations as having inspired and paved the way for, the adoption of more than seventy human rights treaties, applied today permanently at global and regional levels. The UDHR provides that everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.[94]

It is from the spirit of this provision that we find the genesis of the right to own property in another subsequent instrument. However, the declaration has been challenged for lack of normative force as the law. Nevertheless, the declaration resulted in the proclamation of the ICCPR and ISCER of 1966 to enforce the provision of the declaration. Unfortunately, the right to own property was not included in the two covenants. That the human right to own property is still not deeply entrenched in international human rights law is perhaps because many people see it as a right of the rich.

3.2.2The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted in 1965 and entered into force in 1969. It remains the principal international human rights instrument defining and prohibiting racial discrimination in

[93] https://www.un.org/en/about-us/universal-declaration-of-human-rights
[94] Art 17 of the Universal Declaration of Human Rights, 1948

all sectors of private and public life. The Convention among other things, provides for the protection of the right to own property.

> *Everyone has the right to non-discrimination and equality before the law in the enjoyment of the rights to own property alone as well as in association with others and to inherit.*[95]

Thus, the convention prohibits discrimination of any form based on the right to own land and enjoyment of the same. It imposes legal obligations to all state parties to it, including Tanzania.

3.2.3 International Covenant on Civil and Political Rights, 1966

International Covenant on Civil and Political Rights was enacted to enforce provisions of the Universal Declaration of Human Rights of 1948. Generally, ICCPR does not specifically provide for the protection of land rights. No provision directly protects land rights under the covenant. Nevertheless, the protection of land rights has been implied from other rights recognized and protected under the Covenant. Among other things, the covenant provides for the protection of land rights through article 17 which compliments the right not to be forcefully evicted without adequate protection when it "protects against 'arbitrary or unlawful interference with one's home. [96]It also requires state

[95] Art. 5 (d) (v) and (vi) of the International Convention on the Elimination of All Forms of Racial Discrimination

[96] Art 17 of the ICCPR, 1966

parties to provide an effective remedy for persons whose rights have been violated, which includes "adequate compensation for any property.[97]

3.2.4 Convention on Indigenous and Tribal Peoples, 1989

The Convention on Indigenous and Tribal Peoples, which was adopted by the International Labour Organization in 1989 is legally binding on States Parties. The Convention is the only binding international instrument relating to the rights of indigenous peoples in the world. The Convention establishes the right of indigenous peoples in independent countries to exercise control over their own economic, social, and cultural development in several areas specified by the convention.[98] The Convention includes a section on land, which requires States Parties to identify lands traditionally occupied and used by indigenous peoples to guarantee their ownership and protection rights.

In essence, the convention imposes duties to state parties to take appropriate measures to protect the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. The Convention also requires the provision of legal procedures to resolve land claims, establish rights over natural resources, and protect against forced removal.

3.2.5 United Nations Declaration on the Rights of Indigenous Peoples, 2007

[97] Art 2(3) of the ICCPR, 1966

[98] International Labour Organization, Convention 169, Indigenous and Tribal Peoples Convention, opened for signature Jun. 27, 1989, available at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 [Hereinafter ILO Convention 169].

U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples which provides among other things, that Indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired.[99] The Declaration, though not binding, provides that indigenous peoples have the right to own, occupy, and use lands, which they had traditionally owned, occupied, or otherwise used or acquired. It further emphasizes that indigenous peoples have the right to develop and control their lands traditionally owned by them. [100]The declaration further imposes a duty to state parties to give legal recognition and protection to these lands, territories, and resources with due respect to the customs, traditions, and land tenure systems of the indigenous peoples concerned.[101]

Where the state seeks to appropriate their land, indigenous peoples should be consulted before making such a decision to appropriate their land. The need for free, prior, and informed consent concerning decision-making about lands occupied by indigenous peoples especially where the relocation of peoples from land is under consideration.[102] The declaration further provides for the right to redress where indigenous people are not satisfied with any decision affecting their land rights. They can ask for restitution or, for just, fair, and equitable compensation, for the lands, territories, and resources that they have traditionally owned or otherwise occupied or used, and which have been taken or damaged without their free, prior, and informed consent.[103] The right to the conservation

[99] Article 8 of the UN Declaration of the Rights of the Indigenous Peoples, 2007
[100] Article 26 of the UN Declaration of the rights of the Indigenous Peoples, 2007
[101] Ibid, Article 26(3)
[102] Ibid, art 10
[103] Art 28 of the United Nations Declaration on Rights of Indigenous Peoples, 2007

and protection of the environment and the productive capacity of their lands or territories and resources.[104]

Therefore, from these perspectives, the declaration aims among other things to protect the customary or traditional land of the indigenous people for them to enjoy their cultural rights and other related rights.

3.2.6 African Charter on Human and Peoples Rights, 1989

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter)[105] is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. The Charter provides for the protection of the right to property by limiting the justifiable reason for encroachment. It may only be encroached upon in the interest of public need or the general interest of the community and by the provisions of appropriate laws.[106] The Charter imposes an obligation to all state members to recognize the rights, duties, and freedoms enshrined in the Charter and to undertake legislative or other measures to give effect to them.[107]

---

[104] Art 29 of the United Nations Declaration on Rights of Indigenous Peoples, 2007

[105] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 5 November 2022]

[106] *Ibid*, Article 14

[107] *Ibid*, Art 1

3.2.7 Protocol No. 1 to the European Convention on Human Rights, 1952[108]

The Protocol provides for the protection of every natural or legal person to peaceful enjoyment of his possessions of the land. It further limits the deprivation of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. [109]Nevertheless, states are given the right to enforce such laws as they deem necessary to control the use of property by the general interest or to secure the payment of taxes or other contributions or penalties.

In this regard, article 1 of Protocol No. 1 comprises three distinct rules that are- The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers only the deprivation of "possessions" and subjects it to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, inter alia, to control the use of property by the general interest.

3.2.8 The UNESCO Convention on the Safeguarding of Intangible Cultural Heritage

The convention was enacted to safeguard and protect intangible cultural heritages in the state parties. This includes the right to land for the protection of cultural heritages that

---

[108] Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9, available at: https://www.refworld.org/docid/3ae6b38317.html [accessed 23 January 2023]

[109] Article 1 of the Protocol No. 1 to the European Convention on Human Rights, 1952

are found with such land. The convention reaffirms the importance of the link between culture and development for all countries, particularly for developing countries, and supports actions undertaken nationally and internationally to secure recognition of the true value of this link. The Convention further obliges parties to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.

3.2.9 The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions is one of seven UNESCO conventions that was enacted to deal with the four core areas of creative diversity; cultural and natural heritage, movable cultural property, intangible cultural heritage, and contemporary creativity. Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information, and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. The Convention protects against infringement of human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

3.3 Best Practices for the Protection of Customary Land Rights

A best practice can be defined as a method that has been generally accepted by communities as superior to other known alternatives either due to its superior results produced by those achieved by other means or because it has become a standard way of doing things such as a standard way of complying with legal requirements well established. In other words, best practices are empirically based practices that have impacted recovery outcome variables and tested in a variety of geographical settings with a diversity of populations.[110]

Best practices can be a series of practices established and practiced by several states relating to a particular subject matter. To become best practices, they must be consistently practiced by different states and accepted by most civilized nations or tested by researchers to have positive impacts. Protection of customary land rights has been taken in different spheres in different jurisdictions. Customary land rights are considered effective where statutory full support and recognizes it as a means of land ownership thus courts will have to uphold when those rights are interfered with.[111]

3.4 Primary Indicators of Just Legal Respect for Customary Land Rights

Liz Aiden Willy in his report reviewing the fate of customary tenure in Africa outlined several indicators of just legal respect of customary land rights that can be used in

[110] Caruso G, (2011), The Concept of "Best Practice": A brief overview of its meanings, scope, uses, and shortcomings, International Journal of Disability Development and Education 58(3):213-222

[111] Willy L. A, (2011), The Status of Customary Land Rights in Africa Today Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #4 of 5, p. 15

assessing the legal protection of customary land rights. Customary land interests are respected in national laws if they meet the following indicators:

a) *Legal status of customary land rights*: Customary land rights are considered to be respected and protected if they are treated as equivalent in legal force to land interests obtained through non-customary (usually introduced statutory) regimes; that is, accepted as an equitable form of private property. In Tanzania, this is provided under the Village Land Act.[112]

b) *Certification and registration*: They are respected if they can be certified or registered without first being converted into non-customary forms of landholding. Registration and certification of customary land rights are permissible under section 22 of the Village Land Act. They are registerable without being converted to non-customary land holdings. Nevertheless, issuance of a certificate of customary right of occupancy has not been done in most of the village land. Even those with a certificate of customary right of occupancy are still subjected to compulsory acquisition of land and scheme of regularization that demise the customary land rights in favor of the granted rights.

c) *Recognition as Private Property without registration;* Customary land rights are bound to be upheld as private property by the government and the courts, even if they are not formally certified or registered to be considered legally secured. In Tanzania, customary land rights are legally recognized and protected even if they

[112] Section 18(3) & 4(1)(i) of the Village Land Act, 1999

are not certified or registered. They are recognized as deemed customary right of occupancy under the Village Land Act.[113] However, they seem to be inferior to the granted right of occupancy. A mere recognition is not sufficient to protect against encroachment.

d) *Capable of being owned by a person or group of persons:* Customary land rights should be protected and respected to an equal degree as property whether owned by families, spouses, groups, or whole communities, not just individuals. Customary land rights are capable of being owned by a person or group of persons in terms of joint ownership or occupancy in common.

   In Tanzania, a person family, or group of persons can apply for a certificate of customary right of occupancy.[114] A person can hold land under customary law either individually or in association with others. Customary land can be occupied individually or collectively as a common land for communal uses.

e) *Expressible in different bundles of rights:* As an indicator of legal respect of customary land rights, it must be understood in the law as expressible in different bundles of rights, including, for example, the seasonal rights of pastoralists. Pastoral rights are legally recognized and protected under the Village Land Act except in a few cases where such land is taken for public purposes. It is not easy to define what is un exhausted improvements in terms of grazing land.

[113] *Ibid.*
[114] Section 22 of the Village Land Act, 1999

f) *Respect for unfarmed or unsettled land:* One of the conditions for the efficient protection of customary land rights is respect for unfarmed or unsettled land. Such kind of land should not be considered as an unoccupied land. In Tanzania both the Village Land Act and Forest Act regulate forests. However, other unfarmed or occupied land such as forests, rangelands, marshlands, and grazing land can be subjected to unoccupied land. There must be a clear distinction between unoccupied land and land used for another purpose though is not de facto occupied to protect communal land and grazing land.

g) *Acknowledgement of above-ground resources:* As part of the land, anything permanently attached to the land is defined as land excluding petroleum and minerals. The above-ground resources such as trees and wildlife, and also to local streams and ponds, coastal beaches, and surface minerals that have been extracted traditionally for centuries, thus should be legally protected. These rights are legally recognized and protected in Tanzania under land laws and other legislation.

h) *Supremacy over non-customary commercial investment*: In fact, customary land rights should be given primacy over non-customary commercial investment purposes seeking rights to the same land for effective protection. In Tanzania, the village council has no final say when the issue of foreign comes or investment in village land. However, the government can acquire customary land rights for public interest or development purposes including investment.

Therefore, the customary land right is not supreme over non-customary investment.

i) *Democratic land administration:* The administration of customary land rights should be locally institutionalized. It must be recognized as requiring legal support for community-based, democratically formed land administration to be successfully and fairly regulated. In Tanzania, customary land rights are managed by village councils that are composed of people elected representatives (village chairperson and sub-village/street chairpersons). The village council is required to report to the village assembly for review and approval. This is a kind of democratic governance.

j) *Managed by Local-level dispute resolution bodies*: In general, village land councils and ward tribunals are local-level land dispute resolution bodies established and empowered under the Land Disputes Courts Act to mediate land disputes arising in their area of jurisdiction. Recognition and protection of customary land rights should be supported by the creation of local-level dispute resolution bodies, whose decisions carry force and whose rulings rely on just customary practices.

k) *Reined legally where customary norms are unjust:* It must be noted that in some instances, customary may be favorable to a certain gender or group in the community. To avoid such unjust, customary law applicable to customary land rights should be reined in line with justice and other written laws to avoid unjust

to ordinary community members (e.g. as a result of undue chiefly privilege) or vulnerable sectors such as women, orphans, the disabled, hunter-gatherers, pastoralists, immigrants, and former slave communities. In Tanzania, customary law is only applicable where does not contradict with constitution or any other written law as was stated in the case of *Bernado Efraim vs Holaria Pastory and Gervazi. Kaizilege.*[115]

l) *Protection when Expropriated by the state for public purposes*: Customary land rights should be given the same protection as statutorily derived private properties when required for public purposes, as indicated by the extent to which the law requires the same levels of compensation to be paid and the same conditions to both forms of property to apply. The same protection is accorded, however, the Land Acquisition Act tries to diminish the essence of full, fair, and prompt compensation as stipulated by the Constitution, Village Land Act, and Land Act. Payment of un-exhausted improvements can not in itself suffice the legal protection of customary land rights unless they are fully compensated.

m) *Recognition of existence even where forest and wildlife overlaid in customary land rights:* Customary land rights should be recognized and protected as existing even where forest and wildlife reserves have been overlaid on customary lands so that due separation is made between land ownership and the protection status of those lands. This position is not stipulated in Tanzania.

[115](2001) AHRLR 236 (Tz HC 1990)

Based on the discussion herein above, it is evident that Tanzania is among the countries considered with positive laws regarding the protection of customary land rights as revealed in the study conducted by Lizy to determine the fate of customary land rights. However, some shortfalls have been revealed out of the findings that need to be addressed to ensure effective protection of customary land rights.

The protection of customary land rights is now provided in the statute but is legally applicable only to lands that are occupied and used. This leaves most of the customary land resources involving forests, rangelands, marshlands, and other traditionally collectively owned lands without protection. These lands also form part and parcel of the customary land.

3.5 Conclusion

In summary, international law therefore provides for the ownership rights of individuals and communities over lands and resources on which their physical or even cultural survival depends such as ancestors' land and forest. Such protection should be extended to lands in Tanzania that are not expressly protected against conversion to other land categories. Land that has been acquired, or traditionally owned, used, and occupied (regardless of whether they hold a deed or not) must be protected for a great many communities in Africa who currently do not have their land and resource rights recognized by national laws. The state party to the aforementioned instrument is obliged to respect and promote the enjoyment of the right to own property. In any

circumstances, where the property is compulsorily appropriated by the state for public interest, compensation must be paid to holders of such land.

CHAPTER FOUR

LESSON FROM OTHER JURISDICTIONS ON PROTECTION OF CUSTOMARY LAND RIGHTS

4.1 Introduction

This chapter focuses on analyzing and presenting the summary of the survey from other jurisdictions on the protection of customary land rights. The purpose of this survey is to reveal which legal regime is deemed to be sufficient in protecting customary land rights and to compare it with the Tanzanian legal framework. Comparative legal methodology was employed to acquire insight into foreign legal systems and to find solutions for problems of a specific legal system. The method consists of a comparison of different legal systems or legal traditions (external comparison), or of fields of law within national legal systems (internal comparison). Then, the study points out the sound legal system for protecting customary land rights and suggests suitable reforms where necessary in the existing Tanzanian legal regime.

Sudan and Uganda are selected jurisdictions for comparison. They are selected because are perceived to be the best in terms of protection of customary land rights for the sake of stimulating awareness of the legal framework and to gain insights and lessons that could be considered in addressing the same challenges in Tanzania.[116]

[116] Marie L. P, (2016), The Comparative Method in Legal Research: The Art of Justifying Choices, p. 11

4.2 Legal protection of Customary Land Rights in other Jurisdictions

A study conducted by Lizy Aiden shows how countries vary in their policies and laws for customary rights recognition and protection. A minority of national land laws of the thirty-five surveyed countries were assessed as broadly positive in their treatment of customary land rights. In terms of law, the jurisdictions with positive law and preferably considered to be the best in protecting customary land rights are Uganda, Burkina Faso, Southern Sudan, and Tanzania.

Lizy finds that Uganda, Burkina Faso, and Southern Sudan are considered to have the best legislation protecting customary land rights as compared with other jurisdictions. Nevertheless, the named countries considered to be positive in protecting customary land rights are also facing limitations in law and especially post-law implementation and practice.[117] Therefore, the legal framework regulating customary land rights in Uganda and South Sudan is briefly analyzed in line with the outlined indicators.

4.2.1 Protection of Customary land rights in Uganda

The constitution of Uganda provides for dual land ownership in Uganda which is customary land tenure a fully lawful route to land ownership along with freehold, leasehold, and *mailo* (a form of feudal tenure introduced by the British in Buganda areas in 1902). The Land Act of Uganda of 1998, provides for the voluntary acquisition of

[117] Liz Aiden Willy, (2011), The Status of Customary Land Rights in Africa Today Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #4 of 5, p. 2

certificates of customary ownership[118] which is regulated by customary law, anticipated for uptake mainly for individual and household parcels or lands belonging to a traditional institution.[119] Nevertheless, the title can be converted to other forms of ownership such as freehold which weakens the equivalency of these certificates with freehold titles. Thus, freehold is practically viewed more superior to customary as is subject to be uprooted in favour of the freehold titles.

In Uganda, customary rights are legally bound to be upheld even without registration. There has been a minimal issue of certificates of customary ownership. A main constraint is that governing institutions are only at the district level; remote from villages. Thus, implementation of the law is not sufficient. Chiefs or elites have no supervisory powers over actions by statutory institutions.

Customary land is viewed as communal land collectively owned and managed by communities whether registered or not, but they may form a communal land association to formalize this.[120] In practice, internal land-grabbing by elites or investors are also is common and rising due to the increase in land-based investment activities. This is evidenced by measures taken by the state in creating special areas for investment, and public purposes, and claims ownership of all waters, wetlands, forest reserves, national parks, and other areas reserved for tourist or ecological purposes, although in trust for

[118] Section 5 & 6 of the Land Act of Uganda, 1998
[119] *Ibid*, section 4
[120] *Ibid*, Section 16

the nation.[121] This limits community rights over these areas to management and use rights.

Uganda has utilized the liberal adaptation theory regarding the protection of land rights by providing supplement issues to accomplish the protection of customary land rights. It has not replaced the customary rules regulating customary land rights. Despite recognition of customary land tenure and institutions in Uganda, the Land Act of Uganda still permits the state to convert the customary land to freehold and thus demise the legal protection accorded to them.

4.2.2 Protection of Customary land rights in Southern Sudan

The Constitution of South Sudan and new land law directly support customary land rights, whether registered or not, with equivalent force in law with freehold or leasehold rights acquired through statutory allocation, registration, or transaction.[122] Such rights may be held in perpetuity as opposed to statutory land rights. The Land Act also provides for registrable derivative rights of occupancy and use to a person or community[123] such as would apply to pastoralists using an otherwise owned local land area.

The Land Act of South Sudan provides for land councils (ward (Payam) land councils) who are empowered to supervise traditional authorities, although this is not being

[121] *Ibid*, section 45
[122] Section 8(6) of the Land Law of South Sudan
[123] Section 17 of South Sudan Land Law

implemented. It also recognizes the customary land right and is defined as community land.[124] The major constraint of such protection of customary land is the lack of implementation of the institutions at the local level required to protect and administer customary interests. The other challenge is the lack of awareness among local peoples occupying land according to customary laws in rural South Sudan.

Even land that appears unoccupied may be designated for seasonal use by people and livestock. Many communities in South Sudan practice shifting cultivation, and an area that looks like a bush may be a field left fallow for a few years until it is ready to be planted again. The right to land in the community derives from membership of the community through a common ancestry.

All members of a community are entitled to land for purposes of deriving a livelihood whether as a farmer or herder or otherwise although the community retains some control of land and resources meant for common use such as water holes and cattle camps. In South Sudan, there are four main ways of accessing land under customary law, namely allocation, inheritance, gift, and purchase.

There is full legal protection for community-owned forests, pastures, shrines, etc., which may be registered[125] although they are also protected even without such registration. The

[124] Section 11 of the Land Act, 2009
[125] Section 11 of the South Sudan Land Act

ownership of a legal right to communal land may be in the name of a community, clan, family, community association, or traditional leader.[126]

The South Sudan Land Act also cements the rights of traditional authorities within a specific community to allocate customary land rights for residential, agricultural, forestry, and grazing purposes.[127] Traditional or local authorities can allocate land subject to consultation with the community and notification to the land authority.

A community has a right to issue leases of a period not exceeding 99 years on customary land of more than 250 acres with approval of the Payam land council, county land authority, and Minister for Lands.[128] State leases are issued to different investors on the advice of the investment authority, upon consultation with the communities. However, the law does not impose a mandatory legal obligation to obtain the free, prior, and informed consent of the local people before the state delimits an investment zone, although communities must be compensated.[129]

Nevertheless, the government may expropriate land for public purposes subject to compensation and upon agreement as prescribed by the Southern Sudan Land Act or any other provided that the investment activity reflects an important interest for the

[126] *Ibid,* Section 58
[127] Section15(1) of the S.S Land Act, 2009
[128] Section 15 of the South Sudan Land Act
[129] *Ibid,* Section 63

community and contributes economically and socially to the development of the local community.[130]

Where the customary land right is expropriated by the state, the compensation should be just, and equitable, and should take into account the purpose for which the land is being utilized, the land market value,e and the value of the investment in it by those affected and their interest.[131] Unlike Tanzania where compensation is limited to un-exhausted improvements, in South Sudan, the compensation goes to the market value of the land and is supposed to be paid within sixty days. Where payment of compensation is not made within sixty days of the transfer of the property, the affected persons shall, in addition, receive interest on the sum due at commercial rates, recoverable until such compensation is fully paid.[132]

Local leaders including chiefs are responsible for the administration of land justice throughout the ten states in South Sudan by the customary law. The customary court system handles the vast majority of disputes, according to customary law that embraces traditional and alternative dispute settlement mechanisms such as reconciliation and mediation. Customary institutions remain a strong force in the administration of justice in South Sudan, particularly in rural areas of the country where the state has little reach. They are well-coached and adapted to handling local disputes over land that arise from returning populations. They use the win-win approach in settling land disputes.

---

[130] Section 73 of the South Sudan Land Act, 2009
[131] *Ibid,* Section 75
[132] *Ibid,* Section 75(7)

4.3 Lesson Learnt from Uganda and Southern Sudan.

It is noted that the selected case study adopted adaptation theory in reforming land rights protection specifically customary land rights in their jurisdiction. Neither of the selected states has adopted a statutory to extinguish or replace the so-called informal or customary land. They have not adopted conservatives in such as most of the existing customary land rights are regulated by customary laws and statutory law to avoid unjust and discriminatory practices.

A survey of the legal framework regulating customary land rights in South Sudan and Uganda has revealed some important aspects that need to be considered for improvement in our legal framework. Even though Lizy Aiden once noted that Tanzania is one of the four countries in Africa that seems to have progressively legal regimes protecting customary land rights. A comparative survey has been adopted with the view to highlight important aspects that have been covered in the selected case study while noting aspects that are not good in our legal framework to improve our legal framework.

From the above analysis of the selected case study, it has been revealed that South Sudan has the best laws regarding the recognition and protection of customary land rights. It is well recognized and adequately protected in the new Land Act of 2009. Among other things, the Southern Sudan land laws stipulate just and fair compensation once the customary land whether registered or not is expropriated by the state including

the value of the land.[133] In Tanzania, compensation that may be claimed by any person occupying land is limited to the value of unexhausted improvements on the land he is occupying.[134]

In South Sudan, payment is supposed to be affected within sixty days, upon agreement of both parties. The law imposes interest for delay of such payment. Unlike in Sudan, Tanzanian law does not specify within which time the compensation should be paid, and whether they may attract interest on the delay of such payment.

The Southern Sudan legal framework also provides for registrable derivative rights of occupancy and use of land to a person or community[135] such as would apply to pastoralists using an otherwise owned local land area. Customary leases, mortgages, easements, and sales are governed by the Land Act under part VI. This helps to avoid the application of unjust customary laws. The same applied in Uganda, the New Land Tenure Law allows local people to enact their local charter to regulate customary land rights in their areas. In Tanzania, there are no clear rules regulating derivative rights in customary rights, as they are governed by customary laws and practices of the particular community. Customary laws are neither uniform nor consistent regarding their application.

[133] Section 75 of the Southern Sudan Land Act 2009
[134] Regulation 5(2) of the Land (Compensation Claims) Regulations, 2001, G.N 79 of 2001
[135] Section 17 of South Sudan Land Law

Recognition and protection of unoccupied or unused land such as pastoral land. In southern Sudan, unoccupied land is also legally protected whether registered or not. Both communal and pastoral lands are protected under the Southern Sudan Land Act.[136]

Administration of land justice in Southern Sudan is placed under chiefs and customary institutions, Chiefs are responsible for the administration of land justice throughout the country and the customary court system handles the vast majority of disputes, according to customary law. Customary law largely embraces reconciliation and community harmony as principal tenets. This is similar to the Tanzania context, where village land councils and ward tribunals are empowered to mediate land disputes in their areas.

4.6 Conclusion

In a nutshell, customary land tenure systems generally function well in communities with complex secondary land rights that ensure community members are not left landless. Even where they function well, their administration faces a lot of legal and administrative challenges in terms of ownership and use. Among others, the system faces boundary conflicts, unregulated land developments, weak governance, lack of information about transactions, and unscrupulous dealings, all of which lead to tenure insecurity. Therefore, from the survey of the named two countries South Sudan and Uganda, the protection of customary land rights entails more than recognition and declaration of the status. They must be legally protected against compulsory acquisition of land exercisable by the state for the public interest. Expropriation must only be

[136] Section 66 and 67 of the Southern Sudan Land Act, 2009

permissible in limited circumstances with full and fair compensation including the value of the land. Compensation should not only be limited to exhausted improvements in or over the land.

CHAPTER FIVE

LEGAL AND INSTITUTIONAL FRAMEWORK ON CUSTOMARY LAND RIGHTS IN TANZANIA

5.1 Introduction

This chapter presents the key domestic legal instruments regulating customary land rights in Tanzania. It is imperative to review the existing laws to form the basis of the study as laws form part and parcel of the analysis of the collected qualitative data in line with the specific objectives of the study. The focus is placed on identifying the relevant law regarding the protection of customary land rights in Tanzania to test their efficacy and effectiveness.

5.2 National Legal Framework for safeguarding Customary Land Rights in Tanzania

The legal framework is the laws that govern or regulate the operation of the customary land rights in a particular state. In Tanzania, customary land rights are governed and regulated by several laws which are the Constitution of the United Republic of Tanzania, the Village Land Act, the Land Act, the Land Disputes Courts Act, the Urban Planning Act, the Ward Tribunal, and such uncodified customs of the community. To assess their effectiveness or otherwise, it is imperative to analyze critically all these laws that govern the operation of customary land rights in Tanzania. These laws are discussed in detail below as follows; -

5.2.1 Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic of Tanzania (the Constitution) of 1977[137] as amended from time to time, provides for and guarantees the equal right to own property to every person in Tanzania and prohibits deprivation of such property, unless it is authorized by law providing for fair and adequate compensation.[138] Therefore, the right to own property is a constitutional right and the deprivation of property without lawful justification is unconstitutional.

In this regard, customary land rights including the deemed rights in land, even though they are not codified, are protected by the provisions of Article 24 of the Constitution.[139] It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution.[140]

Therefore, there is established a settled jurisprudence, as stated by the Court in *Mwalimu Omari and Another v. Omari A. Bilali*[141]and *Attorney General v. Lohay Akonaay and Joseph Lohay*, [142]which provides that a pre-existing customary right of occupancy cannot be extinguished by a subsequent grant of the right of occupancy on the same plot of land unless compensation was duly paid before the grant was made. This position is in line with the fundamental principles of land policy as enshrined under section 3 of the

---

[137] Cap 2 R.E 2002
[138] Article 24 of the Constitution of the United Republic of Tanzania, 1977
[139] Constitution of the URT, 1977
[140] *Attorney General v. Lohay Akonaay and Joseph Lohay, [1995] T.L.R 80 at p. 90*
[141] [1999] T.L.R. 432
[142] [1995] T.L.R. 80

Land Act and Village Land Act, 1999 that require the payment of full, fair, and prompt compensation to any person whose right of occupancy or recognized longstanding occupation or customary use of land is interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act.[143]

The Constitution is the supreme law of the law in which any law that contradicts any provision of the Constitution may be declared unconstitutional once challenged before the court. Therefore, the legitimacy of legislation is derived from the constitution itself. [144]This was affirmed in the case of *Attorney General v. Lohay Akonaay and Joseph Lohay, [145]*where the court declared the Regulation of Land Tenure (Established Villages) Act, 1992[146] to be unconstitutional for the purported extinguishing of the customary land rights that existed before Operation Kijiji.

The constitution is the supreme law of every other law in Tanzania even customary laws their validity depends on the consistency with the provision of the constitution and other written laws of the law as was stated in the case of *Maagwi Kimito v. Gibena Werema[147]* and the case of *Holaria Pastoty v Ephraim*.[148]

But also constitution provides the foundation of all other human rights and no way such a right can be enjoyed without protection of the right to property specifically land for humankind. Nevertheless, there is no express provision in the constitution that directly

[143] Section 3(1)(g) of the Land Act, 1999
[144] Art 64(5) of the Constitution, 1977
[145]*[1995] T.L.R 80 at p. 90*
[146] Act No. of 1992
[147] [1985]TLR 132 (TZCA)
[148] (2001) AHRLR 236

protects the customary land rights in Tanzania rather it is based on the liberal construction of Article 24 of the Constitution.

5.2.2 The Land Act, 1999

The Land Act[149] is enacted to provide for the basic law about land other than the village land, the management of land, settlement of disputes, and related matters, however, the Act contains some provisions relating to customary land rights as stipulated in some aspects. The Act among other things provides for procedures for the transfer of general land to village land and,[150] the sale of mortgaged land in village land.[151]

The Act also applies to land within the boundaries of any urban authority and any land in a peri-urban area whether that land is within the boundaries of a village and is village land or not.[152] Yet, the Act provides for the appointment of the commissioner for a Commissioner for Lands who shall be appointed by the President.[153] The Commissioner is tasked with the principal administrative and adviser duties to the government on all matters connected with the administration of land and shall be responsible to the Minister for the administration of this Act and the matters contained in it. This includes administrative duties on matters connected with the administration of customary land. This has been seen in the declaration of abandoned land in the village under section 45 of the Village Land Act.

---

[149] Cap 113 [R.E 2019]
[150] Section 5 of the Land Act
[151] *Ibid*, Section 61
[152] Section 56 to 60 of the Land Act, 1999
[153] *Ibid*, Section 9(1)

The Land Act further provides for the application of customary law in the disposition of customary rights as far as the Village Land Act does not provide for such matters and the Land Act does not apply in the disposition of customary rights. Therefore, the legal basis for the application of customary law in the disposition of customary rights is principally provided by the Land Act.[154] Nevertheless, the application of customary laws in Tanzania is governed by the Judicature of Application of Law Act which stipulates the conditions and scope of application of customary laws.

Even though customary law is allowed to be applied in civil matters such as land matters, its application is subject to provision of the constitution, and other written laws of the land. It must not be inconsistent with justice and morality as emphasized in the case of *Maagwi Kimito v. Gibeno Werema.*[155]

The application of customary law in governing customary land rights has been perceived to create an inferiority of such rights as compared to the granted right of occupancy. Since customary law is subjected to statutory laws and constitution, it is possible to be defeated by the statutory provision. But yes, customary laws are not certain and uniform among societies. Consistency of the customary law regarding the protection of customary land rights may be jeopardized in favor of the granted land rights.

Additionally, It must be further noted that the Land Act diminishes the equal status of the customary rights as stipulated under section 18(1) of the Village Land Act. The Land

[154] *Ibid*, Section 61
[155] 1985 TLR 132 (TZCA)

Act recognizes the right of occupancy includes land which is occupied by persons under customary law. However, the Land Act gives room for persons occupying the land under customary rights can be moved or relocated to other land where such land is subjected to the granted right of occupancy.[156]

The Act further imposes an obligation to state where such land is required for public purposes. That, the land before being taken by the government, all occupiers of the proposed land to be taken should be given at least a one hundred and eighty days' notice of an intention to acquire such land and allow them to present their claims. Taking of such land should not affect their right to continue to use water which those persons had before being given notice to move. The law further imposes the mandatory pre-requisite condition for prompt payment of full compensation for loss of any interests in land and any other losses that are incurred due to any move or any other interference with their occupation or use of land.[157]

However, the practice is not the same as provided by the law. It has been evidenced in several incidents, that land is taken by the government without payment of fair and full compensation to the landholders. The Court of Appeal of Tanzania has recently decided in favor of the pre-existing customary land right. The court had this to say:

> *"It is germane at this point to repeat what we stated earlier that a pre-existing customary right of occupancy cannot be extinguished by a subsequent grant of*

[156] Section 34(3) of the Land Act, 1999
[157] Section 34(3)(b) of the Land Act, 1999

> *the right of occupancy on the same plot of land unless compensation was duly paid before the grant was made. Given that it is firmly established in evidence that the respondent received no compensation for the unexhausted improvements he effected on the property, we infer, as we must, that his anterior customary title was not extinguished. This conclusion renders the purported grant of title to the appellant ineffectual. He did not acquire any title to that property."*[158]

Based on the aforementioned case, the court has cemented the requirement of paying full compensation to the customary landholders before their land is taken in favor of the granted right of occupancy as stipulated under section 34(3) of the Land Act.

5.2.3 The Village Land Act, 1999

The Village Land Act (VLA) was enacted to provide for the management and administration of land in villages, and related matters. The Village Land Act recognizes - and legalizes - customary law as it applies to the assignment, transfer, and definition of property rights.[159] The Act further declares that customary rights are of the same status as granted right of occupancy.[160]

The VLA starts by providing the need to ensure that existing rights in and recognized long-standing occupation or use of land are clarified and secured by the law.[161] It also declares the application of customary law to land held under customary tenure.

---

[158] *Victor Robert Mkwavi v. Juma Omary,* Civil appeal No. 222 of 2019, CAT Mwanza (Unreported)
[159] Section 14 of the VLA
[160] *Ibid,* section 18
[161] *Ibid,* section 3 (g)

However, the application of customs, traditions, and practices of the community concerned, should be to the extent that they are by the principles of the national land policy and any other written law.[162] It goes on to qualify that any customary law that "denies women, children or persons with disabilities lawful access to ownership, occupation or use of any such land," will be void and inapplicable, and should not be given effect by a village council or assembly.[163]

Customary laws that were in force before the launching of Operation Vijiji are still recognized and applied under the Village Land Act.[164] Thus, communities that were not affected by the *Ujamaa* scheme, may continue to apply the customary law they had before the Ujamaa scheme. In other areas, for example, communities living on general land, people should apply the "customary law recognized as such by the persons occupying the land.[165]

Alden Wily points out that the Village Land Act does not define the term customary law and its various mandates for how different communities should determine which rules to apply based on their particular history or the state classification of the land they are living on - may "throw some communities into confusion.[166] It should be further noted that customs are not uniform throughout the communities. What is acceptable in one community may not be necessarily accepted in other communities.

---

[162] Section20 of the Land Act
[163] *Ibid.*
[164] Section 20(4) (b) of the Village Land Act, 1999
[165] *Ibid,* section 20(4)(a)
[166] Aiden Lily, 2013, p. 11

The VLA also describes and empowers the village council and village assembly to be the responsible institutions in the administration of all land in the village. The village council is responsible for the management of all village land. The village council in the exercise of its functions of management is required to consider the principles applicable to a trustee managing property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust of the village land.[167]

Village Land is governed by the Village Land Act of 1999 makes an estimated 75% of the Tanzanian population live on village land. The Act has introduced certain reforms regarding protections for customary land use rights in Tanzania through an indication of recognition of the rights of villages to hold and administer land according to their customs.[168] Persons who occupy and use village land have the right to obtain formal documentation of their use rights through a grant of Certificate of Customary Right of Occupancy (CCRO).[169]

In practice, the implementation of the Village Land Act on the protection of customary land rights has been very challenging. Most of the people who occupy land through customary law do not have CCROs for their lands and lack formal documentation of their land rights.[170] In many villages, the land use demarcation and mapping that are

[167] Section 8 of the Village Land Act, 1999
[168] S. 20(3) of the Village Land Act, 1999
[169] *Ibid*, section 22
[170] Pederson, R. (2010). Tanzania's Land Law Reform: The Implementation Challenge. DIIS Working Paper, 37, 1-20.

required to issue the documents have not yet been completed. Moreover, the district land offices (DLOs) responsible for issuing CCROs cannot frequently do so, and rural land users are often unaware of their land rights under the law.[171]

The rapid population growth and rising investment in commercial agriculture had increased land scarcity and created the potential for violence and insecurity of customary land rights in most rural areas in Tanzania due to a lack of documentation and strong legal backup. To secure these customary land rights, it is necessary to review the existing legal framework regulating customary land rights and to harmonize with other laws relating to land matters.

5.2.4 The Land Disputes Courts Act, 2002

The Land Disputes Courts Act (LDCA) is enacted to provide for the establishment of Land dispute settlement machinery and matters incidental thereto. Among other things, the LDCA establishes and empowers the village land council to mediate land disputes arising within the village.[172] The Village Land Council is tasked with duties to receive complaints from parties in respect of the land; (b) convene meetings for hearing disputes from parties, and (c) mediate between and assisting parties to arrive at a mutually

[171] Lauren P et all, Impacts of Customary Land Use Rights Formalization on Smallholder Tenure Security and Economic Outcomes: Midline Results from a RCT Impact Evaluation of USAID's Land Tenure Assistance Activity in Tanzania; Paper prepared for presentation at the "2018 WORLD BANK CONFERENCE ON LAND AND POVERTY" The World Bank - Washington DC, March 19-23, 2018, p. 2

[172] Section 3 of the Land Disputes Courts Act, S. 62 of the Village Land Act and S. 167 of the Land Act

acceptable settlement of the disputes on any matter concerning land within its area of jurisdiction.[173]

The composition of the village land council and its operation is very weak as it lacks clear qualifications for its members as well as procedures for handling disputes. The LDCA does not provide for the composition of the village land council, thus the composition of the council is provided by the Village Land Act.[174] it should be composed of elders as recommended by the Nyalali Commission for more efficiency in mediating land disputes.

The LDCA further provides for other land courts responsible for adjudicating land disputes in Tanzania both under village land and general land. Apart from the village land council, the Act empowers the Ward Tribunal, District Land and Housing Tribunal, the High Court, and the Court of Appeal of Tanzania. They are all responsible for adjudicating land disputes in both general land and village land.

5.2.5 The Land Acquisition Act, 1967

The Land Acquisition Act was enacted to provide for the procedures for the compulsory acquisition of lands for public purposes and in connection with housing schemes. Through this legislation, the President is empowered to acquire any land whether

[173] Section 7 (a) of the VLA
[174] Section 60(2) of the Village Land Act, 1999

occupied or unoccupied for any estate or term where such land is required for any public purpose.[175] Unfortunately, the compensation of vacant land is restricted by the Act. Where compensation is awardable, is only limited to the value of the unexhausted improvements of the land.[176]

Section 12 of the Land Acquisition Act seems to contradict the Land Act that requires prompt payment of full compensation for loss of any interests in land and any other losses that are incurred due to any move or any other interference with their occupation or use of land.[177]

Thus, it is clear that not only does the constitution require compensation for any legal expropriation of personal property but also the Village Land Act and the Land Act require so. Nevertheless, such protection has been witted down by the Land Acquisition Act particularly section 12 of the Act. This provides that, once the land is compulsorily taken by the government for a public purpose, the occupiers of such land are only entitled to compensation for unexhausted improvement made on/ over the land and not otherwise.

In one decision, *National Agricultural and Food Corporation (NAFCO) versus Mulbadaw Village Council and 66 Villagers*, the courts ruled that Village Councils hold land and could allocate land within their geographical jurisdiction provided it does so in good faith and pay prompt and adequate compensation for unexhausted improvements,

[175] S. 3 of the Land Acquisition Act, 1967
[176] *Ibid*, section 12
[177] Section 34(3)(b) of the Land Act, 1999

which might exclude pastoralists or foragers from any compensation. Therefore, village councils have the right to allocate land, despite rights held by ordinary people, but must do so in good faith by providing full and fair compensation to them. Nevertheless, the compensation will only be paid for improvements to the land such as buildings, and ploughed fields), not for the land itself. The key issue is what amounts to improvement in pastoral land. Whether pastures can be defined to mean improvements for compensation, if not, pastoralists receive nothing when their land is taken.

The issue of entitlement to compensation for the land taken by the government for public interest has turned out to be a challenge because it has formed endless causes of action in many of the cut-throat litigations in the courts of law. The case of *Mtumwa Shahame, Baya Kondo & and 111 others v Principal Secretary, Ministry of Works and The Attorney General* is cited in support of the point.

However, the Court of Appeal of Tanzania has departed from this position where it stated that the issue of fair compensation of the land depends on the circumstances of each case. In some cases, a reallocation of land can be considered as fair compensation. Fair compensation, however, is not confined to what is known in law as unexhausted improvements. Where there are unexhausted improvements, the Constitution as well as the ordinary law requires fair compensation to be paid for its deprivation.

5.2.6 The Land Registration Act, Cap 334 [R.E 2019]

Customary land rights are capable of being registered and a certificate of customary right of occupancy can be issued. It can be registered by any person or group of persons provided he/she is an ordinarily resident of the village in which he applies.[178] Such application is made in the prescribed form to the village council.

The Village Council is vested with the power to determine such application and any evidence of residence of the person so applying for a grant of customary certificate of right of occupancy. The village council, within ninety days (90) of that conclusion, may grant a certificate of customary right of occupancy to the applicant to be known as a `certificate of customary right of occupancy' to that applicant.[179]

However, registration and issuance of a certificate of customary right of occupancy is not the ultimate measure of protection of customary land rights. Even the registered and certified land rights are subjected to compulsory acquisition of land and regularization.[180] It is just a perceived attitude that customary land rights can be secured through registration and having a certificate of customary right of occupancy. The certificate has nothing to do with permissible exceptions to the customary land rights as stipulated under section 34(3) of the Land Act and section 18(3) of the Village Land Act. There must be something to be done more and above the issuance of a certificate of occupancy to secure the customary land rights in Tanzania.

---

[178] Section 22(1) & (2) of the VLA, [CAP. 114 R.E. 2019]
[179] *Ibid*, section 25
[180] *Ibid*, section 18

Nevertheless, the Court of Appeal of Tanzania has cemented the protection of customary land rights through case law. It affirmed that the registration under a land titles system is more than mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms a transaction that confers, affects, or terminates that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title. However, such registration does not affect the pre-existing customary land right without full and fair compensation of the pre-existing holders.

5.2.7 The Judicature and Application of Law Act, Cap 358 [R.E 2019]

The Judicature and Application of Law Act among others provides for the law applicable in Tanzania including the customary.[181] Customary law is also the source of law in land matters in Tanzania particularly on village land. The rule of customary law taken into consideration in any decision taken in respect of land held under customary tenure must take into account customs, traditions, and practices of the community concerned to the extent that they are by the provisions of sections 9 and 9A of the Judicature and Application of Laws Act.[182]

[181] No Act of the Parliament of the United Kingdom referred to in the JALO/JALA can apply to land held for a customary right of Occupancy or otherwise governed by customary law see section 20(3) of the Village Land Act.

[182] Section 20(3) of the Village Land Act, 1999

5.2.8 Urban Planning Act, 2007 No.8 of 2007

The Urban Planning Act (UPA) was enacted to provide for the orderly and sustainable development of land in urban areas, to preserve and improve amenities; to provide for the grant of consent to develop land and powers of control over the use of land, and to provide for other related matters. The Act introduces urban planning to facilitate efficient and orderly management of land use for better and more productive and sustainable land use practices.[183] It also intends to coordinate the sustainable development of the area to which it relates to promoting health, safety, good order, amenities, convenience, and general welfare of such area as well as efficiency and economy in the process of such development.[184] The planning scheme is executed after the transfer of land from the village or reserved land to general land which affects the customary land rights.[185] Once the village land is declared to be subjected to planning schemes, the process of transferring the same into general land extinguishes the pre-existing customary land rights over the land subject to compensation.

5.2.9 The Town and Country Planning Act, Cap

The Town and Country Planning Act empowers the minister responsible for land matters after consultation with the local government authority concerned, to declare a planning area in respect of any area, where in his opinion, he deems so necessary to

[183] Section 4 of the Urban Planning Act, 2007
[184] Ibid, Section 9
[185] Ibid, Section 26

establish a general planning scheme. [186]The impact of the declaration is to extinguish customary land rights upon payment of compensation. The Act restricts compensation to developed land only.[187] Hence, where the acquired land is not developed, no compensation will be paid to such land.

Thus, the Minister, in the preparation or adoption of a scheme, may furnish an estimate of the cost of meeting claims for compensation to the Area Planning Committee concerned.[188] Where the holder of the land is not willing to yield the possession of such land once the area is declared as a planning scheme, the President may acquire such land under any law relating to the compulsory acquisition of land.[189]

5.2.10 Local Government (Urban Authorities) (Development Control) Regulations, 2008 & Urban Planning Act, 2007, Urban Planning (building) regulations, 2018

These regulations address the requirement of a building permit in an area that has been declared a planning area. In detail, these regulations impose the condition of building permits before erecting buildings on surveyed lands. Thus, it applies to the erection of a building on any land within the area of jurisdiction of an urban authority. The impact of the declaration of the planning area is the demise of the customary land rights subject to compensation and the land becomes subject to development conditions such as the requirement of a building permit before erecting any building. This was affirmed by the

[186] Section 13 of the Town and Country Planning Act, 1967
[187] Ibid, section 55
[188] Ibid, section 25
[189] Ibid, section 45

Court of Appeal of Tanzania in the case of *Director Moshi Municipal Council v Stanlenard Mnesi and Another*.[190]

5.3 Institutional Framework Regulating Customary Land Rights in Tanzania

Several institutions are responsible to regulate and govern customary land rights in Tanzania. These institutions are primarily established by the Village Land Act. Each institution has its duty relating to the management of customary land rights. It is important to analyze them to establish their efficiency or otherwise regarding the administration and management of customary land rights.

The discussion is centered on administration and management institutions rather than adjudication institutions. These institutions are village council, village assembly, Commissioner for lands, district council, and minister responsible for land matters.

5.3.1 The President

The president is the supreme authority vested with the power to grant or revoke granted right of occupancy in Tanzania. One of the fundamental principles underlying the interpretation of land law is that all land in Tanzania is public land whether occupied or not vested in the President as a trustee on behalf of all citizens.[191] Under customary land,

[190] *Civil Appeal no. 246 of 2017, CA Arusha*
[191] Section 3(1) (b) of the Village Land Act, 1999

the president is empowered to revoke a customary right of occupancy granted to a non-village organization or a group of persons not being villagers.[192]

The President is also mandated to transfer any area of village land to general or reserved for public interest, he may direct the Minister to proceed by the prescribed procedure under the land law.[193] Where the village land is transferred to general or reserved land, the president may direct that any compensation payable to be paid by the person or organization to whom or to which the village transfer land has been transferred to general land is granted by a right of occupancy.[194]

5.3.2 The Ministry Responsible for Land

The Ministry of Land and Human Settlement is the overall institution responsible for policy formulation and for ensuring the execution by officials in the Ministry of the functions connected with the implementation of the National Land Policy and of the land law which are allocated or delegated to him by the President and in pursuance of this responsibility.[195]

The Minister about land matters, is tasked with the duty to give advice, guidance, and directives to the officials in the ministry which will in his opinion be conducive to the efficient effective, economical, impartial, and transparent administration of land under

[192] *Ibid*, Section 44(1)
[193] *Ibid*, Section 4(1)
[194] *Ibid*, Section 4(11)
[195] Section 8 of the Land Act

both general and village land. Also has to seek advice from other knowledgeable persons concerning the administration of land and the implementation of land laws.[196]

Moreover, the VLA empowers the minister responsible for land matters to make regulations for the better carrying into effect the purposes and provisions of the Village Land Act.[197] Such regulations may prescribe the forms to be used in connection with the Village Land Act and the procedures to be followed concerning the making of any claim for compensation and the payment of any compensation under the VLA.

5.3.3 Commissioner for Lands

Administration of village lands in Tanzania is decentralized, though the Commissioner for Lands retains overriding powers on the administration of land laws. However, the responsibility for the adjudication, survey, and registration of customary land rights to village lands is given to elected Village Councils and Village Adjudication Committees, as established under the Village Land Act which also maintain the village land registries. These registries take applications, process them, and submit them to district councils, which issue the certificates of customary right of occupancy. The cost for such a process is borne by rural citizens to have their land demarcated, adjudicated, and registered are low.

[196] Ibid.
[197] Section 65(1) of the VLA

The village councils are tasked with the role of drafting land use management plans, which stipulate how common property and natural resources will be managed within the village. No certificate of customary right of occupancy can be issued if the boundaries are not adjudicated and demarcated by local government authorities and approved by the Commissioner. The law requires that all villages have their boundaries demarcated, which is designed to prevent land grabbing by outsiders and illegal land sales by village authorities and residents. There are only a few villages that have been demarcated for land management in Tanzania.

The power of the village council in declaring the land to be abandoned has been subjected to the advice of the Commissioner.[198] As it is provided that in determining whether the land has been abandoned, regard should be taken to any advice on the matter sought by the village council or given to it by the Commissioner.[199] This has been affirmed by the Court of Appeal in several cases regarding this requirement. In the case of *Abdi M. Kipoto v. Chief Arthur Mtoi*[200]where, the court stated that failure to seek advice from the commissioner for land is fatal as far as procedures for declaring land abandoned.

5.3.4 The District Council

A district council may provide advice and guidance to any village council situated within its area of jurisdiction concerning the administration by that village council of

[198] Section 45 of the Village Land Act, 1999
[199] S. 45(2)(d) of the Village Land Act, 1999
[200] Civil Appeal No. 75 0f 2017 CAT, (unreported)

village land, either in response to a request for that advice and guidance from a village council or of its motion and any village council to which that advice and guidance is given shall have regard to that advice and guidance.[201] Advice from the district council must be made in conformity with the provision of the law and directives of the commissioner for land.

The district council is also involved in issuing recommendations for the transfer of land in villages where such transfer is for more than 250 hectares.[202] Such transfer should be subjected to the recommendation and advice of the district council before being operative.

5.3.5 The Village Assembly

Village assembly is the general meeting of all adult residents of the particular village. It is the supreme body at the village level responsible for the approval of proposals made by the village council. A grant of customary right of occupancy must be approved by the village assembly.[203] It is also responsible for receiving reports from the village on the management and administration of the village land.[204] Thus, the village assembly is the supreme body in the village that approves the proposal of the village council and reviews the report of the village council.

---

[201] Section 9 of the Village Land Act, 1999
[202] *Ibid*, Section 4
[203] Sectionn8(5) of the Village Land Act, 1999
[204] *Ibid*, Section 8(6)

5.3.6 The Village Council

The village council is responsible for the management of all village land. The village council is empowered to exercise the functions of management by the principles applicable to a trustee managing property on behalf of a beneficiary as if the council were a trustee, and the villagers and other person resident in the village were beneficiaries under a trust of the village land.[205]

The village council is also responsible for receiving applications for customary right of occupancy and determining them to grant or otherwise depend on the criteria provided by the law.[206] All applications for customary right of occupancy and disposition of such rights are to be made to the village council. Generally, the village council is the overall authority responsible for administering and managing customary land rights in Tanzania subject only to a few cases where it must see guidance and approval from other authorities such as the district council and commissioner for land.

The village council shall, subject to the provisions of this Act, be responsible for the management of all village land. The village council exercises its functions of management by the principles applicable to a trustee managing property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust of the village land.[207] However such administration and management are subjected to some other higher authorities such

[205] *Ibid,* Section 8
[206] *Ibid,* Section 22
[207] Section 8 of the Village Land Act, 1999

as the district council, land officer, commissioner for land, and minister responsible for land matters.

Village Council is toothless, unable to do anything without first obtaining the approval of the Commissioner; nor can they act until they hear from the Commissioner. For instance, in declaring the abandoned land, the council is obliged to have regard to the advice from the commissioner. Failure to do so may invalidate the whole process of declaring abandoned land.

5.4 Conclusion

Conclusively, both the legal framework and institutional framework regulating customary land rights in Tanzania have been reviewed under this chapter and some gaps have been disclosed. The existing legal and institutional framework is not so effective regarding the protection of customary land rights as some of the legislation contradicts the protection of the customary land rights accorded by the Village Land Act such as the Land Acquisition Act, Urban Planning Act, and Land Act. Yet, the international legal instruments do not expressly protect the customary land rights rather the protection is derived from liberal interpretation of human rights instruments. As such it has been revealed that, customary land rights are still subjected to customary laws and practices of the particular community. In this regard, most of the legal instruments encompass the adaptation theory in protecting customary land rights that emphasize on recognition of customary laws regulating customary land rights by abandoning old-fashioned customary laws that are contradictory to other written laws and justice. The challenge is

that there is no uniformity of customary law between one community and another. This disparity may bring confusion and leave these rights weak and unprotected. For effective protection of customary land rights, all other sectoral laws should be amended to comply with the provisions of the Village Land Act.

CHAPTER SIX

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 Summary of Findings

Based on the legal analysis in the preceding chapter, the study finds the following key legal gaps regarding the protection of customary land rights in Tanzania. The study was aimed at assessing the effectiveness of the legal protection accorded to customary landholders. Therefore, the study finds out that the law recognizes and protects customary land rights by granting equal status to the granted land rights. In practice, the law still embraces some circumstances where customary land rights may be abrogated in favor of the granted rights.

6.1.1 Protection of Customary Land Rights

It has been revealed that customary land rights are not only legally recognized but also protected by the Constitution, Land Act, and Village Land Act. It is the fundamental principle of land law that long-standing occupation of land should be recognized and secured by law[208] with the same status as granted rights of occupancy. Nevertheless, the position is eroded by section 34 of the Land Act which prescribes some incidences that customary land rights can be derogated by the state with compensation.

6.1.2 Intrusion to Customary Land Rights in Tanzania

[208] Section 3(1)(g) of the Land Act and Village Land Act, 1999

The protection of customary land rights is subjected to some incidences that permit a government to appropriate the right in favor of public interest or regularization of land rights. These incidents can be called permissible intrusion into customary land rights. Among other things, both the Village Land Act and the Land Act allow the taking of customary land rights for public interests, as well as for regularization subject to full, fair, and prompt compensation to occupiers of the land so taken. But also village land (customary land) is liable to be converted to general or reserved land subject to procedures stipulated under section 4 of the Village Land Act. All these incidents are viewed as threatening to the security of customary land rights unless they are backed with full, fair, and prompt compensation. Even where compensation is paid, [209] in practice, compensation to the landowners or users is not only inadequate and late but also makes little or no provision for the value of the land itself.[210]

Compulsory acquisition of land in areas occupied by the poor, without providing an alternative resettlement area or paying full and fair compensation is likely to make the livelihoods of many households more precarious.[211] Thus, compensation for compulsory acquisitions may be in terms of monetary or may entail relocation or alternative allocation. Items liable for compensation include the value of unexhausted improvement, disturbance allowance, allowance for transport and accommodation; and loss of profits. The Land Regulations do not provide for compensation for unoccupied

[209] Toulmin C, (2009), Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions; Land Use Policy, Vol 26(1) 10-19, p.15
[210] Section 12 of the Land Acquisition Act, 1999
[211] Toulmin C, (2009), Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions; Land Use Policy, Vol 26(1) 10-19, p.15

land.[212] Thus there is a real likelihood that undeveloped plots of land or farms, such as those used for grazing, and agriculture will not be compensated for the acquisition.

Scheme of regularization; the minister responsible for land matters may declare areas for planning purposes by section 8 of the Urban Planning Act, 2007. The purpose of a general planning scheme is to coordinate sustainable development of the area to promote health, safety, good order, amenity, convenience, and general welfare of such area as well as efficiency and economy in the process of such development.[213]

The occupier of the customary land rights is entitled to receive full, fair, and prompt compensation from the loss or diminution of the value of that land and the buildings and another improvement on it once the land has been or is to be declared to be a part of any scheme[214] which involves the extinguishing of all private rights in the land or any injury to the land or the occupation and its use.[215] Determination of compensation on the land declared to be a planning area is to be made by the provisions of the Land Act.[216]

Wherever the land is declared to be a survey area or scheme of regularization, all customary land rights are thereafter extinguished. The Village Land Act qualifies the

[212] Regulation 12 of the Land (Assessment of the Value of Land for Compensation) 2001
[213] Section 9 of the Urban Planning Act, 2007
[214] *Ibid*, section 8
[215] Section 14(2)(ii) of the Village Land Act, 1999
[216] Section 63(1) of the Urban Planning Act, 2007

application of Part III of the Land Acquisition Act relating to development areas. Land can be acquired under a regularization scheme.[217]

Conversion to General or Reserved Land: Village land (customary land rights) is liable to be converted to general or reserved land subject to full and fair compensation to landholders whose rights have been converted. The power to transfer village land to general or reserved land is vested in the president. Where the President is minded to transfer any area of village land to general or reserved for public interest, he may direct the Minister to proceed by the law.[218] There is a greater possibility for village land to be acquired by the government moving it from the jurisdiction of the Village Council such as by allocating it to non-village organizations or foreigners under the Tanzania Investment Act 2022.[219]

Management and Administration of Customary Land Rights: It has been found that the village council is responsible for the management of all village land. The village council exercises its functions of management by the principles applicable to a trustee managing property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust of the village land.[220] However such administration and management are subjected to some other higher authorities such as the district council, land officer, commissioner for land, and minister responsible for land matters.

[217] Section 8 &9 of the Urban Planning Act, 2007
[218] Section 4 of the Village Land Act, 1999
[219] Section 6 of the Investment Act, 2022
[220] Section 8 of the Village Land Act, 1999

Village Council is toothless, unable to do anything without first obtaining the approval of the Commissioner; nor can they act until they hear from the Commissioner. For instance, in declaring the abandoned land, the council is obliged to regard the advice from the commissioner. Failure to do so may invalidate the whole process of declaring abandoned land. Most of the members of the village council are not conversant with the law particularly the Village Land Act and other land-related laws

6.2 Conclusion

The study was conducted based on the following research questions.

i. What are the laws regulating and governing customary land rights in Tanzania?

ii. To what extent the existing legal framework is effective in protecting customary land rights in Tanzania?

iii. What are the lessons that can be learned from other jurisdictions regarding effective regulation of customary land rights?

Therefore, at the end of the study, these questions are supposed to be answered depending on the findings of the study. Based on the findings and discussion, the study is therefore keen to conclude that:-

Customary land rights in Tanzania though, are governed by the Village Land Act, but in most cases, customary law and general practices of the particular community are

recognized as law govern and regulate them. The Village Land Act does not sufficiently cover every aspect of customary land rights such as derivative rights.

To some extent, the existing land laws have managed to recognize and protect customary land rights in Tanzania. They are registerable and treated as of equal status as granted (statutory) land rights in every aspect. However, some gaps have been identified such as unfair compensation once taken by the government for public interest and lack of clear and uniform rules regulating derivatives rights in customary land. Lack of protection of unoccupied or unused land as it is considered vacant land.

To some extent, Tanzania is mentioned as one of the countries with a positive legal regime recognizing and protecting customary land rights. Most of the primary indicators for legal respect of customary land rights are well satisfied in the Tanzania legal framework. Nevertheless, the lesson learned from Sudan is the best among the identified states with good laws. It set out in detail the customary land rights and derivative rights therein.

6.3 Recommendations

From this conclusion, the study is therefore recommended as follows-

i. Amendment of Section 12 of the Land Acquisition Act, 1967 to provide for full compensation where the customary land rights are expropriated by the government for the public interest.

ii. Amendment of the Village Land Act, 1999 to incorporate framework regarding derivative rights under customary land rights as provided in the Sudan Land Act, 2009. Lease should not be left to be regulated with customary laws as there is no uniform customary law among different communities.

iii. Amendment of Village Land Act to provide the local institution responsible for regulating customary land rights by defining clearly their powers. Unnecessary intervention from the central government should be abolished. The registry of customary land rights should be maintained by the village council and not the District Land Officer.

iv. Amendment of Village Land Act to recognize and protect unoccupied land such as areas designated for grazing purposes and forest. They should be recognized and once expropriated, compensation should be paid to all interest parties whose rights have been interfered with.

v. Amendment of Land (Compensation of Land Claims) Regulations, GN 79 of 2001 to incorporate the time frame within the payment of compensation should be made. The regulations should provide interest for delay of such payment to discourage the government from delaying in paying such compensation.

vi. Amendment of the Village Land Act to incorporate all responsible customary institutions responsible for regulating customary land rights and define clearly

their duties to avoid overlapping of duties between local institutions and central government.

vii. Issuance of certificate of customary right of occupancy should be prioritized to ensure all customary landholders are secured with a certificate of occupancy in all villages.

REFERENCES

Tenga W. R & Mramba S. J, (2008), Manual on Land Law and Conveyancing in Tanzania, p. 309 (Unpublished)

Bank of Tanzania, (2009), The Proposed Additional Financing for the Housing Financing for The Housing Finance Project in Tanzania, Dar es Salaam:

Caruso G, (2011), The Concept of "Best Practice": A brief overview of its meanings, scope, uses, and shortcomings, International Journal of Disability Development and Education 58(3):213-222

Daley, E. (2005a). Land and social change in a Tanzanian village 1: Kinyanambo, 1920s-1990. Journal of Agrarian Change, 5 (3), 363–404. P. 374

Daley, E. (2005b). Land and social change in a Tanzanian village 2: Kinyanambo in the 1990s. Journal of Agrarian Change, 5 (4), 526–572, p. 564

Deininger, K., Selod, H. & Burns, A., (2012), *The land governance assessment framework: Identifying and monitoring good practice in the land sector*, Washington: World Bank Publications.

FAO, (2008) Compulsory Acquisition of Land and Compensation. *Land Tenure Studies*, Volume 10, p. 5.

FAO, (2008) Land Tenue Studies. *Compulsory acquisition of land and compensation*, p. 30.

Grips, (1962), *Compulsory Acquisition of Land, Powers, Procedure and Compensation*

Hayuma & Conning, *Tanzania land policy and genesis of land reform sub-component of private sector competitive project, p. 1:* Available at https://www.oicrf.org/-/tanzania-land-policy-and-genesis-of-land-reform-sub-component-of-private-sector-competitivess-project accessed on [11th February 2023]

Hull S, (2019), Theories of Land Reform and Their Impact on Land Reform Success in Southern Africa" *Land* 8, no. 11: 172. https://doi.org/10.3390/land8110172

John C, (1994), The Myth of Property; New York, Oxford University Press.

Kironde, L. M. J., (2015), Good governance, efficiency and the provision of planned land for orderly development in African Cities: The case of the 20,000 planned land plots projects in Dar es Salaam, Tanzania. *Current urban studies*, 3(4), p. 348.

Komu F, (1999), 'Land Management at Crossroads in Africa : Impact of the Tanzania Village Land Act No . 5 of 1999 on the Fate of Customary Land Tenure,': 6–10.

Kothari, C.R, (2004), *Research Methodology: Methods and techniques*, 2nd revised edition), New Delhi: New Age International (P) Limited,

Knight R. S, (2010). 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Lawmaking and Implementation,' Geneva,

Fao, [online]. available at: http://www.fao.org/3/i1945e/i1945e00.pdf (Accessed: 25th December 2022)

Kurwijila R, (2005) 'Securing Right to land: A priority for Africa,' International Institute for Environment and Development.

Kusiluka, M. M., Kongela, S, Karimuribo, E. D., & Kusiluka, L. J. (2011), 'The Negative Impact of Land Acquisition on Indigenous Communities' Livelihood and Environment in Tanzania, *Habitat International*, 66-73.

Lea D. R, (1998), Aboriginal Entitlement and Conservative Theory, Journal of Applied Philosophy, Vol 15(1): 1-14.

Lupala, J. & Chiwanga, P., (2014), Urban expansion and compulsory land acquisition in Dodoma National Capital, Tanzania. *Land Administration in East Africa,* pp. 206-223.

Martin, G. M, (2010), The Nature of Resistance and Conflicts on Compulsory Land Acquisition Process in Tanzania, Dar es Salaam:

Martina L., (2016), How come others are selling our land?' Customary land rights and the complex process of land acquisition in Tanzania, *Journal of Eastern African Studies*, 10:3, 393-412, DOI: 10.1080/17531055.2016.1250890

Ndlovu, C., (2016), Understanding causes of dissatisfaction among compensated landowners in expropriation programs in Tanzania. *International journal of scientific and Technology Research*, 5(1), pp. 160-17

Nyerere, J. K. (1966), *Freedom and Unity*, Megarrys Manual of the Law of Real Property, 8th Ed, London, Sweet &Maxwell Ltd.

Paris M. L, (2016), The Comparative Method in Legal Research: The Art of Justifying Choices.

Pritchard J, et all, (2013), Securing community land and resource rights in Africa: A guide to legal reform and best practices, FERN, FPP, ClientEarth, and CED.

Quan J and Toulmin C, (2005), Formalizing and Securing Land Rights, (International Institute of Environment and Development).

Samuel G, (2014), '*An Introduction to Comparative Law Theory and Method*, London: Hart Publishing.

Singhal, A.K & Malik, I. (2012) 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits, *Educational Research Journal*, Vol. 2(7), p. 252-256, [Online] Available at: http://www.resjourn (Accessed: 20th October 2022).

Toulmin C, (2009), Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions; Land Use Policy, Vol 26(1) 10-19.

Urassa J. A., (2022), Changing Customary Land Tenure Regimes in Tanzania, PhD Thesis, Ardhi University.

USAID, (2006), The Role of Property Rights in Natural Resources Management, Good Governance and Empowerment of the Rural Poor.

Willy L, (2012),' Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa', - Brief #1 of 5