

**THE RIGHT TO FAIR COMPENSATION FOR LAND ACQUIRED
FOR PETROLEUM ACTIVITIES: A CRITIQUE OF LAW AND
PRACTICE IN TANZANIA**

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A thesis submitted to the Faculty of Law, University of Cape Town, in fulfillment of the
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ABSTRACT

Compensation for land acquired for petroleum exploitation can be highly contentious. Often, the discovery of petroleum in a locality raises the landholders' expectations about the net benefit that the resources will bring their way. These expectations collide with the state's interest to exploit the discovered petroleum resources for the benefit of the whole nation. This brings to the fore the clash between the right of the landholders to their property and the right of the general public to natural resources. To resolve the clash, international human rights law requires the state to pay fair compensation for the land it acquires for petroleum projects. The main question this study asks is: to what extent is the Tanzanian petroleum legal framework for land compensation fair? To answer this question, the study draws on Rawls' theory of fairness, and analyses the jurisprudence of international human rights law which helps to identify the elements of a fair land compensation regime in the context of petroleum projects.

The study shows that, at the international level, the legal instruments and jurisprudence largely incorporate Rawls' theory of fairness by demanding that in acquiring land for petroleum projects the state must approach the landholders as equals. As such, the state must employ a participatory approach, which calls for consultation with the affected people, obtaining their consent, make decisions by consensus where possible, and considering their livelihood situations in calculating compensation. While Tanzanian petroleum laws and practices recognise the duty to give fair compensation to the people affected by petroleum activities before acquiring their lands, the study highlights numerous shortcomings in these laws and practices that prove that the land compensation scheme for petroleum projects in Tanzania fails to meet all the requirements of fairness. The study makes several key recommendations that could ensure that Tanzania fully complies with such requirements of fairness.

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DEDICATION

I dedicate this study to my father, the late Honourable Judge Project A. Rugazia and my guardian, the late Honourable Michael Kiri. I also feel indebted to the love of my daughter Shekinah Byera, my dear wife Corina Malinzi and a crescent smile of my newly born son Rhemas Project Jr.

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ABBREVIATION

ACHPRs	African Commission on Human and Peoples' Rights
AG	Attorney General of Tanzania
AU	African Union
EIA	Environmental Impact Assessment
EWURA	Energy and Water Utilities Regulatory Authority.
EITI	Extractive Industry Transparency and Accountability Initiative
FPIC	Free, Prior and Informed Consent
ICCPR	The International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
IFC	International Finance Corporation, World Bank Group
IPS	IFC Performance Standards on Environmental and Social Sustainability, 2012
LAA	The Land Acquisition Act, 1967
OECD	The Organisation for Economic Co-operation and Development
PAPP	The People Affected by Petroleum Projects
POE	Principle of Equivalence
PURA	Petroleum Upstream Regulatory Authority
RAP	Resettlement Action Plan
SLA	Sustainable Livelihood Approach

TNCs	Transnational Companies
TAITI	Tanzania Extractive Industries Transparency Initiative
TPDC	Tanzania Petroleum Development Corporation
UN	United Nations
UNDHR	Universal Declaration of Human Rights, 1948
UNGP	United Nations Guiding Principles on Business and Human Rights, 2011
VVR	Valuation and Valuers Registration Act, 2016
HRC	Human Rights Committee
ICC	Indian Claims Commission
IDA	International Development Agency
OAS	Organisation of American States
ILO	International Labour Organisation

CHAPTER ONE

INTRODUCTION

1. BACKGROUND TO THE PROBLEM

Petroleum-related wars have repeatedly occurred in Africa.¹ On that topic, one author has stated that 'Africa either trundles with the rhythms of violence or appears perpetually bound to violence'.² Studies mention land grabbing and lack of transparency and accountability as some of the prime causes of social tensions leading to aggravated human rights violations against the local communities where extractive activities take place.³ Reports establish that petroleum conflicts have resulted in over 4 million deaths and the displacement of millions of people in Libya, South Sudan, Nigeria, Algeria and Sudan.⁴ Land grabbing from its owners has affected 134 million hectares in Africa, an

¹ David Bevan, Paul Collier & Jan Willem Gunning 'Trade Shocks in Developing Countries' (1993) 37 *European Economic Review* at 557; See also, Michael L. Ross 'The Political Economy of the Resource Curse' (1999) 51(2) *World Politics* 297-322.

² Ibrahim Elbadawi & Nicholas Sambanis 'Why Are There So Many Civil Wars in Africa? Understanding and Preventing Violent Conflict' (2000) *Journal of Economics* 244-269; Also see, Paul Collier, V. L. Elliott, Håvard Hegre et al. 'Breaking the Conflict Trap Civil War and Development Policy' (Washington DC: World Bank Research Report, 2003) at 1-3.

³ See, Prosper B. Matondi, Kjell Havnevik & Atakilte 'Introduction: biofuels, food security and land grabbing in Africa' in Beyene Prosper Matondi, K Jell Havnevik & Atakile Beyene (eds.) *Land Grabbing and Food Security in Africa* (2011) at 7-9; Also see, Sonja Vermeulen and Lorenzo Cotula 'Over the Heads of Local People: Consultation, Consent and Recompense in Large-scale Land deals for Biofuels Projects in Africa' (2010) 37(4) *Journal of Peasant Studies* 899-916; Lorenzo Cotula *Land Deals in Africa: What is the Contract?* (2011) at 16.

⁴ See, Judith Burdin Asuni 'Special Report on Blood Oil in the Niger Delta' (United States Institute of Peace Washington, DC: Report no. 229 of 2009) at 4; See also, Department for International Development (DFID) 'The Causes of Conflict in Africa: Consultation Document' (London: SW1E 5JL United Kingdom 2001) at 8-14; World Bank 'Country Study Angola, Oil, broad-based growth and equity' (Washington D.C., 2007) at 8; World Bank 'Report on the World Bank on Southern Sudan' (Washington D.C 2018) available at <https://www.worldbank.org/en/country/southsudan/overview> accessed on the 1st of December 2018; Stephanie Hanson *Report on China, Africa and Oil* (Council on Foreign Relations: 2008) Available at: <http://www.cfr.org/publication/9557/>, accessed on 22nd May 2018; Stephanie Hanson, *Vying for West Africa's Oil* (Council on Foreign Relations: 2007) Available at:

area larger than South Africa and much larger than the whole of Tanzania.⁵ Moreover, there have been significant sales of petroleum resources to international buyers giving some governments in Africa the resources to buy large quantities of weapons and to organise large armies to maintain autocracy.⁶ In some countries, rebel groups have acquired territories with hydrocarbon and other mineral resources and spent the revenue from the black market to buy firearms that they use to propel insurgent activities.⁷

In response to the increased resource conflicts in many petroleum-producing countries, there have been strong scholarly voices in the economic and political sciences making a case for more robust regulatory frameworks that promote transparency and

http://www.cfr.org/publication/13281/vying_for_west_africas_oil.html, (accessed 1st June 2016); Cindy Hurst *China's Oil Rush in Africa* (Institute for the Analysis of Global Security: 2006) Available at *http://www.iags.org/chinainafrika.pdf*, accessed on 12th May 2016; Aziz Salmone Fall 'Conflict in the Senegal River Valley (1998)22(4) *Cultural Survival Quarterly*, Available at: *http://www.culturalsurvival.org/publications/cultural-survival-quarterly/224-winter-1998-uprooted-dispossession-africa* at 3, accessed on 5th June 2016.

⁵ See, W. Anseeuw 'The Rush for Land in Africa: Resource Grabbing or Green Revolution?' (2013) 20(1) *South African Journal of International Affairs* 159-177; See also, S.P.J. Batterbury and F. Ndi 'Land grabbing in Africa' in J.A. Binns, K. Lynch, and E. Nel (eds.) *The Routledge Handbook of African Development* (2018) 573-582 at 574; Abiodun Alou *Natural Resources and Conflict in Africa- The Tragedy of Endowment* (2007) at 204; S.M. Borrás Jr, R. Hall, I Scoones, et al 'Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction' (2011)38(2) *The Journal of Peasant Studies* 209-216; Braun J. Von & R. Meinzen-Dick 'Land Grabbing By Foreign Investors In Developing Countries: Risks And Opportunities' (2009) *IFPRI Policy Brief* Available at *http://www.landcoalition.org/pdf/ifpri_apr_09.pdf* accessed on 20 November 2018; A. Zoomers 'A Critical Review of the Policy Debate on Large Scale Land Acquisitions: Fighting the Symptoms or Killing the Hearts?' in S.J.T.M. Evers, C. Seagle & F. Krijtenburg (eds.) *Africa for Sale? Positioning Foreign Large-Scale Land Acquisitions in Africa* (2013) at 55-77; A. Zoomers & M. Kaag 'Beyond the Global Land Grab Hype – ways Forward in Research and Action' in M. Kaag & A. Zoomers (Eds.) *The global land grab: Beyond the Hype* (2014) at 201-216; William Wallis 'Kimberley Process: Africa's Conflict Diamonds: Is the UN-backed Certification Scheme Failing to Bring Transparency to the Trade' (2003) *Financial Times* 29.

⁶ Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz 'Future Directions for the Management of Natural Resources' in Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz (eds) *Escaping the Resource Curse* (2007) at 322.

⁷ *Ibid.*

accountability.⁸ In the late 1990s and early 2000s, the literature in political and economic sciences detailed how the promise of lucrative benefits from oil, gas, and mining was not being realised and linked resource exploitation to increased poverty, armed conflict and corruption.⁹ It suggested the problem went beyond the ‘Dutch Disease’¹⁰ by which natural resources made other export sectors uncompetitive;¹¹ it outlined environmental, social and political concerns, and remedies for addressing them, often noting that no single action was capable of tackling all of these challenges.

However, the literature was clear that transparency and dialogue had to form a central part of the solution.¹² One of the arguments was that countries rich in natural resources such as natural gas and oil, due to lack of transparency and mismanagement of these revenues, had some of the worst development indicators in the world, which in turn propelled angry and violent reactions from their populations.¹³ The proponents of transparency and accountability claim that in countries in which there is insufficient government accountability or transparency, government officials are more likely to be involved in bribery and diversion of public funds to private accounts and to ignore environmental degradation, resource-related violence, and human rights violations.¹⁴

⁸ See, Tumai Murombo ‘Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation’ (2013) 9 (1) *Law Environment & Development Journal* 31, 35: He observes, ‘in my view the curse is not our resources; the real curse is the capitalist regulatory context in which extractive activities are regulated and undertaken.’

⁹ See, generally, Macartan Humphreys *et al*, *Op Cit*, note 6.

¹⁰ Dutch disease refers to a situation whereby the economy of the state is solely reliant to one source of revenue, often the gas sector. Thus, Dutch disease is the opposite of a diversified economy. See more on this in Boniface Luhende ‘Towards a Legal Framework for Preventing Tax Revenue Leakage in the Upstream Oil and Gas Industry in Tanzania, an Analysis of the Concepts, Methods and Options available in a Public Trusteeship Model of Natural Resource Holding’ (Ph.D Thesis University of Cape Town 2017) at 4.

¹¹ See, Anwar Ravat & Sridar P. Kannan ‘A Hand Book for Policy Makers and Stakeholders’ available at <https://eiti.org/history> accessed on 13th June 2016.

¹² *Ibid*.

¹³ United States Institute of Peace Washington, DC, ‘Report on Burma’s Resource Curse the Case for Revenue Transparency in the Oil and Gas Sector’ (2012) at 4-7.

¹⁴ *Ibid*.

Indeed, studies show¹⁵ that in countries with weak state institutions, powerful groups use persuasion or force to gain improper access to natural resources.¹⁶

In the wake of these concerns, the Extractive Industry Transparency Initiative (EITI) Principles¹⁷ were adopted in 2003¹⁸ to facilitate transparency in the management of natural resources. Over 50 countries have signed a statement of support for the Extractive Industries Transparency Initiative (EITI) hoping that information disclosure would improve corporate governance and reduce risks.¹⁹

The EITI International Board accepted Tanzania as an EITI implementing country on 16 February 2009.²⁰ In 2015, Tanzania reformed its petroleum legal framework by enacting the Petroleum Act No. 21 of 2015. The Act has introduced some improvements on the previous legal instruments.²¹ In addition to the enactment of the Petroleum Act, a framework for transparency and accountability was introduced through a special law,

¹⁵ *Ibid.*

¹⁶ United States Institute of Peace Washington, DC, *Study Guide on Natural Resources, Conflict, and Conflict Resolution* (2007) at 7.

¹⁷ Ravat et al, *Op Cit*, note 11 at xviii.

¹⁸ The Extractive Industry Transparency Initiative (2016), The EITI Standards 2016 available at <https://eiti.org/document/standard#download> accessed on 28/11/2018; So far the EITI implementing countries are Afghanistan, Albania, Armenia, Burkina Faso, Cameroon, Central African Republic, Chad, Colombia, Côte d'Ivoire, Democratic Republic of Congo, Dominican Republic, Ethiopia, Germany, Ghana, Guatemala, Guinea, Guyana, Honduras, Indonesia, Iraq, Kazakhstan, Kyrgyz Republic, Liberia, Madagascar, Malawi, Mali, Mauritania, Mexico, Mongolia, Mozambique, Myanmar, Netherlands, Nigeria, Norway, Papua New Guinea, Peru, Philippines, Republic of the Congo, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Suriname, Tajikistan, Tanzania, Timor-Leste, Togo, Trinidad and Tobago, Ukraine, United Kingdom, Zambia. Available at <https://eiti.org/countries> accessed on 28/11/2018.

¹⁹ *Ibid.*

²⁰ See, Japhace Poncian & Henry Michael Kigodi 'Transparency Initiatives and Tanzania's Extractive Industry Governance' (2018)(5)1 *Development Studies Research*, 106-121 at 109.

²¹ Petroleum (Exploration and Production) Act, 1980 (Cap 328 R.E 2002): this was repealed to strengthen the legal and regulatory framework by amending the existing laws and enacting new laws and regulations. See further, Wilbert B Kapinga, Angela Thornsplans, 'Tanzania' in Christopher B. Strong (Ed) *The Oil and Gas Law Review* (2013) at 244.

referred to as Tanzania Extractive Industries (Transparency and Accountability) Act No. 23 of 2015.²²

However, the people debating transparency and accountability have seemingly paid little attention to the conventional argument that conflicts over natural resources in Africa have emerged because citizens across countries on the continent do not have control over their country's natural resources. According to this view, because the local communities do not have access to redress through existing legal structures when their land is taken away by the state either arbitrarily or without fair compensation, they resort to violence.²³

As the issue of land rights abuses is one of the often-mentioned causes of resource-based conflicts, some norms have been developed at the international level to assist states in ensuring that land is managed, controlled and administered to serve the interests and rights of the local communities where extractive activities take place. One of such norms is the United Nations Guidelines on Business and Human Rights (UNGPs)²⁴, adopted in 2011, and the World Bank's IFC Performance Standards on Environmental and Social Sustainability (IPS), adopted in 2012. Both instruments aim at assuring that states hosting transnational corporations (TNCs) and other business enterprises respect the human rights of the host communities, including the right to own land. In particular, the instruments require the payment of fair compensation

²² See, Japhace, *Op Cit*, note 20; See further Michael L. Ross 'Blood Barrels: Why Oil Wealth Fuels Conflict Foreign Affairs' (2008)87(3) *Foreign Affairs* 1-7 at 2; Benjamin K. Sovacool & Michael H. Dworkin *Global Energy Justice. Problems, Principles, and Practices* (2014) at 172.

²³ See, Abiodun Alou *Natural Resources and Conflict in Africa- The Tragedy of Endowment* (2007) at 204. See also, Joseph A. Pratt, William H. Becker & William M. McClenahan, Jr. *Voice of the Market Place- A history of the National Petroleum Council* (2002) at X; Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz, *Op Cit*, note 6; Daniel Lederman & William F. Maloney (eds) *Natural Resources Neither Curse nor Destiny* (2007) at 10; Richard M. Auty *Sustaining Development in Mineral Economies, The Resource Curse Thesis* (1993) at 35; Meshaal Jaber Al Ahmad Al Sabah *Resource Curse Reduction through Innovation - A Blessing for All - The Case of Kuwait* (2013) at 17-24.

²⁴ United Nations Guiding Principles on Business and Human Rights 'Protect, Respect and Remedy' Framework, (2011).

before the investors or the state acquire the land. These two instruments supplement other binding international legal instruments such as the Universal Declaration of Human Rights (UDHR),²⁵ the African Charter on Human and Peoples' Rights 1981 (Banjul Charter) and other instruments discussed in Chapter Three of this thesis.²⁶ At this stage, it suffices to note that although the IFC's IPS and the UNGPs have no binding authority, they provide important guidelines on how extractive activities can be performed without abusing the human rights of the local communities and by promoting sustainable development goals.²⁷

Historically, in Tanzania, the adoption of the Fifth Amendment to the Tanzanian Constitution²⁸ in 1984 was welcomed with a sigh of relief by landowners in Tanzania.²⁹ The amendment codified the Bill of Rights into the Constitution, which provided in Article 24 that everyone has a right to own property.³⁰ This development laid down the foundation for the overthrow of the old practice where land could be acquired by the state with impunity and without payment of compensation.³¹ The proviso to Article 24(1) provides that land can be acquired by the state for public interest subject to

²⁵ Universal Declaration of Human Rights, 1948.

²⁶ See generally Chapter Three.

²⁷ *Ibid.*

²⁸ This introduced the Bill of Rights into the United Republic of Tanzania Constitution, 1977 (Cap. 2 of the Tanzanian Laws) as amended from time to time, which is under Part III, Articles 22-29.

²⁹ See the following cases, *Attorney-General v Lohay Akonaay & Another*, Court of Appeal of Tanzania, Civil Appeal No. 31 of 1994; *Alameni Kambini & 14 Others v Orkesumet Village Council & 2 Others*, High Court (Arusha Registry), Civil Case No. 39 of 1994; *Lohay Akonaay & Another v Tluway Massay & Others*, RM Civil Case No. 4 of 1987; *Kalist Anthony v Kambi ya Simba Village Council & Others*, RM Civil Case No. 68 of 1987; *Lohay Akonaay & Another vs. Hon. Attorney-General*, High Court (Arusha Registry), Civil Cause No. 1 of 1993; *National Agricultural and Food Corporation v Mulbadaw Village Council & Others*, Court of Appeal of Tanzania, Civil Appeal No. 3 of 1985; *Rosa Petrol and Leonard Kashmiry*, High Court PC Civil Appeal (Mwanza Registry) No. 266 of 1989; *Ahmad Nyoni and Rashidi Mrisho & Three Others*, High Court PC Civil Appeal (Tabora Registry) No. 13 of 1983; *Yoke Gwaku & Five Others v The National Agricultural and Food Corporation (NAFCO) & Another*, High Court (Arusha Registry) Civil Case No. 52 of 1988; See also, Damian Lubuva 'Reflections on Tanzania's Bill of Rights' (1988) 14(2) *Commonwealth Law Bulletin* 853-857.

³⁰ Article 24(1) of the Constitution, thus reads: 'Every person is entitled to own property and has a right to the protection of his property held in accordance with the law.'

³¹ See cases in Kennedy, *Infra*, note 304.

payment of fair and adequate compensation. Furthermore, Article 24(2) of the Constitution provides that property could be acquired for a public purpose from its owners under the 'authority of law which makes provision for fair and adequate compensation'.³² Unfortunately, the statutory laws enacted to implement Article 24(2) of the Constitution have often been blamed for being unfair. The Land Acquisition Act 1967³³ (LAA), which is obviously 'outmoded'³⁴ given that it was enacted before the Bill of Rights, still applies.

Like many other projects designed to serve the public interest, the development of petroleum projects demands the acquisition of privately-owned land. In such cases, the Tanzanian Government is entitled to use its statutory powers of compulsory acquisition of property.³⁵ As noted earlier, Tanzania recently reformed its petroleum laws to improve the governance of petroleum resources.³⁶ It is, therefore, necessary to investigate how such amendments and the process of compensating the people whose land has been acquired for petroleum projects is dealt with under these new laws.

While the general discussion of the effectiveness of the current laws in protecting the right to land is not the central focus of this study, statistical information suggests that the challenges caused by the current legal regime are many, and the practical reality on the ground needs urgent attention. Thus, statistically, compensation disputes in Tanzania account for 19% of land-related disputes. There has been a growth in compensation cases in court from 11 000 per annum in 2011 to 43 000 in 2015.³⁷ It was estimated in 2010, that in Tanzania, at least 50 000 households per year would be

³² The United Republic of Tanzania Constitution, 1977 as amended from time to time.

³³ Land Acquisition Act No. 47 of 1967 (LAA).

³⁴ See, a critical examination of this at Chapters Five and Six.

³⁵ See, section 3 and 4 of the LAA.

³⁶ See, the Petroleum Act No. 21 of 2015.

³⁷ Felician Komu 'Conceptualizing Fair, Full and Prompt Compensation – The Tanzanian Context of Sustaining Livelihood in Expropriation Projects' (2014) 2 (2) *JLAEA* at 252-267; Also see, generally Wilbard Kombe 'Land Acquisition for Public Use: Emerging Conflicts and their Socio-political Implications' (2010) 2 *International Journal of Urban Sustainable Development* at 53-63.

displaced.³⁸ The adversity that land acquisition causes extends to land acquired for petroleum projects. For instance, in the petroleum project of the Mtwara to Dar es Salaam natural gas pipeline construction, the project (marine and terrestrial) was implemented under the National Natural Gas Infrastructure Project (NNGIP) whose aim was to address the infrastructure gap in the natural gas sector. The construction of the 542-kilometre pipeline took place between 2013 and 2015 and had four main parts; (i) 290-kilometer terrestrial pipeline of 36-inch diameter from Madimba village in Mtwara region to Somanga Fungu village in Lindi region; (ii) 25-kilometer marine pipeline of 24-inch diameter from Songo Songo Island in Lindi to Somanga Fungu; (iii) 197-kilometer terrestrial pipeline of 36-inch diameter from Somanga Fungu to Kinyerezi in Dar es Salaam; (iv) 30-kilometer terrestrial pipeline of 16-inch diameter from Kinyerezi to Tegeta in Dar es Salaam.

The pipeline, as well as the two processing plants in Songo Songo and Mnazi Bay, required land, especially a 30-meter wide way-leave and the land for the construction of processing plants. The pipeline passed through 113 villages, 41 wards, eight districts, four regions and one marine park. The government had to acquire land from individual citizens and communities through whose property the pipeline passed, triggering a process for compensation and resettlement managed by the Tanzania Petroleum Development Corporation (TPDC).³⁹ Although the reason for acquiring the land for the construction of the Mtwara pipeline was legally justified, people suffered the loss of their agricultural lands that supported their livelihood. Consequently, the frustration of this loss combined with the fact that the gas from Mtwara was transported to Dar es Salaam for processing instead of doing that in Mtwara where it was found, led to an attempt by some local activists to force the Tanzania government to build the gas plant in the south where the gas is being extracted.⁴⁰ The justification for the uproar was that the local communities should specifically and preferentially benefit from the gas

³⁸ *Ibid.*

³⁹ Prosper *et al*, *Op Cit*, note 3.

⁴⁰ See, Mwesigwa Thobias & Mikova Kseniia 'Mtwara Gas Project Conflict: Impacts on Local Communities' Socio-economic Activities (part 1)' (2017) 6(3) *Social Sciences* 63-72.

extracted in their districts. This supports the view that land acquisition for petroleum projects can spark unrest if not handled properly.⁴¹

It is important to note that actual exploitation is at present carried on only at Songo Songo off the coast. It has also recently been established that there are petroleum and petroleum gas fields under Lake Tanganyika located in the west of the Mainland, and substantial helium gas fields have been discovered in the Katavi and Rukwa Regions where extraction was scheduled to begin in 2019 but has been stalled.⁴² There will surely be more extensive relocations of communities occasioned by future extractive activities. As such, the net results already experienced have led to the critical view⁴³ that land acquisition on unfair terms often causes conflict between the state and the people.⁴⁴ Attesting to this opinion are the current upheavals in Kilwa and Mkuranga in Lindi. In these areas, there have been frequent acts of terrorism, which involved systematic attacks against the members of the ruling party and the police. This has opened yet another dimension of suspected resource conflict in Tanzania.⁴⁵ During

⁴¹ *Ibid.*

⁴² See generally, Energy Charter Secretariat, Report on Pre-Assessment Report of the Tanzanian Energy Sector under the Principles of the International Energy Charter and the Energy Charter Treaty, July 2015.

⁴³ See, R. W. Tenga & J. M. L. Kironde Study of Policy, Legal and Institutional Issues Related to Land in the SAGCOT Project Area (2012) at 77: They state, 'land conflicts... a study between 1996 and 2010 covering over 30 villages in 30 districts and 40 villages in each Region found that 70% of the conflicts were between communities and investors, 25% were between farmers and herders, and the rest were problems emanating from urban expansion and land expropriation'.

⁴⁴ See generally, Issa G. Shivji 'The Land Acts 1999: A Cause for Celebration or Celebration of a Cause? Keynote Address to the workshop on land held in Morogoro, Tanzania' available at http://mokoro.co.uk/wp-content/uploads/land_acts_1999_cause_for_celebration.pdf accessed on 17 April 2016; Jwani T Mwaikusa 'Community Rights and State Control in Tanzania' in Never Drink from the same Cup (Proceedings of the Conference on Indigenous Peoples in Africa 1993); International Institute for Environment and Development (Issue Paper no. 140) Ambivalence and Contradiction , A review of current policies and laws that touch on pastoralism in Tanzania (2006) at.4; A. L. Wily Community-based land tenure management. Questions and answers about Tanzania's new Village Land Act, 1999 (2003) at 11; Michael J. Watts 'Righteous Oil? Human Rights: The Oil Complex and Corporate Social Responsibility' AR Reviews in Advance (2005) para 9.15.

⁴⁵ See, Louis Kolumbia 'Unanswered Questions on Rufiji Killings' The Citizen Thursday, May 25, 2017, available at <http://www.thecitizen.co.tz/news/unanswered-questions-on-rufiji-killings/> accessed on 1st December, 2017; See also, Eginald Pius Mihanjo 'Security and Development: A Case of Growing Restlessness in Rufiji -

these acts perpetrated by local extremists, police were reported to have been killed, as were members of the ruling party.⁴⁶ In response, security forces have reacted with vengeance, which has left many dead in areas such as Kibiti and Mkuranga, an area officially categorised as a 'special military zone'.⁴⁷

Generally, while these responses to issues of land accountability are beginning to take place at the international level, Tanzania has not yet undertaken serious corresponding legal reforms at the local level. Instead, the government recently enacted a series of laws, including the Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017, which do not really address the issue of how land should be fairly acquired and compensated.

This thesis rests on the assumption that the establishment of a transparent regulatory framework for land that guarantees fair compensation when land is acquired for purposes of extractive activities is critical to promoting the constitutional right to property, as well as preventing land-related conflicts in petroleum producing countries.⁴⁸ This assumption is in turn based on the belief that it is not enough to ensure that the oil industry and the government are accountable for their activities. If the revenue accruing from the industry fails to reach the population in the oil-producing regions, and the people who live in these areas are displaced from their land, land conflicts will most likely continue. Scholars like Cotula⁴⁹ have increasingly focused on how fairness can be used to avoid conflicts and incidences of hunger and low productivity caused by land grabbing for petroleum exploitation. Cotula insists on the need to obtain free, prior and informed consent before acquiring land from local

Kibiti - Kilwa Area' The Citizen Monday, May 29, 2017, available at <http://www.thecitizen.co.tz/news/1840340-3946082> accessed on 1st December, 2017.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Sonja Vermeulen and Lorenzo Cotula, *Op Cit*, note 3.

⁴⁹ *Ibid*; See, also, L. Cotula., N. Dyer & S. Vermeulen 'Bioenergy and Land Tenure: The Implications of Biofuel for Land Tenure and Land Policy', Land Tenure Working Paper, FAO and IIED Fueling Exclusion? The Biofuels Boom and Poor People's Access to Land (London: 2008).

communities,⁵⁰ but seemingly, he has not taken this argument further, to give it a significant place in the human rights field.

The term 'right to property' as used in this thesis means the right to protection from arbitrary deprivation of property, and payment of fair compensation whenever the state interferes with a person's right to property. 'Land acquisition' means the compulsory taking of land by the state for a public purpose. The use of the phrase 'land expropriation' is intentionally avoided in this study.⁵¹

2. STATEMENT OF THE PROBLEM AND RESEARCH QUESTIONS

While article 24(1) of the Tanzanian Constitution recognizes individual ownership of land, the LAA and the Petroleum Act place the right to own land and extractive resources under state sovereignty and control. Such limitations on the right to own land and extractive resources have gradually led to the collision between individual expectations over the net benefit that the extractive resources discovered beneath their land should bring their way and the state's interest to exploit the discovered petroleum resources for the benefit of the whole nation. To resolve the clash, the Tanzanian Constitution and the international human rights law require the state to pay fair compensation for the land that the State acquires for petroleum projects. However, contradictions exist among key national legislation governing land and mineral exploitation on how to pay fair compensation for the acquired land. As competition intensifies for scarce and invaluable resources, both local and international investors position themselves for a share of the pie, and often in disregard of regulatory and policy frameworks, or take advantage of existing lacuna or the absence of adequate legal guidance.

⁵⁰ *Ibid.*

⁵¹ Land expropriation was historically associated with the arbitrary taking of the land without payment of compensation.

The foregoing factors coupled with weak institutions of governance adversely impact people's livelihoods and human rights, particularly the most vulnerable and poor rural inhabitants, who are less educated and informed. As such, this thesis examines the legal framework for the acquisition of land in Tanzania for petroleum exploration and exploitation activities with a particular focus on the issue of 'fair' compensation.

3. THE OBJECTIVES OF THE STUDY

This study's main objective is to examine the fairness of the procedural and substantive laws governing land compensation in the petroleum projects in Tanzania. The study analyses the extent to which the petroleum legal framework for land acquisition in Tanzania respects and complies with the values of fairness with specific reference to compensation as envisaged in the Tanzanian Constitution and international human rights law.

To achieve this aim, the study identifies the laws that protect the right to land and provide for compensation for land acquired for petroleum activities. Since the Petroleum Act is not the only law that provides for compensation procedures in Tanzania, this study will investigate the fairness of the procedures provided in other relevant legal instruments. The study will thus also examine the relationship and consistency between the framework created by the Petroleum Act and other laws dealing with the fairness of land acquisition. Ultimately, it addresses the question whether the Tanzania legal framework governing compensation for land compulsorily acquired for purposes of petroleum projects complies with the applicable international human rights standard of fairness. If it is found that there are gaps, the study will recommend an appropriate legal framework for acquiring land for petroleum purposes that meets the standard of fairness.

4. RESEARCH METHODOLOGY

As stated earlier, the study seeks to show how, at the international level, the legal instruments and jurisprudence incorporate Rawls' theory of fairness, especially the element of participation, inclusion and the protection of people's livelihoods. Chapters Five and Six then use that theory of fairness to answer the question: to what extent does the Tanzania petroleum legal regime comply with all components of fair compensation codified by international and constitutional law? To do this, the study is based on literature review. It reviews the literature on fairness, considering both theory and legal practice, international and domestic. The aim is to develop a framework for the review of the Tanzanian legal framework governing compensation for land acquired for petroleum-related projects. In the study, the two important theories of fairness developed by John Rawls, namely the *difference principle* and the *justice as fairness theory*, are used to conceptualise fairness. It is important to conceptualise fairness because the Tanzanian Constitution and the international legal instruments state that compensation for property acquired by the state should be fair.⁵² Since the word 'fair' is abstruse, the theories developed by Rawls are used to shed light on fairness.

Furthermore, the study reviews scholarly works and official publications. Primary sources such as case law from the African Commission on Human and Peoples' Rights and national courts; national legislation; and international human rights instruments are also reviewed. The international materials consulted include decisions, treaties and other documents from the United Nations (UN), the African Union, the Council of Europe, and the Organisation of American States (OAS) and specialised human rights monitoring bodies. The legal instruments are analysed to establish that while the right to property is not absolute, it can be limited when there is reasonable and objective justification.⁵³ The jurisprudence from the African Court on Human and Peoples' Rights

⁵² See, Article 24(2) of the Constitution. Also see generally, Chapter Four.

⁵³ See, Caroline Henckels 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012)15(1) *Journal of International Economic Law* 223–255; John F. Hart 'Land Use Law in The Early Republic and The Original Meaning of The Takings Clause' (2000) 94(4) *Northwestern University Law Review* 1099.

(African Court), the European Court on Human Rights and other international and regional courts are closely analysed to ascertain the threshold of fair compensation provided by international judicial organs. Such a threshold from the international judicial organs and the literature giving account on how the people affected by petroleum projects were compensated are used to analyse how Tanzanian laws and practice reflect the guidelines for fair compensation developed at the international level.

Generally, this study blends the philosophical underpinning of fairness by Rawls and international human rights jurisprudence to create a fairness theory of compensation, which is used in the study to analyse the fairness of Tanzanian laws, particularly the Petroleum Act⁵⁴ and the Land Acquisition Act as well as the practice.⁵⁵

5. CONCLUSION AND OUTLINE

This chapter has shown that the petroleum compensation law in Tanzania is in dire need of critical appraisal and analysis. Both the questions of the extent to which the laws recognises the right to fair compensation for the land acquired by the state for petroleum activities and the meaning of fair compensation demand attention. While the old Tanzanian land compensation laws reflected the principles of a command economy where the state had much power over land and individuals had none, most recent laws allocate land ownership and concomitant rights to individuals. However, the laws enacted in de facto socialist Tanzania between 1967-1974 prior to the enactment of the Bill of Rights into the current Tanzania Constitution still co-exist alongside the laws adopted in the post Bill of Rights era, causing confusion as to how land should be acquired and on what terms. Against this backdrop, the study draws on the principle of fairness as developed in international human rights law and legal theory to analyse the

⁵⁴ The Petroleum Act.

⁵⁵ This is because, the Petroleum Acts relies on the LAA, see Chapter Four.

fairness of the Tanzanian land acquisition and compensation laws relevant to petroleum projects.

Chapter Two provides the theoretical foundation for this study. It discusses the two theories of fairness by Rawls: *justice as fairness* and distributive justice especially his *difference principle*. The justice as fairness theory sets benchmarks for the procedural aspects of fairness, while his difference principle of distributive justice defends and articulates the principles underpinning substantive justice or expected outcomes of fairness. In the final analysis, the chapter establishes that fairness, as advocated by Rawls, allows for a reconciliation of the right of the individual or group to land with the right of the general public regarding the distribution of land resources, in particular, petroleum land.

Chapter Three examines the international standards for fair compensation. It analyses the relevant international human rights legal instruments and jurisprudence in order to identify the international standards for the protection of the right to property and for determining what constitutes fair compensation. The extent to which the principles of fairness suggested by Rawls are reflected in the jurisprudence of fair compensation for land acquisition in international human rights law is the focus of the discussion. The aim is to develop an overarching theory of fairness applicable to the analysis of Tanzanian law.

Chapter Four primarily describes the legal regime governing land compensation in the petroleum projects in Tanzania. It discusses the various sources of compensation laws pertaining to petroleum in Tanzania and the procedures governing land acquisition. Moreover, the chapter offers an overview of the legal regime governing compensation for petroleum products in Tanzania.

Chapters Five and Six are analytical. Chapter Five conducts a detailed analysis of the substantive compensation laws and principles relevant to petroleum projects by using the theory of fairness established in the study. Chapter Six, on the other hand, focuses on the analysis of the procedural laws and practices to determine the extent to which

the Tanzanian petroleum legal framework for land acquisition and compensation embodies fairness. The aim is to find out whether there are gaps in the law as far as fairness is concerned.

Chapter Seven presents the main conclusions and recommendations of this study.

CHAPTER TWO

FAIRNESS OF LAND COMPENSATION: CONCEPTUAL FOUNDATION

1. INTRODUCTION

Both the Tanzanian Constitution and international law state that the yardstick for the appropriateness of compensation for land acquired for petroleum projects is 'fairness'. Since the term 'fairness' is abstruse, this chapter seeks to study John Rawls' theory of fairness with the view of ascertaining what fairness means in legal theory and philosophy. The chapter will specifically explore Rawls' theory of justice as fairness and his difference principle for following reasons. First, a large body of literature considers Rawls' theory of justice as fairness to be more credible than rival theories. Second, Rawls' theory of fairness meshes well with human rights, particularly the human right to property, since it recognises that basic rights and freedoms are inherent to every person. To that end, Rawls' justice as fairness theory relates fairness to participatory approaches in the protection of rights, including the right to property.

The participatory approach spearheaded by Rawls is critical to developing an appropriate scheme for calculating compensation in respect of land acquired for petroleum projects. The elements that Rawls elaborates are free, prior and informed consent, consultation and consensus building (procedural fairness). Furthermore, Rawls' difference principle of distributive justice demands that decisions should fundamentally respect the livelihood rights of the least advantaged (substantive fairness). Understanding what fairness means will help to address the compensatory challenges that the petroleum communities in Tanzania are facing. This principle lays the foundation for establishing the extent to which the Tanzanian petroleum compensation legal regime is fair, which is examined in Chapters Five and Six.]

2. JUSTICE ACCORDING TO RAWLS

2.1 Introduction to Rawls' Theory of Justice

Rawls' justice as fairness theory has highly influenced modern political and legal philosophy. In that regard, Nozick has stated that political philosophers cannot ably theorise justice without considering Rawls' theory on the subject.⁵⁶ Rawls introduced his theory on justice in 1971 in his book titled 'A Theory of Justice'⁵⁷, in which he aimed to counter the utilitarian theory that had been dominant at the time in the Anglo-American political theory for a long time.⁵⁸

In his justice theory, Rawls' major rebuttal against utilitarian theory, whose fundamental aim is to maximise the good for all, was that the concept of 'goodness' is vague. In addition, Rawls opposed utilitarianism for ignoring the liberty of individuals.⁵⁹ He convincingly argued that what the ruling class considered good might not be necessarily good to the ruled. Rawls instead looked at justice as being a virtue of a society, or rather justice as being fairness. In that sense, he urged that those who frame a constitution, the basic legal structure of a society, should ensure that it is founded on principles of justice. This means that the law or the decision-making process should be participatory, in other words, every person's voice should count. In the context of petroleum activities, it implies that the land acquisition and compensation process should be participatory by assuring the participation of every person that is affected by the petroleum project.

⁵⁶ Robert Nozick *Anarchy, State, and Utopia* (1974) at 1; See also, Elijah Okon John 'A Critique of John Rawls' Social Justice Theory and the Fate of Nigeria's Politics in the 21st-Century and Beyond' (2014) 28 *Journal of Law, Policy and Globalization* 12-20 at 15; Mehmet Kanatli 'Rawlsian theory prioritises of Justice as Fairness: A Marxist Critique' (2015)8(1) *Hitit University Journal of Social Sciences Institute* 301-318 at 302.

⁵⁷ John Rawls *A Theory of Justice* (1971) at 21.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 395.

While utilitarianism is consequentialist, as it prioritises justice as the outcome or the happiness of the majority, Rawls' assertion is deontological because it crafts basic structures that could lead to fair ends. As such, Rawls' theory of justice as fairness attempts to formulate fair rules likely to lead to a just end. Rawls' deontological approach tends to agree well with human rights for two reasons. First, human rights are normative. Second, they are concerned with the rights of every individual, which means that 'public interest' cannot be used as an excuse for overriding the rights of individuals. In that regard, fundamental human rights such as the right to property are considered inherent.⁶⁰

Furthermore, Rawls explained how society could derive the basic principles of justice. He asserted that it was possible to derive them by speculating about what is just from a 'veil of ignorance' or the original position.⁶¹ In that view, fair rules can only be made when one understands that the rules they are making will apply to themselves, unaware of the circumstances they will be in at that particular time. For example, they do not know whether they will be educated or uneducated, rulers or the ruled, landowners or investors. In that sense, fair laws are the rules made by a person who anticipates those rules to bind them without knowing the circumstance that they will find themselves in.⁶² In the context of petroleum projects, this means that the representative of the states involved in acquiring land and formulating compensation rules must make the rules under the veil of ignorance as to their own position in society. These rules, according to Rawls, should allow the affected people to participate fully in the land acquisition and compensation process.

Rawls then categorised his basic principles of justice into three, in what he referred to as the lexical ordering.⁶³ In that ordering, Rawls asserted that the most important principle is the liberty of the people, the second is equality and the third is reward. Rawls, however, stated that limitation of equality is permissible if it is necessary to

⁶⁰ *Ibid* 22-23

⁶¹ *Ibid* at 136; Also see, John Rawls *Political Liberalism* (1993) at 22.

⁶² See, John Rawls 'Justice as Fairness' in Samuel Freeman (ed.) *John Rawls, Collected Papers* (1999) at 63.

⁶³ *Ibid* at 42.

improve the livelihood standards of the worst-off. What Rawls means by this is that justice and fairness demands the protection of human rights, although rights, including the right to property, may be derogated from for the good of the society, provided that such derogation does not impair the fundamental livelihood of the affected people. In the context of land needed for petroleum projects, this means that the right to own property must be protected, but where the state is forced to acquire land from its holders for petroleum activities, which is in the public interest, it must pay compensation to the affected people taking into account their livelihood.

2.2 Criticism of Rawls' Theory and Responses

Although Rawls' theory of justice resonates with the objectives of this thesis, it has not been entirely immune from criticism. Scholars from different schools of thought have attacked Rawls' theory of justice from varying perspectives. Feminist legal theorists, for example, have argued that Rawls' veil of ignorance is blind to the different demands prevalent in pluralistic societies, which could lead to a conservative representation of women.⁶⁴ Some Marxist scholars on the other hand argued that Rawls' theory was faulty by suggesting that the principle of equality is less important, and that rights can be derogated from.⁶⁵

Other respected legal theorists like Dworkin have criticised Rawls' theory of justice by asserting that his suggestion that raising the livelihood standards of the worst-off justifies the derogation of the right to equality is incorrect. According to Dworkin, societal action can be categorized into two: endowment and ambitious.⁶⁶ In that view, endowments are the natural position that people find themselves in, such as talent, being born in a rich family or a developed country, whereas ambitious actions are the

⁶⁴ See, Suzan Moller Okin *Justice, Gender and the Family* (1989) at 89.

⁶⁵ See, a Marxist Critique against Rawls thus: Richard Miller 'Rawls and Marxism' in Norman Daniels (ed.) *Reading Rawls Critical Studies on Rawls' A Theory of Justice* (1975) at 206-229.

⁶⁶ See, Ronald Dworkin 'What is Equality? Part 2: Equality of Resources Ronald Dworkin' (1981) 10(4) *Philosophy and Public Affairs*, 283-345 at 334-340.

actions that the members of society choose to do.⁶⁷ Therefore, Dworkin's criticism of Rawls' justice theory is that it is wrong to penalise the privileged group for the natural endowments that they possess by permitting derogation from the principle of equality, or in other words, by allowing a derogation of right in order to benefit the majority.⁶⁸ Instead, Dworkin suggested that systems should be created so that they do not allow the ambitious actions of the members of the society to lead to unequal classes. Seemingly, Dworkin is not concerned about correctional measures that help to uplift the least advantaged. He seems to suggest that the impoverished should remain impoverished and the rich should remain rich, a suggestion that is unlikely to be acceptable in human rights. Instead, as shall be seen in the next chapter, human rights require a balance to be struck between individual rights and the good of the society.⁶⁹ Human rights allow limitations on rights provided that they are legitimate, proportional and reasonable.⁷⁰ This closely resembles Rawls' theory of justice as fairness, which sets limits on the derogation of basic liberties by stating that such derogation should be done for the good of all, and it must not fundamentally affect the basic rights of the individual concerned.⁷¹ Moreover, Rawls' argument that laws should be made from a veil of ignorance is also in line with the human rights basic tenet of impartiality and equality.

Rawls' response to critics of his theory of justice is contained in his second masterpiece titled 'Political Liberalism',⁷² which is an improved version of his theory of justice. In 'Political Liberalism' Rawls directly links justice to fairness. In the justice as fairness theory, Rawls responded to the criticism that his theory fails to take into account a pluralistic society by asserting that it is impossible to confine justice in a body of comprehensive rules. Therefore, he suggested a justice system based on the

⁶⁷ See generally, *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See, Committee on Economic, Social and Cultural Rights, General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para 2) (U.N. Doc. E/C.12/GC/20 (2009)).

⁷¹ See, Rawls, *Op Cit*, note 61 at 6.

⁷² *Ibid.*

participation of every affected person.⁷³ He argued that justice is an outcome of overlapping consensus, that the fundamental objective of justice is fairness, and therefore that the justice system should reflect a participatory approach when making decisions that affect citizens.⁷⁴ What Rawls meant by this explanation is that, since we live in a pluralist society, it is difficult to agree on what is good, just or fair.

As a result, political institutions must have systems that allow everyone in the society to discuss what they consider fair on their own terms. His underlying idea is that there are general public moral values that the society agrees on, but for different reasons. This agreement is what Rawls termed 'overlapping consensus'.⁷⁵ In the context of land acquired for petroleum activities, as seen earlier, this requires that every person affected must be consulted in the land acquisition and compensation process.

Despite notable improvements in Rawls' justice theory, Amartya Sen has argued that political philosophy should move beyond the Rawls methodological outlook, which Sen calls transcendental institutionalism, towards a different, more practically-oriented approach to justice.⁷⁶ According to Sen, it is easier to deal with manifest injustice than to create just institutions. Sen points out what he considers weaknesses in Rawls' theory of justice as follows:

John Rawls' rightly celebrated approach of 'justice as fairness' yields a unique set of 'principles of justice' that are exclusively concerned with setting up 'just institutions' (to constitute the basic structure of the society), while requiring that people's behaviour complies entirely with the demands of proper functioning of these institutions. In the approach to justice presented in this work, it is argued that there are some crucial inadequacies in this overpowering concentration on institutions (where behaviour is assumed to be appropriately compliant), rather than on the lives that people are able to lead. The focus on actual lives in the assessment of justice has many far-reaching implications for the nature and reach of the idea of justice.⁷⁷

⁷³ See, Rawls, *Op Cit*, note 62 at 47; Also see, Rawls, *Op Cit*, note 61 at 144 where he advocates for what he refers to as reasonable pluralism under the concept of overlapping consensus.

⁷⁴ See, John Rawls 'Justice as Fairness' (1958) 67(2) *The Philosophical Review* 164-195 at 164.

⁷⁵ Rawls, *Op Cit*, note 61 at 144.

⁷⁶ See generally, Amartya Sen *The Idea of Justice* (2009).

⁷⁷ *Ibid* at xi.

However, Sen's argument fails to explain how the rational process that he expects to combat manifest injustices would fail to create just systems.⁷⁸ Rawls seems to have good answers to some of the questions raised by Sen. He argues that to arrive at overlapping consensus rationally, a distinction must be drawn between private interests, which are communicated in private language, and public interests, which can be universally agreed upon. Rawls exemplifies his notion of overlapping consensus by stating that issues like the right to religion are easily acceptable to everyone but how those rights are exercised individually is wholly private. For example, states Rawls, the way Muslims and Christians exercise their right to religion is different but they all agree that the right to religion is important.⁷⁹ Similarly, the fact that one is entitled to compensation when their lands are acquired for petroleum purposes is universally acceptable but what will be considered satisfactory compensation depends on each individual person. This is why a participatory approach is important, as it allows the affected people to agree on what they will consider satisfactory compensation. As seen, Rawls' justice as fairness theory is rights based, and there is a general agreement that Rawls is mainly concerned about the individual, which is the approach taken in human rights discussions and legislation. Moreover, Rawls relates fairness to justice. In that regard, he states that the fundamental object of justice is fairness.

Since the language used in the Tanzanian Constitution and the international legal instruments as seen in Chapter One is that compensation should be fair, it is reasonable to use Rawls' justice as fairness theory in conceptualising what should be regarded as fair in the context of compensation for land acquired for petroleum projects. It is important to note that Rawls' approach to justice from a liberalist point of view was based on two important elements: first, justice is fairness, and second, distributive justice requires that an economic transaction should benefit the least advantaged by

⁷⁸ See, Laura Valentini 'A Paradigm Shift in Theorizing about Justice? A Critique of Sen' (University of Oxford: CSSJ Working Papers Series, SJ011, 2010) 5-10; Also see, Wilfried Hinsch 'Ideal Justice and Rational Dissent. A Critique of Amartya Sen' (2011)33(2) *Journal of Philosophy and Social Theory* 371-386 at 381.

⁷⁹ See Rawls on overlapping-consensus in, Rawls, *Op Cit*, note 61 at 144.

raising their standard of living. Rawls dealt with these goals in his discussion of justice as fairness, in what he termed the difference principle.

3. RAWLS' JUSTICE AS FAIRNESS THEORY AND THE DIFFERENCE PRINCIPLE

3.1 Justice as Fairness

Rawls' major premise in his argument on justice as fairness is that it is possible for an institution of justice to be unfair.⁸⁰ This position is evident in some injustices that are legalised by parliamentary legislation or administrative decrees.⁸¹ In 'Justice as Fairness', Rawls stresses that 'justice' and 'fairness' are two separate concepts but the fundamental idea in the concept of justice is fairness.⁸² According to Rawls, the failure to distinguish between justice and fairness could result in an erroneous understanding of what fairness is. The underlying precept in Rawls' justice as fairness theory is that for the rules governing practice to be fair, the parties submitting to be bound by them must engage in the practice with the full understanding of their scope, but not necessarily with an understanding of the contingencies that will follow an arrangement. The latter is what he calls 'a veil of ignorance' or the original position.⁸³ The participants are strictly required to follow the procedures governing their relationship if they wilfully submit to them.⁸⁴ Rawls asserts thus:

⁸⁰ See, Rawls, *Op Cit*, note 62; see similar argument in Ronald Dworkin *Justice for the Hedgehogs* (2011) at 410.

⁸¹ For example, the institutionalisation of apartheid in South Africa. On this example, see generally, D. Welsh, *The Rise and Fall of Apartheid* (2009); Also see, John Dugard & John Reynolds 'Apartheid, International Law, and the Occupied Palestinian Territory' (2013) 24(3) *The European Journal of International Law*, 867-913 at 872.

⁸² Rawls, *Op Cit*, note 62 at 47.

⁸³ Rawls, *Op Cit*, note 62 at 63.

⁸⁴ *Ibid* at 63.

... a practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or to acknowledge before one another when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be their peculiar condition, and thus when it meets standards which the parties could accept as fair should occasion arise for them to debate its merits.⁸⁵

Rawls bases his line of argument on Hart's principle of 'fair play', which posits that 'when a number of persons conduct any joint enterprise according to the rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.'⁸⁶ Rawls, like Hart, looks at justice as a virtue.⁸⁷ However, Rawls' conception of justice is grounded on the idea that the fundamental object of justice is fairness and as such, the question of fairness is raised when there are participants who have competing interests⁸⁸ and a decision is needed on their rights and duties. In this view, fairness relates to a just dealing between persons who are cooperating with or competing against one another.⁸⁹ He says:

Justice is the virtue of practices where there are assumed to be competing interests and conflicting claims, and where it is supposed that persons will press their rights on each other. Those persons are mutually self-interested in certain situations and for certain purposes and that is what gives rise to the question of justice in practices covering those circumstances. Amongst an association of saints, if such a community could really exist, the disputes about justice could hardly occur; for they would all work selflessly together for one end, the glory of God as defined by their common religion, and reference to this end would settle every question of right. The justice of practices does not come up until there are several different parties (whether we think of these as individuals, associations, or nations and so on, is irrelevant) who do press their claims on one another, and who do regard themselves as representatives of interests which deserve to be considered.⁹⁰

⁸⁵ *Ibid.*

⁸⁶ Rawls, *Op Cit*, note 57 at 112.

⁸⁷ H.L.A Hart 'Are There Any Natural Rights' (1955) 64(2) *Philosophical Reviews* 175-191 at 185.

⁸⁸ See Rawls, *Op Cit*, note 62 at 20.

⁸⁹ *Ibid* at 59.

⁹⁰ See, Rawls, *Ibid* at 176.

Therefore, Rawls' conception of fairness and justice addresses the aspects of justice that utilitarianism fails to account for, such as the failure to differentiate between justice and fairness. In Rawls' own words: 'it might seem at first sight that the concepts of justice and fairness are the same, but that is a mistaken impression'.⁹¹ It is this aspect of justice for which utilitarianism in its classical form is unable to account.

The second aspect of the principle of justice that Rawls addresses is the equality principle that he considers to be a vital aspect of justice. In arguing a case for equality, Rawls claims that the utility theory is merely concerned with the accumulation of wealth.⁹² He then argues that a justice system, which does not deal with how the accumulated wealth is distributed to the society, is not fair.⁹³ To ensure that wealth is equally distributed, Rawls suggests that an institution of justice could allow derogation from the principle of equality when that is necessary to raise the living conditions of the least advantaged, which he calls the 'difference principle'.⁹⁴ What this means, as seen earlier, is that the right to own land can only be interfered with for the interests of the public, particularly the least advantaged. The limits for derogating individual rights, according to Rawls, is that doing so should not negatively affect the basic human rights of the affected people and the reason for the limitation must be for the benefit of all.⁹⁵ In the context of land needed for petroleum projects, this means that the state could acquire land from its holders but such acquisition must be followed by compensation, which takes into account the livelihood rights of the worst-off. This is different, for instance, from Aristotle's view of distributive justice, which adopts a formal equality approach that demands that the unequal be treated unequally, and the equal equally.⁹⁶

⁹¹ *Ibid* at 164.

⁹² This is a well-known objective of utilitarianism. See, Jeremy Bentham 'An Introduction to the Principles of Morals and Legislation' in John Stuart Mill *Utilitarianism and on Liberty, Including Mill's 'Essay on Bentham' And Selections from the Writings of Jeremy Bentham and John Austin* (2nd Edition 2003) at 181.

⁹³ See generally the argument in John Rawls, *Op Cit*, note 62.

⁹⁴ Rawls, *Op Cit*, note 57 at 75.

⁹⁵ *Ibid*.

⁹⁶ See, Robert C. Battlet and Susan D. Collins (Transl.) *Aristotle's Nicomachean Ethics* (2011) at 85; See also, Anton-Hermann Chroust & David L. Osborn 'Aristotle's Conception of Justice' (1942) 17(2) *Notre Dame L. Rev.* 129- 143 at 139.

Rawls' principle, unlike Aristotle's, is suitable in the context of fairness of compensation in petroleum places because, as seen in Chapter One of this study, most communities living around extractive areas are often marginalised and vulnerable to human rights abuses and violent conflicts.⁹⁷ Moreover, the human rights approach is strongly centred on the notion of raising the living standards of the marginalised groups.⁹⁸ As was seen earlier, Rawls' account of justice is divided into two. The first category of justice comprises what Rawls calls 'basic liberties' which includes the right to property and what are best known as the basic human rights.⁹⁹ The second category is equality, but as seen, Rawls, uniquely, accepts that the equality principle could be qualified to benefit the worst off, precisely; Rawls looks at equality from the lens of distributive justice.¹⁰⁰

Applied in the context of land acquired for petroleum activities from local communities who rely on it for survival, Rawls' theory of justice as fairness and the difference principle suggest that those benefiting from the production of petroleum exploitation should bear the burden of production by allowing part of the income gained from petroleum projects to be spent towards raising the living standards of those who sacrifice their land for the good of all.¹⁰¹ Another important element of Rawls' theory of justice as fairness, as seen above, is that decisions and relationships are fair if they are founded upon rules and regulations that the participants understand. This requires the participants to be fully aware of the content of the rules to which they subject themselves.¹⁰² That way, Rawls argues, fairness is a function of procedures, which means that the participants must, among others things, consent to be bound by the rules that are expected to regulate their relationship with other participants in what Rawls refers to as the principle of 'mutual acknowledgement'.¹⁰³

⁹⁷ See generally Chapter One.

⁹⁸ See Chapter Three, in section 3.

⁹⁹ Rawls, *Op Cit*, note 57 at 42.

¹⁰⁰ Hence the difference principle.

¹⁰¹ See, John Rawls *a Theory of Justice* (Revised Edition 1999) at 74.

¹⁰² *Ibid*.

¹⁰³ Rawls 'The Justification of Civil Disobedience', *Op Cit*, note 62 at 179.

Consequently, when consenting to be bound by the agreed rules, the participants sacrifice some of their rights for the sake of attaining the common good.¹⁰⁴ According to Rawls, the main idea is that ‘when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.’¹⁰⁵ In the context of compensation in petroleum places, this principle means that the state must adopt rules that facilitate a mutually beneficial transaction with the affected people. Such outcome is possible if there is provision for participation, consent or consensus in the land acquisition process, especially the determination of compensation.¹⁰⁶ Fairness demands that the participants play an active role in formulating the rules of procedures that they reasonably believe to be reasonable in regulating their conduct, and the rules must thus also make provision for the resolution of disputes between the participants.¹⁰⁷ These Rawlsian procedural tenets are similar to those defended by Aristotle, who argued that fairness must involve consensus, assignment principles or agreeable procedure, and merit or entitlement.¹⁰⁸

Like Aristotle, Rawls views a just justice system as being a by-product of fair rules and fair distribution of wealth and resources, and he states that a justice system that does not have institutions that are participatory and inclusive is unfair.¹⁰⁹ In the context of land acquisition for petroleum use, a Rawlsian theory would suggest that there must be an agreement between the landholders and the acquirer of the land, which is the state, and the end goal of this agreement should be to put the affected people in a better situation.¹¹⁰ The requirements of consultation, consent and consensus are equally

¹⁰⁴ Rawls, *Op Cit*, note 86 at 112, citing, H. L. A. Hart ‘Are There Any Natural Rights?’ (1955) 64 *Philosophical Review* at 185f.

¹⁰⁵ See, Rawls, *Op Cit*, note 86 at 112.

¹⁰⁶ See, Chapter Three in section 2.3 on how this is reflected internationally.

¹⁰⁷ See Rawls, *Op Cit*, note 86 at 112.

¹⁰⁸ See, Aristotle Nicomachean Ethics, 1129b-1130b5; as cited by Rawls in his: Rawls, *Op Cit*, note 57 at 112.

¹⁰⁹ Rawls has maintained this position in both Rawls, *Op Cit*, note 57 and Rawls, *Op Cit*, note 61.

¹¹⁰ See, Chapter Three section 3, on how this is dealt with internationally.

important since these principles of a participatory approach allow the affected people and the community generally to reason with the state on the value of land, the use to which it can be put, and the amount of compensation to be awarded. This clearly supports a system that respects the dignity and the human rights of the affected people since their voices form part of the decision taken against their land.

3.2 The Difference Principle

Apart from emphasising the element of fairness in his account of justice, Rawls has contributed to debates about distributive justice through his 'difference principle'. While other approaches to distributive justice maintain that wealth should be distributed on grounds of merit or desert, the difference principle's point of departure is that the production process in any society is an outcome of societal cooperation. Consequently, it holds that a just system should also reward all those involved in the cooperation that is responsible for wealth production and not only those that are privileged or talented. Hence, Rawls' argument is that merit or desert lacks moral justification. While accepting that merit should be rewarded, he argues that those that fare well should recompense the worst-off who he believes play an equally important role in the production process.¹¹¹ In the context of petroleum-related acquisition, this view runs counter to the utilitarian argument which would sacrifice the wellbeing of those living in the vicinity of petroleum resources to serve the public interest or common good. Also, Rawls distinguishes his views from those of libertarians and Marxists who do not accept any derogation from the right to equality. His theory allows a balance to be struck between the private and the public rights. While Rawls accepts that property can be acquired for the benefit of all, he urges that such acquisition should not marginalise the affected people.

Rawls' account of distributive justice underscores the importance of possessions to people's livelihood, of sacrifices to humanity that ordinary people make and of the need to reward all those involved in the production process in order to promote equality. In

¹¹¹ Rawls, *Op Cit*, note 57 at 10.

effect, his theory means that we should interpret the acquisition of land for purposes of petroleum exploitation as forming part of the cooperation that ultimately results in wider benefits from the petroleum production.¹¹² However, since petroleum communities are often marginalised, Rawls' difference principle demands that they must be put in a better situation.

While Rawls adopts the Aristotelian view of justice as a virtue, he disagrees that justice means either 'lawfulness' or 'fairness'. On the contrary, Rawls views fairness, equality, lawfulness and justice as different concepts.¹¹³ Hence, what is lawful may not be fair and what is legal can be unjust. According to Rawls, an unequal treatment is fair if its object is to raise the livelihood standards of the worst-off.¹¹⁴ However, he insists that inequalities for purposes of raising the living standards of the worst-off are acceptable if, first, they lead to the greater good of all, second, such inequalities must not lead to violation of the fundamental human rights of the individuals involved.¹¹⁵

Rawls theory of justice leaves a recurring theme in this chapter that for a justice system to be fair it must accommodate the voices of those affected by government decisions and policies. The argument that inequalities are acceptable if they lead to the greater good of all and where they do not lead to the violation of the fundamental human rights of the individual involved is relevant to this study. As seen earlier, it means that land can be justifiably taken from its holders for petroleum use, which is a public good, but the acquisition, as well as ensuing compensation must be based on consent, consensus and consultation and it must be aimed at benefiting all. It should not prejudice the livelihood rights of those whose land the state acquires.

In conclusion, Rawls' contractarian approach to justice requires that the justice institution should allow society to participate in formulating the rules likely to be accepted by all regardless of their personal interests. Rawls regards fairness as being

¹¹² Rawls, *Op Cit*, note 61 at 133; Also see, Rawls, *Op Cit*, note 57 at 207.

¹¹³ See generally, John Rawls 'Justice as Fairness' (1958) 67(2) *The Philosophical Review*, 164-194.

¹¹⁴ See, Rawls, *Op Cit*, note 62 at 18; Also See, Rawls, *Op Cit*, note 57 at 63.

¹¹⁵ *Ibid.*

the foundation of justice and states that rules must be made that are likely to result in just outcomes. This approach is most likely to harmonise with human rights because it promotes liberty, equality and the need to raise the living standards of the worst-off. Also key to Rawls' theory of justice is participation. As seen, Rawls posits that justice is the result of a fair agreement or bargain.¹¹⁶ Participation constitutes the whole process of reaching a consensus or an agreement and not merely rubber-stamping decisions. It thus requires that there should be meaningful consultation and seeking of consent from all the affected individuals. In the context of land acquisition for petroleum purposes, a participatory approach is important since it assures that the affected people are involved in decisions concerning what areas should be opened for extractive activities, the acquisition procedures and timelines, compensable items, compensation rates and mode of payment. Generally, a participatory approach ensures that the transactions involved are based on personal agreements between the parties.¹¹⁷ In summary, the important procedural elements of fairness emerging from Rawls' ideas are consultation, consent, and consensus-based decision making. Substantively, fairness demands that the projects for which indigent communities lose their properties must be aimed at raising the living standards of the worst-off.

4. THE ELEMENTS OF FAIRNESS IN RAWLS' THEORY

Rawls' theory of justice as fairness and his difference principle are relevant to human rights law regarding compensation for land that the state acquires for petroleum projects in two important ways. First, Rawls' theory of justice as fairness confirms the requirement that the state must reward or compensate the individuals who sacrifice their properties, like land, for the good of all. As shall be seen in the next chapter, this aligns with the demands of the right to property. Second, Rawls requires that such compensation must be awarded in accordance with fair procedures. These elements of fair compensation are discussed below.

¹¹⁶ See, John Rawls 'The Justification of Civil Disobedience' in Samuel Freeman (ed.) *John Rawls, Collected Papers* (1999) at 178.

¹¹⁷ Per Rawls, *Op Cit*, note 113.

4.1 Compensation as a Response to Burden Sharing

In general, the theory of distributive justice holds that the state has the responsibility to distribute the burdens and benefits of wealth production fairly in the society. However, philosophers have differed on how to achieve distributive justice. For instance, libertarians take the view that individuals must be allowed freedom to act independently and make decisions on how they spend their earnings or wealth, without the intervention of any central authority, which has been termed as minimal interference by the state.¹¹⁸ Rawls rejects the idea of minimal state control but accepts that individuals should be rewarded for what they have and for their merits, provided that merit does not give absolute entitlement to those that have merit or talent over the less talented.¹¹⁹ For this reason, he differentiates between merits and entitlements. Rawls' idea is that any deviation from the general rule that fundamental rights should be protected at all costs must be aimed at rewarding and improving the living standard of the worst-off.¹²⁰ He rejects the notion that reward should be based purely on the natural gifts and endowments. Instead, the reward must seek to bridge the inequality gaps. He states:

The intuitive notion here is that this structure contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way, the institutions of society favour certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men's initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert.¹²¹

Rawls criticizes the traditional view that those bearing the burden of production or wealth are naturally or inherently placed in that position and that they deserve no

¹¹⁸ See, Nozick and Dworkin in for example: Dworkin, *Op Cit*, note 64 at 283-345; and, Nozick, *Op Cit*, note 56.

¹¹⁹ Rawls, *Op Cit*, note 57 at 7.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

reward for the burden they bear against those who enjoy the benefits of production. Against this traditional approach, Rawls argues that equality implies distributive justice. The bottom line of Rawls' distributive justice theory is that the economic system has to be organised in a way that the least advantaged members of society are better off than they would be in an alternative economic arrangement.¹²² In the context of petroleum compensation laws, this would mean that the system of justice should ensure that the affected people participate as equal partners in the process of giving up their land, in order to ensure that the project requiring land has a plan for raising their living standards. It is important to note that, in Rawls' difference principles, the minimum standard for compensation is putting the affected people in a better situation than they would have been had the state not acquired their land.¹²³

In that framework, reward, which in this case comes in form of compensation for the sacrifice of land, is a concept linked to distributive justice, which requires that sacrifices made for the good of others should be rewarded. According to Rawls, fairness expresses justice as a complex of liberty, equality, and reward for services contributing to the common good.¹²⁴ Rawls' argument is that although individuals should make sacrifices for the good of the society of which they are part, the sacrifices should not be unreasonable and unrewarded. This means that those that make the sacrifices should be rewarded for their contribution to prevent them from being marginalised.¹²⁵ As such, rewarding those who are forced to give up their land for the good of the public is a critical requirement. In this regard, the compensation must go beyond replacement costs. The calculation of the compensation must consider the livelihood of the affected people and put them in a better position. Generally, Rawls' conception of reward must therefore be understood as a complex of three related ideas: liberty, which means free will or consent and consultation; equality of participants, which includes reaching consensus on the losses and benefits as equals, as well as establishing a dispute

¹²² See, Rawls, *Op Cit*, note 86 at 14.

¹²³ John Rawls 'Distributive Justice: Some Addenda' in Samuel Freeman (ed.) *John Rawls, Collected Papers* (1999) at 164.

¹²⁴ See, Rawls, *Op Cit*, note 62 at 165.

¹²⁵ Rawls, *Op Cit*, note 57 at 78.

resolution mechanism that is fair; and reward for services contributing to the common good.¹²⁶

4.2 Procedural Fairness in Rawls' Theory

As seen earlier, Rawls' theory of fairness would demand that acquisition of land for petroleum activities is done through participatory procedures. The three procedural principles seen under section 4.1 above that come from Rawls' participatory approach are informed consent, consultation, consensus that also involves how a dispute should be solved. These principles are discussed in greater detail below.

4.2.1 Consent and Consultation

Rawls' justice as fairness theory is premised on the idea that the structure of a society is based on agreement between members of that society,¹²⁷ and that free and rational persons concerned to further their interests would accept that structure in an initial position of equality as defining the fundamental terms of their association.¹²⁸ Rawls states: 'the notion of mutual acknowledgement of principles by free persons is what makes the concept of fairness fundamental to justice.'¹²⁹ This assumes that consent is meaningful only when it is the product of a informed free choice.¹³⁰ In other words, a justice system is fair if the parties have all relevant information and have engaged on a voluntary basis in formulation of the rules regulating their association and have freely consented to be bound by them. He writes:

¹²⁶ Rawls, *Op Cit*, note 122 at 164.

¹²⁷ *Ibid* at 78; Also see, Rawls, *Op Cit*, note 57 at 343; Michael J. Sandel *Liberalism and The Limits of Justice* (2d ed. 1998) at 109-11; Elizabeth Chamblee Burch 'Group Consensus, Individual Consent' (2011) *Geo. Wash. L. Rev.* 506 at 79; Robert Goodland 'Free, Prior and Informed Consent and the World Bank Group' (2004) 4 *Sustainable Dev. L. & Pol'y* at 66.

¹²⁸ Rawls *ibid* at 178.

¹²⁹ *Ibid* at 59.

¹³⁰ Sandel, *Op Cit*, note 127 at 109-11; Also Burch, *Op Cit*, note 127 at 79.

Those who engage in social cooperation choose together, in one joint act, the principles, which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.¹³¹

Seeking consent provides an opportunity to the affected communities to receive information about a proposed development project. The consent-seeking process may include details on the nature of a proposed action, as well as the risks, benefits and alternatives to the proposed action.¹³² The requirement that consent and consultation should form part of the land acquisition and compensation process could be useful in areas where land is acquired for petroleum activities. Such a consultative approach is likely to answer questions such as the applicable compensation rates or the adequacy of compensation, and the type of compensation preferred by the landowners (monetary compensation, resettlement and other options) are some of the things that can be discussed and negotiated in such a process.¹³³

4.2.2 Consensus and Legal Redress

As noted earlier, Rawls asserts that it is impossible to confine justice to a body of comprehensive rules. Rather, justice is an outcome of overlapping consensus and the fundamental objective of justice is fairness.¹³⁴ What Rawls means by this is that since we live in a pluralist society, it is difficult to agree on what is good, just or fair. To arrive at agreed principles, Rawls posits that the political institutions must have systems that allow everyone in the society to participate in developing principles that lead to what they will all consider fair. His underlying idea is that there are general moral values that

¹³¹ Rawls, *Op Cit*, note 57 at 207.

¹³² Goodland, *Op Cit*, note 127 at 66.

¹³³ See, generally Chapter Three.

¹³⁴ Rawls, *Op Cit*, note 61 at 133.

the society agrees on, though for different reasons. Rawls termed this 'overlapping consensus'.¹³⁵

In that sense, the concept of overlapping consensus in Rawls' theory of justice has a meaning broader than the ordinary understanding of the term. Rawls speaks of 'overlapping' consensus, which he asserts is a situation where citizens endorse a core set of laws for different reasons.¹³⁶ In that sense, citizens may not have shared notions on how rights should be enjoyed but overlapping consensus specifies what participants agree on without reference to any comprehensive doctrine. As was seen earlier, overlapping consensus was set to answer the question about how there can be a stable society whose free and equal citizens are deeply divided by conflicting philosophical and moral doctrines.¹³⁷ Hence, the doctrine of overlapping consensus, which considers how the well-ordered democratic society of justice as fairness may establish and preserve unity given the pluralistic nature of that society.¹³⁸ Rawls asserts that social unity based on consensus in a political conception of justice and stability is possible when society's politically active citizens affirm the doctrines making up the consensus.¹³⁹ This means that the consensus is reached when all reasonable citizens affirm a common 'module' that should bind them from within their individual perspectives'.¹⁴⁰

In the context of fair compensation for land taken for petroleum activities, the concept of overlapping consensus is particularly important in two ways. First, it sets a basis for an agreed 'module' or rules of procedures on how the state should acquire the land and provide compensation for it. Secondly, the comprehensive aspect of the agreement on rules of procedure is limited to the procedural aspects of land acquisition and compensation, but not the amount of money to be paid. The rules of procedure are

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid* at 134.

¹³⁹ *Ibid* at 133.

¹⁴⁰ See, Goodland , *Op Cit*, note 127 at 66.

expected to lay stress on negotiation as a method of arriving at an agreement on what should be satisfactory compensation. Since land has sentimental and other non-monetary value, the rationale of overlapping consensus is served since participants agree on compensation in accordance with reasonable rules and a code of conduct that the parties have themselves agreed on. At the same time, consensus-based agreement allows different parties to negotiate and arrive at different terms on what is satisfactory compensation. As Rawls states, 'persons engaged in a just, or fair, practice can face one another openly and support their respective positions should they appear questionable, by reference to principles which it is reasonable to expect each to accept.'¹⁴¹

Some have argued for 'participatory fairness beyond consent', considering that the state's engagement with the affected people can lead to unconscionable bargaining and unfair outcomes if the affected persons have poor negotiation skills.¹⁴² Critics of participatory approaches maintain that participation does not fully engage with issues of politics and power and pays lip service to the issue of the capacity of the individual citizens to give consent or bargain fairly with the state.¹⁴³

While these concerns are plausible, Rawls stipulates that parties must have knowledge of what they are consenting to. This presupposes that the basic social structure, which Rawls anticipates, must have systems for providing information and knowledge to the participants. As shall be seen in the next chapter, this aspect is consistent with the human rights approach¹⁴⁴ Rawls also argues that the negotiations or rather consensus between the state and the individuals or communities must respect the basic structure of the society and, finally, Rawls states that the outcome of consensus must benefit the worst-off.¹⁴⁵

¹⁴¹ Rawls, *Op Cit*, note 57 at 178.

¹⁴² See analogous example in: Samuel Hickey & Giles Mohan *Participation from Tyranny to Transformation? Exploring New Approaches to Participation in Development* (2004) at 4; Zulfiqar A. Bhutta 'Beyond informed Consent' (2004) 82 *Bulletin of the World Health Organization* 771-777.

¹⁴³ Rawls, *Op Cit*, note 57 at 4.

¹⁴⁴ Rawls, *Op Cit*, note 61 at 14.

¹⁴⁵ *Ibid* at 18.

In the case of Tanzania, since the current laws do not create space for negotiations on what to compensate the affected people, as Chapter Six will show, Rawls's theory could be used as a basis of formulating regulations that allow people to be involved in the land compensation process.

5. LIVELIHOOD RIGHTS UNDER THE DIFFERENCE PRINCIPLE

As seen earlier, Rawls categorises rights according to what he refers to as lexical ordering. In his lexical ordering, Rawls identifies the most important elements of justice - liberty and equality.¹⁴⁶ Although Rawls considers equality as an important element of justice, he argues that equality can be limited for purposes of raising the living standards of the worst off (the difference principle). Critics of this principle have argued that it is wrong to allow limitations on the right to equality. For example, Marxists¹⁴⁷ are insistent that Rawls' justice as fairness perpetrates inequalities by assuming that inequalities are inevitable in a society and should only be exercised without infringing basic liberties.¹⁴⁸

Some of the critics of Rawls' justice as fairness theory and the difference principle have missed its context or failed to recognise its use. In my opinion, Rawls' justice as fairness theory is critical to the advancement of equality and improving the livelihoods of all.

¹⁴⁶ Rawls, *Op Cit*, note 57 at 63.

¹⁴⁷ See, Walter E. Schaller 'Rawls, The Difference Principle, and Economic Inequality' (1998) 79(4) *Pacific Philosophical Quarterly* 368–391 at 172; Rawls, *Op Cit*, note 56 at 15 states: 'Who the least advantaged persons really are? Schaller (1998:172) asks: but who are the least advantaged in Rawls' theory? In *A Theory of Justice*, it is true that circumstances over which people have no control should not adversely affect their lives prospects. But one may legitimately question what Rawls means by a low-skilled person. Why is the person so low-skilled? How low is the low? Is it the consequences of his choices that make him so low skilled? Who is poor? These so-called least advantaged persons may for all that Rawls has shown on the contrary have everything they are entitled to having.'

¹⁴⁸ See, Rawls, *Op Cit*, note 64 at 206-229.

6. CONCLUSION

This chapter has discussed Rawls' justice as fairness theory and his difference principle. In short, he argues that a justice system is fair if it is formulated by those affected by it. Rawls suggests that fairness entails a system where participants agree on the rules that should bind them. In advocating for a fair justice system, he embraces participation, including seeking consent from, holding consultations with, and seeking consensus from the affected participants. At the substantive level, Rawls argues that any economic activity, as well as a justice system, must be aimed at raising living standards of the worst off. The elements of fairness detailed in this chapter will inform the analysis of the international law in the next chapters.

CHAPTER THREE

FAIR COMPENSATION: HUMAN RIGHTS PERSPECTIVE

1. INTRODUCTION

Chapter Two demonstrated that fairness is a function of proper procedures and some substantive principles. In the context of this study, this means that for a land acquisition and compensation procedure to be fair it must be based on a participatory approach, which includes, consensus, consent and consultation with the people affected. Furthermore, the distribution of rewards and benefits must be such that the living standard of the people affected by the petroleum projects is raised.

This chapter investigates the extent to which the principles of fairness discussed in Chapter Two have been codified in international human rights law. To do that, this chapter evaluates the international standards as have been interpreted by international human rights bodies and regional human rights courts. As Tanzania is a member of the African Union and a party to the African Charter on Peoples' and Human Rights (the Banjul Charter),¹⁴⁹ and therefore bound by the provisions of the Charter, the chapter will pay particular attention to this treaty and the jurisprudence of the African Commission on Peoples' and Human Rights (African Commission), and the African Court. The chapter also makes reference to International Covenant on Civil and Political Rights, (ICCPR)¹⁵⁰, the International Covenant on Social, Economic and Cultural Rights (ICESCR)¹⁵¹ and the Covenant on the Elimination of Discrimination Against Women (CEDAW)¹⁵² to which Tanzania is also a party. The UDHR though a document of general application will also be referred to since Article 9(f) of the Tanzanian Constitution incorporates it into the Constitution. Also, because Tanzania is a member state to the

¹⁴⁹ African Charter on Peoples' and Human Rights, 1981 (hereinafter the Banjul Charter).

¹⁵⁰ International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966).

¹⁵¹ International Covenant on Civil and Political Rights (New York, 16 December 1966).

¹⁵² Covenant on the Elimination of Discrimination Against Women (New York, 16 December 1979).

UN, various legal and soft-law instruments made by the UN and its organs will be relied on.

1.1 The ‘In Accordance with the Law’ (Legality) Test

Article 13(1)-(3) of the Banjul Charter provides:

- (1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law;
- (2) Every citizen shall have the right of equal access to the public service of his country;
- (3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

The African Commission has interpreted the words ‘in accordance with the law’ to mean that the state must apply fair procedures in determining compensation for the acquired land.¹⁵³ To that end, regionally, human rights law makes provision for the affected people to be allowed an opportunity to participate in issues that affect them. For example, the Kampala Convention for Displaced People of the African Union (Kampala Convention),¹⁵⁴ in Article 10(2) provides that in development projects, state parties shall ensure that the stakeholders concerned explore feasible alternatives, give them full information and consult all persons likely to be displaced by the projects.¹⁵⁵

¹⁵³ See, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* Comm. 276/2003 para 265; See also, the European Court Case of *Sunday Times v United Kingdom*, Case no 6538/74, 26 April 1979, para 49; The UN Human Rights Committee, General Comment No. 16 (1988) in Human Rights Instruments, Volume I, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (Vol. I) 2008, pp. 191-193, para 4.

¹⁵⁴ Kampala Convention for Displaced People of the African Union, 2009.

¹⁵⁵ The article 10(1) & (2) states: (1) States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors; (2) States Parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects.

The UN Declaration on the Rights of Indigenous Peoples,¹⁵⁶ in Articles 10, 11, 19, 28 and 29, as well as Article 12(1) of the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries¹⁵⁷ provide that these groups of people shall not be removed from the land they occupy without being consulted. In addition, Articles 21 and 27¹⁵⁸ of the UDHR,¹⁵⁹ as well as the common Article 1(2) of the ICCPR and Article (12) of the ICESCR provide a similar requirement. Hence, the state must assure that the people affected with a particular undertaking such as land acquisition are given the opportunity to participate in the decision-making process. The section that follows will show that such participatory procedures must involve consent seeking, consensus building and consultation. For example, in the case of the *Endorois*,¹⁶⁰ the Kenyan government evicted hundreds of *Endorois* families from their land in the Lake Bogoria area of the Rift Valley for economic use by the state. The *Endorois*, an indigenous people, had been promised compensation and benefits, but the state failed to pay the compensation. The eviction prevented the community from practicing their pastoralist way of life.

¹⁵⁶ United Nations Declaration on the Rights of Indigenous Peoples, 2007.

¹⁵⁷ Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), 1957: The Articles states: '12(1). The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations. 2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees. 3. Persons thus removed shall be fully compensated for any resulting loss or injury.'

¹⁵⁸ Universal Declaration of Human Rights 1948, Article 27 stating thus: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'

¹⁵⁹ See, ICCPR) Article 25(a); International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (c); CEDAW Articles 7, 14 (2) (a) and (f); The Convention on the Rights of Persons with Disabilities, Article 29.

¹⁶⁰ *Endorois case*, *Op Cit*, note 153.

Complainants (Centre for Minority Rights Development, Kenya and Minority Rights Group International, acting on behalf of the *Endorois* Welfare Council) submitted a claim before the African Commission after unsuccessfully pursuing domestic legal remedies for the violations alleged.

The ACHPR found that the Kenyan government had violated the rights of the *Endorois* to practice their religion, to property, to culture, to dispose freely of their natural resources, and to development, which are protected by the Banjul Charter (Articles 8, 14, 17, 21 and 22, respectively). Article 14 of the Banjul Charter, which forms a basis of the protection of the right to property states thus: 'the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'¹⁶¹

The African Commission stated that lack of consultation with the community, the subsequent restrictions on access to the land, and the inadequate participation in the process of acquiring the land constituted a violation of the community's right to development. Also, the African Commission found that the Kenyan Government's Trust Land System violated the right of the *Endorois* to land. Even though the system allowed for compensation, it nevertheless violated property rights by effectively causing forced evictions. For these violations, the Commission recommended that the government recognise rights of ownership, restore the *Endorois* to their ancestral lands, compensate them for their losses, and ensure that the *Endorois* benefitted from the royalties and employment opportunities arising from the project the Government implemented on their land. In the conclusion, the African Commission agreed with the complainants that a participatory approach forms part of the law on property acquisition and compensation in light of Article 14 of the Banjul Charter.¹⁶² It can therefore be seen that the jurisprudence of the African Commission clearly looks at 'in accordance with the law principle' as a function of proper procedures similar to a case built in the last chapter.

¹⁶¹ Article 14 of the Banjul Charter.

¹⁶² See, the *Endorois* case, *Op Cit*, note 153, para 265.

The Inter-American Commission on Human Rights also took the view that the 'in accordance with the law' principle is a function of proper or fair procedures in *Mary and Carrie Dann v USA*.¹⁶³ In this case, the petitioners were members of the Western Shoshone indigenous people who lived in the rural community of Crescent Valley, Nevada. According to the petition, their land and that of the Dann community were part of the ancestral territory of the Western Shoshone people and the Danns and other members of the Western Shoshone were in current possession and actual use of these lands. The petitioners also contended that the state interfered with the Danns' use and occupation of their ancestral lands by purporting to have acquired the lands as federal property through an unfair procedure before the Indian Claims Commission (ICC). It was alleged that the government had physically removed and threatened to remove the Danns' livestock from the lands, and permitted gold prospecting activities within Western Shoshone traditional territory. Based on these circumstances, the petitioners alleged that the state was responsible for violations of Articles 2, 3, 6, 14, 18 and 23 of the American Declaration of the Rights and Duties of Man (the 'American Declaration').

The Commission acknowledged the special interest indigenous people have in their traditional land and declared that special measures must be taken to ensure that they are not deprived of this interest except with fully informed consent under conditions of equality, and with fair compensation.¹⁶⁴ Moreover, the Commission noted that 'to have a process of consent that is fully informed requires at a minimum that all the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.'¹⁶⁵

This jurisprudence suggests that, before the state acquires land for petroleum projects, it must consult the people affected by petroleum projects, attempt to obtain their

¹⁶³ See, *Mary and Carrie Dann vs. USA* (1999) Case 11.140, Inter-Am. C.H.R., Report No. 99/99, para 136.

¹⁶⁴ *Ibid* para 138.

¹⁶⁵ *Ibid* para 133.

consent, attempt to make decisions by consensus, and ensure that their livelihood is not adversely impacted.

2. ELEMENTS OF A PARTICIPATORY COMPENSATION PROCEDURE

The discussion above has shown that land acquisition for public interest and compensation must follow proper procedures that are participatory. Thus, the section below discusses in greater detail the key elements of participation – consultation, free, prior and informed consent and consensus. Thereafter, it examines the protection of the livelihood rights of those affected by land being acquired for state projects.

2.1 Consultation

As was seen in section 1.1 above, the human rights provisions protecting the right to property and land impose a duty upon states to award fair compensation to the people affected by land acquisition for public interest. The word ‘fair’ or ‘fairness’ in that case means consulting the affected people in land acquisition and compensation process.

International human rights jurisprudence is also unequivocal that the right to property must be read together with the right to participate in decision-making.¹⁶⁶ Illustratively, the African Commission considered the issue of consultation in *Endorois*, supra.¹⁶⁷ Notably, in this case, the state consulted a few people but claimed that they represented the whole community. Opposing the state’s acquisition of the *Endorois* land, the

¹⁶⁶ *Kichwa Indigenous People of Sarayaku*, Case No. 12,465, Inter-Am. C.H.R., Report No. 62/04; See also, *Dann v United States*, Case 11.140, Inter-Am. C.H.R., Report No. 99/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999) para 136; *The Endorois case*, *Op Cit*, note 153, para 277; Kenya Antonella-Iulia Motoc and the Tebtebba Foundation, ‘Preliminary Working Paper On The Principle Of Free, Prior And Informed Consent Of Indigenous Peoples In Relation To Development Affecting Their Lands And Natural Resources That Would Serve As A Framework For The Drafting Of A Legal Commentary By The Working Group On This Concept’ (U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004)), para 14 (a).

¹⁶⁷ *Endorois case*, *Op Cit*, note 153.

claimants argued that members of the *Endorois* community were denied an opportunity to be heard. The *Endorois* Welfare Committee, the representative body of the *Endorois* community, was refused registration, thus denying the right of the *Endorois* to a fair and legitimate consultation. This failure to register the *Endorois* Welfare Committee, according to the complainants, led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community.¹⁶⁸ The complainants thus sought to obtain a declaration that the Republic of Kenya was in violation of Articles 8, 14, 17, 21 and 22 of the Banjul Charter.

Responding to the issue of consultation the Commission stated:

Two further elements of the 'in accordance with the law' test relate to the requirements of consultation and compensation. In terms of consultation, the threshold is especially stringent ... as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property.¹⁶⁹

Moreover, the importance of consultation has been highlighted by the Human Rights Committee (HRC) in *Mazurka v New Zealand*,¹⁷⁰ where it found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the *Maori* people in determining fishing rights. The Committee specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the *Maori* people, and that the *Maori* representatives were able to affect the terms of the final Settlement.¹⁷¹

On the other hand, in the inspirational case of *Kichwa People of Sarayaku v Ecuador*,¹⁷² which concerned the granting of oil exploration and exploitation licenses within the

¹⁶⁸ See *Endorois Case, Op Cit*, note 153, para 20.

¹⁶⁹ See *Ibid* para 255-256.

¹⁷⁰ *Apirana Mahuika et al v New Zealand*, Human Rights Committee, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), paras. 5.7-5.9.

¹⁷¹ See *Ibid*.

¹⁷² *Kichwa's case, Op Cit*, note 166: This case involved the granting of a permit by the State to a private oil company to carry out oil exploration and exploitation activities in the ancestral territory of the Kichwa

territory traditionally occupied and used by the Kichwa People, the Inter-American Commission of Human Rights held that the state of Ecuador violated the Kichwa People's right to property.¹⁷³ It held that failure to adequately consult the affected communities before the granting licenses and allowing activities within their territories constituted a violation of their right to property.¹⁷⁴ According to this case, the right to participate imposes a duty on the state and its agencies to consult the affected people whenever an action is taken which is likely to affect their right to property.¹⁷⁵

Soft laws have also endorsed the requirement that the state must consult the people affected by petroleum projects when making decisions that will affect them. The UNGPs¹⁷⁶ in guideline 17 provide that business enterprises and the state must engage in meaningful consultation with potentially affected groups and other relevant stakeholders.

indigenous people of Sarayaku, without previously consulting them. The forcible entry caused destruction of sacred sites, deprived the people of subsistence activities and led to confrontations between the indigenous community, the company and Ecuador's armed forces. The Court held that Ecuador was responsible for the violation of the indigenous people's rights to consultation, communal property and cultural identity. The Court reaffirmed the State duty to consult.

¹⁷³ *Ibid* para 163 interpreting Article 21 of the American Convention on Human Rights, 1978, the Court held: 'ILO Convention No. 169 concerning Indigenous and Tribal Peoples of 1989 applies, inter alia, to "the tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations, and for whom States "shall have the responsibility of developing, with the participation of the peoples concerned, coordinated and systematic actions to protect the rights of these peoples and to guarantee respect for their integrity. Articles 13 to 19 of this Convention refer to the rights of those populations to their land and territories, and Articles 6, 15, 17, 22, 27 and 28 regulate the different situations in which prior, free and informed consultations should be applied in cases where measures are contemplated that affect them.'

¹⁷⁴ *Kichwa's case*, *Op Cit*, note 166 para 216.

¹⁷⁵ *Ibid*.

¹⁷⁶ UNGPs Guidelines, *Op Cit*, note 24.

Principle 4(16) of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and the Forests in the Context of National Food Security¹⁷⁷ establishes the expectation that states to ensure that the planning and process of land acquisition are transparent and participatory. The affected people should be identified, adequately informed and consulted at all stages.¹⁷⁸ Moreover, performance standard 5 of the International Finance Corporation Performance Standards on Environmental and Social Sustainability¹⁷⁹ (IPS) provides for a negotiation process, which also applies to customary or traditional rights recognised or recognisable under the laws of the host country. Such negotiations may be carried out by the government or by the prospective investor needing to develop petroleum resources.

The IPS requires that the companies and the state should establish and maintain an ongoing relationship based on informed consultation and participation with peoples affected by a project throughout the project's life cycle. The IPS also requires states to ensure that they obtain free, prior, and informed consent (FPIC) of the affected communities when the circumstances described in the performance standard are present.¹⁸⁰

According to the United Nations' Office of the High Commissioner, when implementing development-based evictions and displacement, 'all potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to full consultation and participation, as well as to propose alternatives that authorities should duly

¹⁷⁷ Food and Agriculture Organization of the United Nations, Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012).

¹⁷⁸ Food and Agriculture Organization of the United Nations Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012); See also, Wynberg, R., Marshak, M., Munuo, N. and Van Niekerk, J. 2018. Policy Brief. Agricultural research in resource poor settings: Towards an ethical approach. A Report for Trust, available at <http://trustproject.eu/deliverablesand-tools/> accessed on 26/03/2019 at 7.

¹⁷⁹ IFC Performance Standards on Environmental and Social Sustainability (2012).

¹⁸⁰ *Ibid* performance standard 7.

consider'.¹⁸¹ The HRC has correctly pointed out that lack of participation by the affected communities in policy-making can lead to a failure of land-related policies and programmes and may result in social tension and violence.¹⁸² Also, forcibly evicting people from their settlements may result in those evicted repeatedly returning to the same site, as they have no other place to go. Studies affirm that the participatory approach can lead to more sustainable solutions.¹⁸³ Therefore, the HRC recommends that the state must award fair compensation to the people affected by the development projects such as petroleum activities. Fair in this case means that both the land acquisition and compensation procedure should be participatory.

On the other hand, the Committee on Economic, Social and Cultural Rights (CESCR) which monitors the implementation of the ICESCR, expressed concern about the lack of effective consultations and legal redress for persons affected by displacement and by forced evictions, and the inadequate measures to provide sufficient compensation or alternative housing to those who have been removed from their homes and/or their ancestral lands.¹⁸⁴ It has thus recommended that 'prior to implementing development and urban renewal projects, sporting events and other similar activities, the state party should undertake open, participatory and meaningful consultations with affected residents and communities.'¹⁸⁵ In its concluding observations on Cambodia,¹⁸⁶ for

¹⁸¹ Office of the High Commissioner, *Land and Human Rights, Standards and Application* (United Nations, 2015) at 35.

¹⁸² *Ibid.*

¹⁸³ See, The UN, Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty And Human Rights* (2016: A/HRC/32/31) para 60; Also see, Olivier De Schutter Report Submitted By The Special Rapporteur On The Right to Food, (2010: UN, Human Rights Council, A/HRC/16/49) para 32; The UN Human Rights Council, Joint Study Of The Special Rapporteur On The Promotion Of Truth, Justice, Reparation And Guarantees of Non-Recurrence And The Special Adviser To The Secretary-General On The Prevention Of Genocide (2011: A/HRC/37/65) para 11; Eric Holt-Giménez 'Measuring Farmers' Agro-ecological Resistance after Hurricane Mitch in Nicaragua: A Case Study in Participatory, Sustainable Land Management Impact Monitoring' (2002) 93 *Agriculture, Ecosystems and the Environment* at 87-105.

¹⁸⁴ Committee On Economic, Social And Cultural Rights Report On The Fortieth And Forty-First Sessions (E/C.12/2008/3) at 42.

¹⁸⁵ *Ibid* at p. 49 para 288.

example, the CESCR expressed concern about the increase in economic land concessions which resulted in the displacement of indigenous peoples from their lands without just compensation and resettlement, and in the loss of livelihood for rural communities who depended on land and forest resources for their survival. The Committee recommended that to avoid this situation, the state had to review its policy, conduct environmental and social impact assessments, and consult with relevant stakeholders and communities.¹⁸⁷

This discussion shows that international human rights law and practice largely reflects Rawls' theory of fairness discussed in the preceding chapter. It recognises the principle that those likely to be affected by land acquisition must be consulted before the state acquires their land.¹⁸⁸

2.2 Free, Prior and Informed Consent

Consent is one of the critical components of procedural fairness advocated by Rawls that is also a well-established principle in international human rights law.¹⁸⁹ This part shall rely on the Kampala Convention, ICCPR, ICECSR, cases from the African Commission and other regional human rights courts and commissions, as well as from UN human rights monitoring bodies to show how consent is embedded in international law.

The Kampala Convention provides for the right to free, prior, and informed consent. Article 11(2) of this Convention states that state parties shall enable internally displaced persons to make a free and informed decision on whether to return, integrate

¹⁸⁶ Concluding Observations of the Committee on Economic, *Social and Cultural Rights on Cambodia*, (E/C.12/KHM/CO/1) at p. 5 para 15.

¹⁸⁷ *Ibid.*

¹⁸⁸ See Chapter Two.

¹⁸⁹ See United Nations, Office of the High Commissioner for Human Rights, *Free, Prior and Informed Consent of Indigenous Peoples* (United Nations: 2003); Anaya S. James 'The Human Rights of Indigenous Peoples' in: Krause, Catarina & Scheinin, Martin (Ed.) *International Protection of Human Rights: A Textbook* (2012) at 307.

locally or relocate, by consulting them on these and other options and ensuring their participation in finding sustainable solutions. Article 12 of the Kampala Convention deals with the right to compensation, which is contextually subjected to Article 11(2) of the same Convention. It requires that compensation for the property acquired by the state should be just and fair.¹⁹⁰ On the other hand, Article 1 common to both the ICCPR and the ICECSR provides that all peoples may, for their own purposes, freely dispose of their natural wealth and resources. This Article provides further that ‘in no case may a people be deprived of its means of subsistence’. Similar provisions are found in Article 21 of the African Charter. It has been observed that the word ‘free’ used in Article 1(2) common to the ICECSR and the ICCPR establishes the need to seek consent from the affected people before acquiring their land or making the decision that will adversely affect them.¹⁹¹

Similarly, the United Nations Declaration on the Rights of Indigenous Peoples¹⁹² directs the state to obtain consent from the affected people. Articles 10, 19 and 32, provide that when acquiring land for state projects, states should obtain the affected peoples’ free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Cases decided at the regional level also emphasise the importance of obtaining consent before the state can acquire land from its owners for petroleum or other development activities. As shown earlier, the African Commission held in *Endorois*,¹⁹³ that failure to observe the obligations to seek consent and to compensate the affected people fairly for their loss, results in a violation of landholders’ right to property.¹⁹⁴ Furthermore, the

¹⁹⁰ Article 12(2) of the Kampala Convention provides that: 12(2) States parties shall establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, to internally displaced persons for damage incurred as a result of displacement, in accordance with international standards. 12(3). A state party shall be liable to make reparation to internally displaced persons for damage when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.’

¹⁹¹ See, generally the *Endorois case*, *Op Cit*, note 153.

¹⁹² United Nation Declaration on the Rights of Indigenous Peoples, 2007.

¹⁹³ See *Endorois Case*, *Op Cit*, note 153, para 60.

¹⁹⁴ See *Ibid*.

African Commission has said, construing Article 14 of the Banjul Charter, that the state has the duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.¹⁹⁵ Similarly, interpreting Article 21 of the American Convention of Human Rights,¹⁹⁶ which is similar to Article 14 of the Banjul Charter, the Inter-American Court of Human Rights has held,¹⁹⁷ that since the state failed to obtain free, prior and informed consent from the affected people, it infringed their right to property.¹⁹⁸ In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*,¹⁹⁹ members of the Awas Tingni Community, an indigenous community on the Atlantic Coast of Nicaragua, lodged an application to the Inter-American Commission on Human Rights claiming that the State of Nicaragua had not complied with its obligations under the American Convention on Human Rights. In 1966, Nicaragua had granted a concession to a corporation to carry out road construction work and logging exploitation in the forest where this community lived. The community thereafter lodged an objection against the government, requesting that no further steps should be taken to grant the concession to the corporation without an agreement with the community. This request was ignored, which led the community to seek legal redress. In their complaint to the Commission, the community alleged that the

¹⁹⁵ See *the Endorois case, Op Cit*, note 153; See, also, African Charter on Human and Peoples' Rights, 1981, Article 14; American Convention on Human Rights, 1978, Article 21; Arab Charter of Human Rights, 2004, Article 25; International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 5 (d) (v) and (vi); European Convention on Human Rights, Protocol No. 1, 1952, Article 1; Convention on the Elimination of All Forms of Discrimination against Women, 1979; Articles 15 (2) and 16 (1) (c) and (h); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 19 (c); ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), 1989, Article 6 (b).

¹⁹⁶ American Convention on Human Rights, 1978, Article 21(1) 'everyone has the right to the use and enjoyment of his property. The law may subordinate such use and utility or social interest, and in the cases and according to the forms established by law. 21(2). No one shall be deprived of his property except upon payment of just compensation, for reasons of public enjoyment to the interest of society. 21(3). Usury and any other form of exploitation of man by man shall be prohibited by law.'

¹⁹⁷ See *infra* note.

¹⁹⁸ *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights (2001), para 25.

¹⁹⁹ *Ibid.*

State did not demarcate the communal lands of the Awas Tingni Community. It had not adopted effective measures to ensure the property rights of the community to its ancestral lands and natural resources, and also because it granted the concession on community lands without the consent of the community, the State was in breach of their right to property.

Similarly, upon further reference to the Inter-American Court of Human Rights, the Court examined whether there was a violation of the right to property. It concluded that the State of Nicaragua was actively responsible for violations of the right to property, embodied in Article 21 of the Convention, because it had granted a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands without obtaining the consent of the Awas Tingni Community.

*Saramaka People v Suriname*²⁰⁰ also considered the right of indigenous peoples to free, prior, and informed consent. Suriname granted resource concessions to private companies within the territories of the Saramaka people without their consent. The Inter-American Court found that Suriname had violated the Saramaka people's rights, as tribal peoples, to legal protection and property by granting the logging and mining concessions and failing to have effective mechanisms to protect them from acts that violated their rights to property as defined in the American Convention of Human Rights.²⁰¹ It was held that although the right to property was not absolute and that states have the power to limit it in the public interest, the state can only acquire the needed land through fair procedures that allow the affected people to participate in the process. The court said: '... states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the

²⁰⁰ *Saramaka People v Suriname*, Inter-American C.H.R., IACHR Series C No 185 (2007).

²⁰¹ *Ibid.*

development, utilisation or exploitation of mineral, water or other resources.’²⁰² Clearly, this confirms Rawls’ argument.

Several soft-law instruments recognise the principle of free and informed consent. The UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Prior to Evictions²⁰³ provide that in the course of acquiring land, the affected groups and persons, including women, indigenous peoples, persons with disabilities and, or their representatives, have the right to relevant information, full consultation, participation and to propose alternatives.²⁰⁴

Similarly, in its concluding observations on Tanzania, the CESCR expressed the following concern:

The Committee is concerned that several vulnerable communities, including pastoralist and hunter-gatherer communities, have been forcibly evicted from their traditional lands for the purposes of large-scale farming, creation of game reserves and expansion of national parks, mining, construction of military barracks, tourism and commercial game-hunting. The Committee is concerned that these practices have resulted in a critical reduction in their access to land and natural resources, particularly threatening their livelihoods and their right to food.²⁰⁵

Following the above observation, the Committee recommended that state projects on ancestral lands must be preceded by obtaining free, prior and informed consent of the people affected.²⁰⁶ It asked Tanzania to ensure that vulnerable communities, including pastoralist and hunter-gatherer communities, are effectively protected against forced

²⁰² *Saramaka’s case*, *Op Cit*, note 200 para 131, referring to Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples; Also see, *Mayagna (Sumo)’s case*, *Op Cit*, note 211 paras. 148-149, and 151; *Sawhoyamaya v Paraguay*, Reparations and Costs (2006) Series C No. 146, paras. 118-121, and 131, and *Yakye Axa v Paraguay*, Merits, Reparations and Costs (2005) Series C No. 125, paras 124, 131, 135-137 and 154.

²⁰³ The United Nations, Basic Principles and Guidelines on Development-Based Evictions and Displacement, Prior to Evictions, 2018.

²⁰⁴ *Ibid* Guideline 38

²⁰⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Initial to 3rd Reports of the United Republic of Tanzania, (Adopted by the Committee at its 49th session, 12-30 November 2012) at p 5 para 22.

²⁰⁶ *Ibid*.

evictions from traditional lands.²⁰⁷ In *Land and Human Rights, Standards and Application*,²⁰⁸ the UN Office of the High Commissioner for Human Rights has said that in implementing development-based evictions and displacement, ‘all potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information and full consultation and participation, as well as to propose alternatives that authorities should duly consider’.

In conclusion, the requirement of free, prior and informed consent in the context of land acquisition is well reflected in the provisions of the international human rights law.

2.3 Consensus: Clarity, Certainty and Legal Redress

As seen, the fairness theory by Rawls advocates a justice system that is based also on consensus. The theory is that the parties concerned must have explicit knowledge of the content of the agreement in question.²⁰⁹ Rawls’ fairness theory rests on the assumption that the question of fairness arises when there is a competing interest between rival parties.²¹⁰ Because of that, the parties must agree in advance on the terms they are willing to respect and on how the differences between them will be solved when a conflict arises. This brings to the fore the concept of consensus, which requires the parties to an arrangement should not only consent to be bound by an agreement, but must also have a shared understanding on the terms of the agreement in question. It is important to note that consensus goes beyond consultation that seeks to merely satisfy formalities. Consensus demands that the agreement between the affected people and the state must be observed, and parties engaging in an agreement should have the opportunity to defend their interests as equals. In comparison, the human rights legal instruments and case law take a similar position by obliging the states to consult and

²⁰⁷ *Ibid.*

²⁰⁸ See, *Cambodia Concluding Observation, Op Cit*, note 186 at 35.

²⁰⁹ See Chapter Two, section 4.2.1.

²¹⁰ *Ibid.*

cooperate with the people affected by development activities such as petroleum projects, and eventually to respect the agreement they arrive at.²¹¹

For example, in *Endorois* case,²¹² the Commission dealing with the cursory provision of the Banjul Charter providing for the right to property, was of the view that the level of engagement with the affected communities must be stringent enough to produce a signed agreement with the affected people on how the state will proceed with the land acquisition, the compensation process and the extractive activities to be performed. As was seen earlier, in this case the complainants alleged that the Government of Kenya violated Article 14 of the Banjul Charter, among others, by forcibly removing the members of the *Endorois* community from their ancestral lands without proper prior consultations or adequate and effective compensation.²¹³ In this case, the state was aware that they were legally obliged to engage with the affected communities and ensure their participation in the decision leading to the acquisition of their land, as well as in the compensation process. The Kenyan government decided however, to engage with only a few people from the *Endorois* community for formality. In turn, the Commission underscored the importance of intensive engagement with the affected community in the process of acquiring and compensating them for their land. To that end, the Commission held that since the representatives of the *Endorois* community were illiterate, which impaired their ability to understand the documents produced by the state, the agreement and the intended activities that the government was proposing were not founded on consensus, or in other words there was no consensus *ad idem*.²¹⁴ The Commission categorically stated that:

From the oral testimony and even the written brief submitted by the Complainants, the African Commission is informed that the Endorois representatives who represented the community in discussions with the Respondent State were illiterates, impairing their ability to understand the documents produced by the Respondent State. The Respondent State did not contest that statement. The African Commission agrees with the Complainants that the Respondent State did

²¹¹ *Ibid.*

²¹² The *Endorois case*, *Op Cit*, note 153.

²¹³ *Ibid* para 2.

²¹⁴ *Ibid* para 292.

not ensure that the Endorois were accurately informed of the nature and consequences of the process, a minimum requirement set out by the Inter-American Commission in the Dann case.²¹⁵

The above ruling shows that consensus is a product of clear and certain terms agreed upon which must be legally binding. Consequently, Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples²¹⁶ states that the people who have unwillingly lost possession of their lands due to land acquisition without their free, prior and informed consent are entitled to restitution or other appropriate redresses.²¹⁷ Articles 19 and 32 of the Universal Declaration on the Rights of Indigenous Peoples²¹⁸ require that the input given by the affected people when dealing with their rights to land, territory and resources, including mining and other utilisation or exploitation of resources, should go beyond the general obligation to have consent as the objective of consultations. Under Article 10, the Declaration explicitly requires states to obtain the indigenous peoples' consent before relocating them from their lands or territories. Article 10 of the Declaration demands that the state should respect the agreed timelines and terms.²¹⁹ Article 29 of the Declaration requires consultation and consensus to be arrived at on issues such as storage or disposal of hazardous materials on indigenous peoples' lands or territories.²²⁰

Legal redress is part of what must be agreed upon in the resettlement plan between the state and the affected people. International guidance on this point could be sought in

²¹⁵ *Ibid*; See also, *Mary and Carrie Dann v USA* (2002) where the IAcMHR noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. To have a process of consent that is fully informed “requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.

²¹⁶ United Nations Declaration on the Rights of Indigenous Peoples, 2007.

²¹⁷ See for example, *U'wa Indigenous Community / Precautionary Measures*. Inter-American, C.H.R., case number 11.754.

²¹⁸ United Nation Declaration on the Rights of Indigenous Peoples, 2007.

²¹⁹ Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.

²²⁰ Article 29 of the United Nation Declaration on the Rights of Indigenous Peoples.

*Sierpinski v Poland*²²¹ where the applicant complained about the alleged breach of his property rights provided in Article 1 of Protocol No. 1 to the European Convention of Human Rights. The state had annexed his property allegedly for public use without awarding him compensation. The applicant attempted to seek redress in domestic courts, but all the domestic courts rejected his claim on technical grounds. A further appeal to the European Court of Human Rights resulted in the following ruling:

The Court reiterates that the genuine, effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State's duty not to interfere but may give rise to positive obligations. Such positive obligations may entail the taking of measures necessary to protect the right to property, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions, even in cases involving litigation between private entities. This means, in particular, that States are under an obligation to provide a judicial mechanism for settling effectively property disputes and to ensure compliance of those mechanisms with the procedural and material safeguards enshrined in the Convention.²²²

The above requirement enshrined in *Sierpinski*²²³ reflects Rawls' argument discussed in Chapter Two that fairness demands that parties should agree in their original position on the terms of the agreement and agree on how a dispute among them will be solved.²²⁴ Soft laws are also handy on the issue of consensus. The UN Guiding Principles on Business and Human Rights (UNGPR) in guideline 13 states that the proper grievance mechanism is one that allows engagement with the affected stakeholders about its design and performance. The UNGPR asserts that since a business enterprise cannot with legitimacy both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue.²²⁵

²²¹ *Sierpinski v Poland*, Application no. 38016/07, Judgment of 3 November 2009.

²²² *Ibid* see, para 68-77.

²²³ *Ibid*.

²²⁴ See generally Chapter Two.

²²⁵ UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2012), guideline 13.

Also, the IFC Performance Standards on Environmental and Social Sustainability (IPS), in its various provisions requires that the actions implemented should be the ones agreed on in collective negotiation. The IPS in Performance standards 2(15) and 5(9) requires that payment of compensation should be made in accordance with a timeline agreed on through a collective agreement.²²⁶ Although these soft-laws are not binding on the Tanzanian government, it has been stated that they can form a basis on which the binding legal instruments could be interpreted.²²⁷ Thus, the above shows that consensus as one of the elements of fairness discussed in Rawls treatise in the last Chapter, tends to be satisfactorily covered at the international level.

3. THE LIVELIHOOD AND THE CORRELATED NATURE OF RIGHTS

Chapter Two established that Rawls' difference principle of distributive justice largely protects the livelihood rights of the least advantaged. To that end, the principle, in the context of this study, requires that the aim of the activities leading to land acquisition from the affected people, as well as the compensation package should be to raise the standard of living of the worst-off. This part will show that, internationally, the case law jurisprudence reflects Rawls' call in his difference principle by first recognising livelihood rights as ones that override any other interest in land. Second, the law demands that the compensation package must take into account the livelihood situation of the affected people, by considering land as a key factor to the livelihood rights in light of other correlated rights, which are linked to the land rights. As such, the law demands that a compensatory legal regime that is fair should be able to take into account all the other strands of rights attached to the right to land when considering suitable compensation package. This part shall do an evaluation of jurisprudence of the African Commission as several relevant cases have interpreted Article 14 of the Banjul Charter to that direction, persuasive decisions from other regional courts, as well as

²²⁶ IFC Performance Standards on Environmental and Social Sustainability (2012).

²²⁷ See, Fons Coomans 'The Ogoni Case before the African Commission on Human and Peoples' Rights' available at <http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>.

conventions and soft-law materials provided at the UN agencies, of which Tanzania is a member.

3.1 Recognition of the Right to Own Land as an Important Livelihood Right

As was seen in Chapter Two, Rawls looks at protection of livelihood right as a substantial value of fairness. Similarly, at the international level, since land is an important factor of livelihood, there is rich jurisprudence insisting that land acquisition and compensation must take into account the livelihood aspect of land. For example, the African Commission on Human and Peoples' Rights decision of the *Ogoni* indigenous community stipulated that Article 14 of the Banjul Charter seen earlier protects the well-being, and livelihood of landholders.²²⁸ In this case, the *Ogoni* community alleged that the Military Government of Nigeria was involved in oil production through the state oil company in a consortium with Shell Petroleum Development Corporation (SPDC), whose activities in the *Ogoni* region caused land annexation, environmental contamination, health problems and a climate of terror. In the material part, the African Commission stated:

The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the Oil Companies, in particular, to devastatingly affect the well-being of the Ogonis.²²⁹

²²⁸ See, the Ogoni's case thus: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Afr. Comm. of P.H.R 155/96 (*SERAC*); See also, The Ogoni case before the African Commission on Human and Peoples' Rights' (2008) 52 (3) *International and Comparative Law Quarterly* 749-760.

²²⁹ See, *Ibid* para 58.

The Commission concluded that the government of the Federal Republic of Nigeria should ensure the protection of the environment, health, and livelihood of the people of *Ogoniland* by providing adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations.²³⁰ In *Endorois* case,²³¹ discussed earlier, a similar position was taken suggesting that a correct interpretation of Article 14 of the Banjul Charter must see the correlation between the right to property and the livelihood rights.²³² The Commission inspired by the European Court of Human Rights, alluded thus:²³³

For compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them.²³⁴

It can be seen from the above that the Commission interpreted the right to property and compensation provided under Article 14 of the Banjul Charter in light of its place in supporting the livelihood of the landholders. Other inspirational cases from the Inter-American Court, and the Human Rights Committee has also maintained a similar position that land acquisition and compensation must consider the livelihood situation of the affected people. Examples of these cases include *Saramaka v Suriname*,²³⁵ which confirmed earlier jurisprudence laid down in *Moiwana v Suriname*, *Yakye Axa v Paraguay*,²³⁶ *Sawhoyamaxa v Paraguay*,²³⁷ and *Mayagna Awas Tingni v Nicaragua* that

²³⁰ See generally, *the Ogoni's case Ibid*

²³¹ *Endorois case, Op Cit*, note 153 para 247.

²³² *Ibid* note 153 para 184 & 189.

²³³ See, *Dogan and Others v Turkey*, European Court of Human Rights (2004), Applications nos. 8803-8811/02, 8813/02 & 8815-8819/02 para 154.

²³⁴ See the *Endorois case, Op Cit*, note 153 para 237.

²³⁵ *Saramaka's case, Op Cit*, note 200.

²³⁶ *Indigenous Community YakyeAxa v Paraguay* (2005).

²³⁷ *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, (2006).

the right to livelihood lies at the centre of the question of how land should be acquired and compensated for in the petroleum projects.

In *Saramaka*, the facts of the case were that Ecuador increased oil exploration activities to the country's Amazonian region, where the first reserves of crude oil were discovered. The discovery made the Amazonian region very important from a geopolitical and economical perspective. The state, thus, took steps to secure complete control over the country's oil resources from a nationalist perspective and under a philosophy of national security, and the economic-political concept that defined the oil sector as a strategic area.²³⁸

To enable the development of oil, on numerous occasions the state oil company tried to negotiate access to the *Sarayaku* People's territory and to obtain their consent for oil exploration, by actions such as: (a) direct contacts with members of the community, circumventing the indigenous organisational levels and, (b) offering to send a medical team to provide care in several *Sarayaku* communities. However, to receive care, the people would have been required to sign a list, which would have been used subsequently as a letter addressed to the state company supporting the continuation of its work; (c) payment of wages to specific individuals within the communities to recruit others to support the seismic survey; (d) offering personal gifts and incentives; (e) forming support groups for the oil exploration activities, and (f) offering money, either individually or collectively.²³⁹

At the hearing, the Court set to determine whether the state adequately respected and guaranteed the rights of the *Sarayaku* People that were allegedly violated, by granting a contract for oil exploration and exploitation on their territory to a private company; by implementing this contract and by the occurrence of a series of related events. Even though the state acknowledged that it had failed to conduct prior consultations in this case, during the litigation, it questioned its obligation to do so and argued that certain

²³⁸ *Ibid* paras 17, 58 and 59.

²³⁹ *Ibid* para 73.

actions taken by the company satisfied the requirement to consult the indigenous communities of the area granted in concession.²⁴⁰ In turn, the court held:

In cases concerning natural resources on the territory of an indigenous community...the State must verify that these restrictions do not entail a denial of the survival of the indigenous people themselves. For this reason, in the case of *Saramaka v Suriname*,²⁴¹ the Court established that, to ensure that the exploration or extraction of natural resources in ancestral territories did not entail a negation of the survival of the indigenous people as such, the State must comply with the following safeguards: (i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans; (ii) conduct an environmental impact assessment, and (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions. Based on all the above, one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is established in ILO Convention No.169, and other complementary international instruments.²⁴²

It is clear from the above that Rawls' difference principle demanding that the worst-off should not be marginalised by state's economic projects such as the petroleum activities is sufficiently reflected in the international human rights law, which forcefully protects the livelihood rights. As was seen earlier, this thesis argues that the law demands that the compensation package must take into account the livelihood situation of the affected people, by considering land as a key factor to maintaining a livelihood. The section below examines in specific detail how the international law protects land in view of its correlation with other rights.

²⁴⁰ *Ibid* para 124.

²⁴¹ *Saramaka People's case, Op Cit*, note 200.

²⁴² *Ibid* para 160.

3.2 The Correlated Nature of Livelihood Rights and Land

Land can never be discussed without considering other livelihood rights that it supports. Land is a source of water and food, hence good health, which is a source of life. Farmers also see land as being connected to their right to work. Shelter and housing are also erected on land. In the context of Africa and indigenous societies, land is considered a home ground for the forefathers, hence is tied to culture and religion. So, Rawls' difference principle, which requires that livelihoods should not be adversely affected due to economic activities, means in the context of African society that the cultural welfare of the affected communities should also be considered. Below it will be shown that international law tends to protect land for its other importance including its place in relation to gender rights, the right to food, right to life, good health and water, as well as cultural rights.

3.2.1 Land as Life: The Right to Life

The right to life is the cradle of humanity and existence. In human rights law, land and property tend to be protected as important means of supporting the right to life. For example, the African Commission case of *Endorois* seen earlier, relying on the Inter-American Court of Human Rights case of *Yakye Axa v Paraguay* explained how the right to property is connected to the right to life, thus:

The African Commission notes that the link to the right to life is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the 'public interest test' is further confirmed by jurisprudence of the IActHR. In *Yakye Axa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.²⁴³

This case shows that the state has a positive obligation to protect and ensure the right to life by generating minimum living conditions that are compatible with the dignity of

²⁴³ See the *Endorois case*, *Op Cit*, note 153, para 216.

the human person. In this regard, the state has the duty to take positive measures geared towards fulfilment of the right to a decent life, especially those connected to persons who are vulnerable and at risk, whose care becomes a high priority.²⁴⁴

3.2.2 Land and Gender Equality (Non-Discrimination)

Land rights have been recognised as a central point within the issue of gender equality. Women's land rights are often dependent on marital status, which makes women's security of tenure dependent on relations with their husband.²⁴⁵ This has a direct effect on the compensation process since men are the ones that often receive compensation based on the notion that they are the head of the family.²⁴⁶ Reports by the international human rights bodies show that for most women worldwide, discrimination in marriage, inheritance, legal capacity or access to financial and other resources is the main obstacle to access, use and control of the land. Poor rural women, for example, are the most marginalised group.²⁴⁷

Women's lack of secure tenure owing to discrimination based on gender has an impact on their survival, as well as on the well-being of their families, particularly following a

²⁴⁴ See, *Ibid* para 217.

²⁴⁵ Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 21: Equality in Marriage and Family Relations (UN Doc. A/49/38) 13th session, 1994) at 1.

Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> accessed on: 01 March 2013; See also, Jérémie Gilbert 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 10 International Journal on Human Rights at 18; The Report by Food and Agriculture Organisation Land and Property Rights (2010: United Nation FAO) at 36.

²⁴⁶ *Ibid*.

²⁴⁷ See *Cambodia Concluding Observation, Op Cit*, note 186 at 10; See also, Hema Swaminathan, Rahul Lahoti and J Y Suchitra, Women's property, Mobility, and Decision Making: Evidence from rural Karnataka, India (Discussion Paper, No. 01188 Washington, D.C., International Food Policy Research Institute: 2012),

Available at www.ifpri.org/sites/default/files/publications/ifpridp01188.pdf accessed on 22/05/2017; Jeetendra P. Aryal and Stein T. Holden 'Caste Discrimination, Land Reforms and Land Market Performance in Nepal' (2011: Centre for Land Tenure Studies Working Paper, No. 01/11 Ås, Norwegian University of Life Sciences) Available at www.umb.no/statisk/clts/papers/CLTS_WP1_2011.pdf accessed on 22/05/2017.

divorce, death or remarriage of the spouse.²⁴⁸ Studies indicate that women who own land or a home are better placed to make decisions that favour their interests than those who do not own land or a home.²⁴⁹ The report by the UN Special Rapporteur on Adequate Housing²⁵⁰ has stated that access to, use of and control over land have in some instances denied on discriminatory grounds.²⁵¹ In response, various human rights legal instruments²⁵² actively provide for women's right to property. For example, the Convention on the Elimination of All Forms of Discrimination against Women²⁵³ (CEDAW) provides in Article 15(2):

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.²⁵⁴

As seen already, Rawls' difference principle insists that the vulnerable groups that are the worst off or marginalised deserve to be rewarded with the view of improving their livelihood.²⁵⁵ As the current practices mostly marginalise women, Rawls would argue that the procedures for acquiring and compensating land acquired for economic activities including petroleum projects must seek to raise their living standards. Article 15 of CEDAW espouses the livelihood approach to the right to property by creating a

²⁴⁸ *Cambodia Concluding Observation, Op Cit*, note 186 at 10.

²⁴⁹ See, UN Commission on Human Rights, *Infra*, note 250.

²⁵⁰ See, *Report by The Special Rapporteur on Adequate Housing as A Component of The Right to An Adequate Standard of Living and on the Right to Non-Discrimination*, Miloon (United Nations Commissioner on Human Rights, E/CN.4/2006/118, 2006).

²⁵¹ See, Article 15.

²⁵² See also, ICCPR, Articles 2(1) & 3, 7 and 23(4); UDHR, Article 2 and 7; ICESCR, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1); Convention on the Rights of Persons with Disabilities, 2006, Article 5 (2).

²⁵³ Convention on the Elimination of All Forms of Discrimination against Women, 1979.

²⁵⁴ *Ibid* Article 15.

²⁵⁵ See, Chapter Two.

basis for which the women's right to own property can be enforced.²⁵⁶ The Article categorically states that women, just like men, are entitled without any discrimination to equal protection of the law. This implies that the law is cognisant of the importance of the right to property and other related rights to the livelihood of women.

3.2.3 Land as a Source of Food, Water, and Good Health

The right to food is associated with the right to land and the right to life. Article 15(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)²⁵⁷ provides that states shall ensure that women have the right to nutritious and adequate food.²⁵⁸ The Protocol also mentions the need to protect the right of access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.²⁵⁹

²⁵⁶ Article 15 of CEDAW; See also, *The Report of the Special Rapporteur on Adequate Housing As A Component Of The Right To An Adequate Standard Of Living, And On The Right To Nondiscrimination In This Context* (United Nations, Human Rights Council: A/HRC/40/61, 2019) para 49 which states: 'Women experience multiple systemic barriers to access to justice. As noted by the Committee on the Elimination of Discrimination against Women, obstacles include 'gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.' Access to justice for the right to housing for women – as described in thematic reports of previous mandate holders – means women must be able to challenge systemic discrimination with respect to land, housing and property in a range of areas, including inheritance, marriage, divorce, succession and title registration.'

²⁵⁷ See, Article 11(1) ICESCR.

²⁵⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 15(a); Also see, CEDAW, Article 15(2) which states: 'States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.' See also, Article 28(1) of the Convention on the Rights of Persons with Disabilities, 2006.

²⁵⁹ The African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, Article 15(a) and (b) states: (a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food; (b) establish adequate systems of supply and storage to ensure food security.'

In *Ogoni's* case discussed earlier,²⁶⁰ the African Commission said that there was a strong nexus between the right to property or land and other rights such as the right to food, water, and housing.²⁶¹ Similarly, in the *Yakye Axa* case,²⁶² the Inter-American Court of Human Rights, in the course of drawing a link between the right to property and the right food, said the following:

The members of that community might have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement, the members of the *YakyeAxa* Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.²⁶³

Moreover, Article 25 of the UDHR posits that everyone has the right to an adequate standard of living, including food.²⁶⁴ Article 11(1) of the International Covenant on Economic, Social and Cultural Rights²⁶⁵ refers to the right to food by expressly affirming the right of everyone to an adequate standard of living, including adequate food.²⁶⁶ Article 11(2) proclaims the fundamental right of everyone to be free from hunger and requires states to improve methods of production, conservation, and distribution of food.²⁶⁷

²⁶⁰ *Ogoni's case*, *Op Cit*, note 228 para 63, 64 & 65.

²⁶¹ *Ibid* para 63, 64 & 65.

²⁶² *YakyeAxa v Paraguay* (2005) Series case no. 125.

²⁶³ *Ibid* para 50.96.

²⁶⁴ UDHR Article 25.

²⁶⁵ ICESCR Article 11.

²⁶⁶ See, *Ibid*.

²⁶⁷ *Ibid* Article 11(2)(b) states: 'The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.'

Also, in its General Comment on the right to adequate food,²⁶⁸ the CESCR underlines ‘availability of land’ as a crucial element of the right to adequate food. The General Comment refers to the possibilities for the people to feed themselves directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.²⁶⁹ In his report on large-scale land acquisitions and leases, the Special Rapporteur²⁷⁰ on the right to food argues that the states’ obligations regarding the right to food are directly linked to those concerning the right to land.²⁷¹ States are thus obliged to protect access to land from encroachment by other private parties or state actors and strengthen people’s access to and utilisation of land resources to ensure their livelihoods.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its concluding observations on the combined seventh and eighth periodic reports of the United Republic of Tanzania²⁷² had an opportunity to advise on the situation and the place of land to women in Tanzania. It expressed a concern that women in rural and remote areas who form the majority of women in Tanzania lack adequate access to ownership of land. The Committee found that women in Tanzania do not have adequate access to productive, social and human assets, nor do they enjoy adequate protection of their right to ancestral lands. In addition, the CEDAW Committee observed that the laws do not adequately allow women the opportunity to participate in

²⁶⁸ CESCR General Comment No. 12: The Right to Adequate Food (Art. 11). The Committee on Economic, Social and Cultural Rights underlines availability as an element of the right to adequate food general comment No. 12 (Contained in Document E/C.12/1999/5) para 12.

²⁶⁹ *Ibid* para 12 states: ‘availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.’

²⁷⁰ UN Human Rights Council, Report of the Special Rapporteur on the right to food Access to Land and the Right to Food (2010: General Assembly of the United Nations, A/65/281) Para 2.

²⁷¹ *Ibid*; See also, *Op Cit*, note 228; In this case, the Commission found that ‘the destruction of individual and communal farmland by acts and omissions of the state amounted to violations of the obligations to respect and to protect the implicit rights to food and adequate housing.’

²⁷² CEDAW Concluding Observation, *Op Cit*, note 219.

and benefit from rural development initiatives.²⁷³ As a result, the Committee recommended that the Tanzanian government should preserve tribal ancestral land, protect it from being arbitrarily acquired and award appropriate compensation to those whose access has been impeded. Moreover, the state should guarantee rural women's equal access to land ownership and tenure, education, employment and health care, and facilitate their access to and control over land, water and other natural resources.²⁷⁴

In conclusion, international law recognises that the right to food cannot be fully realised without protecting the right to property, especially land and the livelihood rights of those that till the land. The holistic approach adopted internationally which views land and other rights as important for livelihood clearly supports Rawls' theory of fairness, seen in Chapter Two.

3.2.4 Land and the Right to Adequate Housing

The right to adequate housing is recognised under Article 15 of the African Women's Protocol. It shows that states have a duty to guarantee women, whatever their marital status, access to adequate housing.²⁷⁵ Moreover, Articles 21(1),(2) & 3 of the Protocol on the Protection and Assistance to Internally Displaced Persons (IDP protocol) also provides that everyone has the right not to be evicted from his or her housing, land and property, and to be protected against arbitrary displacement.²⁷⁶ These provisions

²⁷³ *Ibid*, p. 13 para 40

²⁷⁴ *Ibid* p. 14 para 41.

²⁷⁵ See, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003: Article 16 reads: 'Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.'

²⁷⁶ The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), art. 9.2; states in art. 21 that States shall provide all displaced persons with adequate humanitarian assistance. Regarding housing, the State shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

creates a positive obligation of the state to protect the PAPPs right to land and shelter.²⁷⁷

In the *SERAC*²⁷⁸ case, the African Commission stated that although the right to housing or shelter is not explicitly provided under the African Charter, the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the right to the family protection, all of which are expressly recognised by the African Charter, forbid the wanton destruction of shelter. The Commission said that when housing is destroyed, all these rights are adversely affected. The combined effect of these rights is that the right to shelter or housing is protected by the African Charter.²⁷⁹

Similarly, Article 25 of the UDHR, which is contextually similar to Article 11(1) of the ICESCR provides 'that everyone has the right to an adequate standard of living for himself and his family, including food, housing and water, and to the continuous improvement of living conditions.' Interpreting this Article, the CESCR in its General Comment No. 4 (1991) states that 'all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'.²⁸⁰ According to the CESCR, tenure takes a variety of forms, including, rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including the occupation of land or

²⁷⁷ Article 21(1)-(3) thus states:- Principle 21 (1). No one shall be arbitrarily deprived of property and possessions. (2). The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: (a) Pillage; (b) Direct or indiscriminate attacks or other acts of violence; (c) Being used to shield military operations or objectives; (d) Being made the object of reprisal; and (e) Being destroyed or appropriated as a form of collective punishment. (3). Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

²⁷⁸ *Ibid* para 60.

²⁷⁹ *Ibid*.

²⁸⁰ *Ogoni's case, Op Cit*, note 228 para 60.

property.²⁸¹ The Committee comments that ‘regardless of the type of tenure, all persons should possess a degree of security of tenure, which guarantees legal protection against forced eviction, harassment, and other threats.’²⁸² This implies that the customary tenure should equally be protected.²⁸³ The Committee further expects ‘states to confer legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with the affected persons and groups.’²⁸⁴

In conclusion, it is clear that international human rights law considers security of tenure as one of the main elements of the right to adequate housing. It also shows that the right to housing and shelter are inextricable from the rights to land, and to a livelihood.

3.2.5 Land as a Cultural Right

Land is essential element for the realisation of many human rights. Crucially, land is connected to peoples’ identities and cultures. Articles 11, 12 and 31 (1) of the United Nations Declaration on the Rights of Indigenous Peoples, affirms that ‘states shall endeavour to protect communities with special attachment to, and dependency on land due to their culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests’.²⁸⁵ Also, the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries²⁸⁶ provides in Article 13 that

²⁸¹ CESCR General Comment No. 4: The Right to Adequate Housing, Article 11 (1) of the Covenant (1991) para 8.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ European Committee of Social Rights *European Roma Rights Centre v Greece*, Communication No. 15/2003 (8 December 2004): This case involved the forced eviction of nomadic Roma communities from land used for temporary housing, where the legal questions included whether the right of the family to social, legal and economic protection under the European Social Charter afforded protection related to land and housing. The Committee held that adequate land necessary for stopping places should be provided and that forced eviction from such land should be prohibited para 8 (a).

²⁸⁵ The United Nations Declaration on the Rights of Indigenous Peoples, 2007.

²⁸⁶ ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), 1989.

indigenous peoples have the right to practice their culture, tradition and customs.²⁸⁷ Articles 5(1) and 5(15) of the Convention for the Protection of National Minorities, provide that states will promote the conditions necessary for persons belonging to national minorities to maintain these practices.²⁸⁸ Governments are required to recognise the importance of culture as it relates to their land. In addition, Article 27 of the UDHR states that the cultural right to property must be protected.²⁸⁹ The ILO Convention, too, provides that ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture.²⁹⁰ Moreover, the United Nations- Human Rights Council Report of the Special Rapporteur on the Rights of Indigenous People²⁹¹ also posits that most evictions fail to recognise the distinct cultural and land-use patterns of many of the indigenous communities that the state has an obligation to aid.²⁹²

²⁸⁷ *Ibid* Article 13

²⁸⁸ The Convention for the Protection of National Minorities, 1998.

²⁸⁹ See also, The International Covenant on Economic, Social and Cultural Rights, 1966, Articles 15 and 27; The International Convention on the Elimination of All Forms of Racial Discrimination, Articles 5 (d) & (e); The Convention on the Elimination of All Forms of Discrimination against Women, 1979, Article 13; The Convention on the Rights of the Child, 1990, Article 31; The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988, Articles 14 and 27; the Convention on the Rights of the Child, 1990 Article 30.

²⁹⁰ ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), 1989, Articles 4 and 13; Also see, The International Covenant on Civil and Political Rights, 1966, Articles 2(1) & 3, 7 and 23(4); Universal Declaration of Human Rights, 1948, Article 2 and 7; International Covenant on Economic, Social and Cultural Rights, 1966, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 1(1); Convention on the Rights of Persons with Disabilities, 2006, Article 5 (2).

²⁹¹ See, United Nations- Human Rights Council: Report of the Special Rapporteur on the rights of indigenous people: The situation of indigenous peoples in Botswana (2010: A/HRC/15/37/Add.2).

²⁹² *Ibid* paras 31 and 32 has partly stated that: ‘A primary poverty reduction strategy of the Remote Area Development Programme [of Botswana] was the resettlement of remote dwellers into ‘remote area settlements’ in order to facilitate the provision of social services: For example, the Basarwa people in Botswana who have traditionally maintained a hunter-gatherer subsistence way of life, were in tension with Remote Area Development Programme initiatives to relocate them into settled communities in favour of a sedentary, agropastoralist lifestyle, the programme was reported to substantially violate their rights.’

Regionally, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), stipulates in Articles 4(5) and 11(5) that states shall take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion. The Banjul Charter states in Articles 4 and 17 that everyone has the right to participate in cultural life, to live in community with others freely and without discrimination.

Generally, the Banjul Charter protects the close relationship between the people and their lands, as well as the natural resources on their ancestral territories. The Banjul Charter by its nature approaches property as being communally owned.²⁹³ African societies have a community-based tradition related to a form of communal collective land ownership. Thus, ancestral land is not usually owned individually, but by the group and their community. These notions of land ownership and possession do not necessarily conform to the classic concept of property but deserve equal protection under Article 14 of the Banjul Charter. The state practices that ignore certain forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people is an implied denial of the right to property. Also, as seen above, the right to land is linked to cultural rights since land is a symbol of identity. It serves as burial ground, a home of ancestors and a place of worship. As all these are essential livelihood rights, it is important that the right to land must be understood from this perspective.

4. CONCLUSION

This chapter has demonstrated that the international legal framework protecting the right to property reflects fairness principles in two ways. First, it stresses the importance of the participation of the people affected by development projects in decisions concerning land acquisition and compensation. As seen in this chapter, the procedural aspect of fairness at the international and regional levels includes the need

²⁹³ See, generally, the *Ogoni's case*, *Op Cit*, note 228.

to consult the people affected by petroleum projects, and to obtain their consent or reach a consensus with them on matters regarding land acquisition and compensation. Second, international human rights law codifies the substantive aspect of fairness. It does this by requiring the state to refrain from infringing the livelihood rights of the people whose land has been acquired by the state or its agencies.

The next chapter provides an introductory discussion of Tanzanian laws governing land acquisition and compensation in the context of petroleum projects in order to lay a basis for further analysis in the succeeding chapters.

CHAPTER FOUR

THE TANZANIAN LEGAL FRAMEWORK FOR LAND COMPENSATION IN PETROLEUM PROJECTS

1. INTRODUCTION

The major question that this chapter asks is: how does the Tanzanian petroleum legal framework protect the right to fair compensation to those whose land the state acquires for petroleum use? To answer that question, this chapter does the following. First, it examines the safeguards provided in the Tanzanian Constitution to protect the rights to property. Second, it examines the two relevant statutes setting out the procedures and the principles governing how compensation should be determined and paid, namely, the Petroleum Act and the Land Acquisition Act²⁹⁴ (LAA). Third, it provides an introductory discussion of these procedures and principles to foreground the detailed analysis in the next two chapters. Finally, the chapter discusses other relevant compensation standards derived from soft-law materials of international law.

2. SAFEGUARDS FOR THE PROTECTION OF THE RIGHT TO PROPERTY

Similarly to Article 14(1) of the Banjul Charter, Article 24 of the Tanzanian Constitution provides:

- (1) Every person is entitled to own property, and has a right to the property protection of his property held in accordance with the law.

- (2) Subject to the provisions of Sub-Article (1), it shall be unlawful for a person to be deprived of his property for the purposes of nationalisation or any other purposes without the authority of law, which makes provision for fair and adequate compensation.

²⁹⁴ The Petroleum Act No. 21 of 2015 and Land Acquisition Act No. 47 of 1967 (LAA).

As can be seen from the Article 24 of the Tanzanian Constitution above, the requirement that public interest must be proved before the state acquires property for petroleum activities is one of the critical constitutional principles regarding the acquisition of property including land. The other requirements are that the acquisition of land must be done in accordance with the law, and that the land acquisition must be accompanied by payment of fair and adequate compensation.

However, despite their importance to protecting the right to property, terms like ‘public interest’ and ‘fair and adequate compensation’ are vague.²⁹⁵ Fortunately, parliament and the courts in Tanzania have on different occasions attempted to define these terms, as the discussion below shows.

2.1 Public Interest

Article 24 of the Tanzanian Constitution reflects the international law discussed in Chapter Three, which provides that land can only be acquired from its holders in the public interest. However, as seen above, the term ‘public interest’ is abstruse. In response, the High Court of Tanzania in *Sisi Enterprises Limited*²⁹⁶ attempted to explain the term public interest. In that case, the claimant negotiated with the United States’ representatives in Tanzania about selling to the United States government her piece of land for the erection of the United States’ Embassy building.²⁹⁷ The negotiations on the price between the seller and the United States’ representatives failed. In response, the government invoked the power to acquire the property in the public interest. The Tanzanian government then forcibly acquired the land on behalf of the United States’ Embassy, arguing that building the US Embassy was in the public interest.

In rejecting the state’s argument, the High Court held that ‘public interest’ must include an aim or object in which the general interest of the community, as opposed to the

²⁹⁵ *James F Gwagilo v Attorney General* (1994) TLR 73.

²⁹⁶ *Attorney General v Sisi Enterprises Ltd* (Civil Appeal No. 30 of 2004) [2005] TZCA 2 (15 June 2005); Also See, *Agro Industries Ltd v Attorney General* (1994) TLR 43.

²⁹⁷ *Ibid.*

interest of individuals, is directly and vitally involved. It is not enough that the public might benefit indirectly or incidentally; it must be shown that the acquisition will directly benefit the public. The Court further stated that the LAA gives a list of examples of acquisitions that can be said to be in the public interest, and noted that building an embassy for a foreign government was not on the list.²⁹⁸

This test is consistent with Rawls' argument, seen in Chapter Two, and the international requirement considered in Chapter Three that a limitation on the right to property should be justified only if it will benefit the public directly.²⁹⁹ Fortunately, section 4(1) of the LAA specifically lists gas activities as one of the public interest grounds on which land acquisition can be based. However, meeting this requirement does not mean that arbitrary land acquisition for purposes of gas activities is constitutional. The requirement of fair and adequate compensation must also be met.

2.2 Fair and Adequate Compensation

As seen in section 2 above, the Tanzanian Constitution requires that people deprived through land acquisition for petroleum activities must be compensated fairly. To that end, Article 24(2) of the Constitution is explicit that land cannot be acquired arbitrarily from its owners for any activity, including petroleum projects. This conforms to the international standards discussed in Chapter Three.³⁰⁰

Petroleum projects in Tanzania tend to apply two systems of compensation, namely, compensation based on local laws and compensation based on international legal standards.³⁰¹ Local law is applied where the funding for the project is domestically sourced. On the other hand, international standards are used in projects funded by international agents such as the World Bank, through its lending arm the International Finance Cooperation (IFC). The application of different systems in the compensation of

²⁹⁸ *Ibid.*

²⁹⁹ See Chapter Two, section 5 and Chapter Three, section 3.

³⁰⁰ See Chapter Three, section 1.1.

³⁰¹ See Chapter Five, section 4.

the people affected by petroleum projects threatens the principle of equality before the law which ought to govern compensation, as was seen in the last chapter.

The two local laws providing for the procedural and the substantive principles of compensation in Tanzania are the LAA and the Tanzanian Petroleum Act.

3. THE STATUTORY PROCEDURES

As noted in Chapter One, the Petroleum Act is an outcome of the reforms made to respond to the claim that the preceding legal regime was inadequate in regulating the upstream, midstream and downstream petroleum activities.³⁰² Tanzania's new petroleum law was expected to represent significant improvements on past legislation.³⁰³ The reform was necessary given the inadequate and unsatisfactory land compensation legal regime that existed at the time.³⁰⁴ This is acknowledged in the Tanzanian National Energy Policy 2015, which states that because liquid biofuel development brings many challenges related to socio-economic and environmental sustainability, the institutional capacity, legal and regulatory framework of Tanzania needed to be strengthened.³⁰⁵

The newly enacted Petroleum Act has three, rather terse sections on compensation. The first is section 111, which provides for compensation in cases where there is no

³⁰² See Chapter One, section 2.

³⁰³ See, Bryan Lee & Kendra Dupuy 'Petro-Governance in Tanzania: Opportunities and Challenges' (2016) 15 (14) *CHR. Michelsen Institute: CMI Brief* at 1-4.

³⁰⁴ See, Hawa Suleiman Mkwela 'Land Injustices, Tracing the Impact of Land Development Projects on Farmers' Land Justice in Dar es Salaam, Tanzania' (Doctoral Theses at Norwegian University of Science and Technology 2016); Kennedy Gastorn *The Impact of Tanzania's New Land Laws on the Customary Land Rights of Pastoralist, A Case Study of the Simanjiro and Bariadi Districts* (2008) at 23-24; Paul Mtoni 'A Compensatory Framework for Sustainable Development: The Case Study of Tanzania' (PhD Thesis. Cranfield University 2010); U. Wanitzek, Ibrahim Juma & H Sippel 'Tanzania Peri-Urban Land Insecurity in Dar es Salaam', in G. R. Woodman, U. Wanitzek & H. Sippel (eds) *Local Land Law and Globalisation a Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania* (2004) at 2.

³⁰⁵ Tanzanian National Energy Policy, 2015.

eviction, but where the petroleum activities have interfered with land use or enjoyment. The second is section 213, which relates to compensation in cases of pollution. Lastly, there is section 186(3), which deals with compensation for land physically acquired for petroleum activities. This section provides that licensees shall compensate the owners of the land for any interferences or property acquired for petroleum purposes. However, this section does not say much about the procedures and standards to be applied in computing the compensation. Instead, it states that disputes related to the amount of compensation shall be settled by the LAA. The entire section 186 provides thus:

- (1) A licensee shall, in consultation with the relevant authorities, acquire wayleave around existing and future gas infrastructure and petroleum installations.
- (2) Owners of property on or bordering a wayleave shall not interfere with a licensee's acquired rights.
- (3) A licensee shall compensate a property owner for any wayleave granted, and any dispute related to the amount of compensation shall be settled in accordance with the Land Acquisition Act.

Seemingly, this means that to understand how a piece of land should be compensated for under the Petroleum Act, one must examine the land compensation procedures and benefits provided for in the LAA. Another facet of compensation relates to whether the petroleum project has acquired land temporarily or permanently. In temporary petroleum projects, the people living around the prospective petroleum fields and who are affected by the petroleum projects are temporarily evicted from their landed property under exploration.³⁰⁶ If petroleum resources are not discovered, the affected people are returned to their lands; this event is referred to as temporary dislocation.³⁰⁷

On the other hand, permanent eviction occurs when petroleum resources are discovered on the explored land. At that stage, the investor is granted a permanent license to operate followed by a permanent dislocation.³⁰⁸ As seen earlier, the practice is

³⁰⁶ Under section 5 of the LAA.

³⁰⁷ *Ibid.*

³⁰⁸ See, Section 66 of the Petroleum Act.

somewhat inconsistent in the sense that the projects funded by international donors tend to apply the sustainable livelihood approach to compensation, provided in the United Nations Guiding Principles on Business and Human Rights, and other international guidelines. On the other hand, local projects apply the compensation procedures and principles provided for in the LAA, which espouses the equivalent theory of compensation,³⁰⁹ which aims at putting the affected person in the exact position that they would have been if the land had not been taken. This thesis as shall be seen in Chapter Five³¹⁰ argues that this bifurcated compensation system which depends on who funds the project creates legal uncertainties and unequal treatment and protection before the law.³¹¹

3.1 Procedural Aspects

As seen earlier, the Petroleum Act relies on the land acquisition and compensation procedures provided in the LAA. This Act lays down several procedures for land acquisition and compensation: notice to acquire land or enter land, valuation surveys, valuation assessment, valuation approval, compensation schedules, budgeting and payment, and resettlement plan.

3.1.1 Notices

The LAA makes provision for various forms of notices. The most critical one for purposes of this thesis is the notice of intention to acquire land, provided for under

³⁰⁹ See, Simon Keith, Patrick McAuslan, Rachael Knight, Jonathon Lindsay, et al *Compulsory Acquisition of Land and Compensation* (2008); Also see Jonathan Mills Lindsay ‘Compulsory Acquisition Of Land And Compensation In Infrastructure Projects An Explanatory Note On Issues Relevant To Public-Private Partnerships’ (2012) *PPP Insights* 1(3) 1-10; J. L. Kironde *Improving Land Sector Governance in Africa: The Case of Tanzania* (Washington, DC: World Bank, (2009)); J. L. Kironde ‘Natural Resources and Conflict Management: The Case of Land’ (Land Policy Initiative. Kigali: Sub-Regional Office for Eastern Africa SRO-EA of the United Nations Economic Commission for Africa, UNECA, 2012); Also see, Komu, *Op Cit*, 37 at 252-267.

³¹⁰ See, Chapter Five, section 4.

³¹¹ *Ibid.*

section 6. This notice applies when the government decides to acquire and take possession of the land initially under survey. According to section 7 of the Act, the period of notice shall not be less than six weeks. This means that the people living or performing their activities on these lands will have one and half months to relocate. However, the proviso to section 7 states that where the President has certified that the land is urgently required for a public purpose, land may be acquired within a lesser period, as the President may direct.

Section 7 provides for the service of notice, and section 8 provides for the publication of the notice.³¹² According to section 8, defective service of notice cannot invalidate the acquisition.³¹³ This implies that notice is not a mandatory requirement under the LAA.³¹⁴

Section 5(d) of the LAA regulates how officers are expected to enter and survey the land needed for acquisition by the state.³¹⁵ The section prohibits entry without notice into a person's house. The section gives powers to the surveyors to enter and conduct their activities once an area has been earmarked for potential public use, subject to permission by the landowner in case they need to enter the house.³¹⁶ However, the draft Valuation and Valuer Regulations (VVR) contradicts the provisions of the LAA by allowing valuers to enter the building, premise or land at all reasonable hours even without the permission of the landowners.³¹⁷ According to the draft, failure to allow valuation officers to enter a premise, or to provide documents needed by the officers, is

³¹² See, further complaints on this in: Sigsbert Ngemera 'Land Dispute Settlement Machineries: Is Inaccessibility a Source of Village Land Disputes in Morogoro?' (2017) 7(3) *International Journal of Scientific and Research Publications* 2250-3153.

³¹³ This is contrary to the IFC Standards which require that land rights or land use rights acquired through negotiated settlements with property owners or those with legal rights to the land if failure to reach a settlement would have resulted in expropriation or other compulsory procedures. See, The IFC Performance Standards, 2012 P.S 5.

³¹⁴ As per section 5 of the LAA.

³¹⁵ See, section 5(d) of the LAA.

³¹⁶ *Ibid.*

³¹⁷ See, rule 55(1) of the Valuation and Valuers Regulation, 2016.

an offence punishable by imprisonment or fine.³¹⁸ The extent to which the notices provided for under the LAA, the Petroleum Act and other laws reflects the fairness theory discussed in this study is thus analysed in Chapter Six.³¹⁹ In conclusion, it could therefore be said that the LAA and the Petroleum Act attempt to put in place provisions that alert the PAPPs on the intended actions of the government. How that avenue is used to engage the PAPPs, however, is yet to be seen in the next chapters.³²⁰

3.1.2 Assessment and Valuation

The LAA, in section 11, requires that compensation should be fair, adequate, and prompt.³²¹ However, the LAA does not specify the time within which compensation must be paid. In the other laws, such as section 3(1)f of the Land Act, the law states that the value of land is included in calculating compensation. Also, the Land (Assessment of The Value of Land for Compensation) Regulations,³²² emanating from the Land Act state that compensation should be paid not more than six months after the acquisition. The problem is that the Petroleum Act omits to state that the Land Act is applicable to land acquired for petroleum purposes. It therefore remains to be settled whether the Land (Assessment of The Value of Land for Compensation) Regulations apply to the land acquired for purposes of petroleum activities as the Petroleum Act confines itself to the LAA.

Unlike section 3(1)f of the Land Act, section 12 of the LAA, excludes vacant land from compensation. According to section 12, compensation of land is for unexhausted improvements.³²³ More specifically, section 12(4) of the LAA states that land does not cease to be vacant ground by reason only of it having been fenced or hedged, or having

³¹⁸ *Ibid* rule 55(2).

³¹⁹ See, Chapter Six, section 4.

³²⁰ See *Ibid*.

³²¹ See, The LAA section 11 read with the Land Act, section 3(1)f requires compensation to be fair.

³²² The Land (Assessment of The Value of Land for Compensation) Regulations, 2001.

³²³ See this further in Chapter Six.

been levelled and so forth.³²⁴ Therefore, according to the LAA,³²⁵ compensation is not made on the value of land, but for the structures or the fixtures developed on the land.³²⁶ It is important to note that the draft Regulations to the Valuation and Valuers Registration Act, 2016, (VVR) purport to add more compensable items in regulation 39, to wit: land and all unexhausted improvements, buildings and ancillary structures, site works, fencing, paved walkways driveways, drains, swimming ponds, irrigation systems, infrastructures like piping, graves, boreholes and water wells among many other items. However, the regulation is still being drafted, and therefore, it cannot be authoritatively referred to in this study.³²⁷ The VVR approach to land acquisition seems to be at par with the international standards on fair compensation, but how it will be harmonised with the existing laws such as the LAA remains unknown.

As such, the challenge for further determination in the next chapter is how and to what extent the Tanzania petroleum legal guidance on how land should be assessed for compensation complies with the international standards discussed in Chapter Three. Such determination is particularly important because different laws in Tanzania have varying standards of compensation.³²⁸ A further analysis about this subject in Chapter Six³²⁹ is thus necessary to inquire how the valuation process is fair.

³²⁴ The section further states: ‘...or having been ploughed or cleared, or consisting of a cleared or partially cleared site of some former development, or being used, otherwise than as an ancillary to adjacent land which is not vacant land or land which is inadequately developed, as a place of deposit for refuse or waste or as standing or parking places for vehicles.’ See generally, section 12(4) of the Tanzanian Land Acquisition Act, 1967.

³²⁵ Section 12, LAA.

³²⁶ See, Cletus E. Ndjovu ‘Expropriation Losses and Entitlements in Tanzania: A Study of Compensational Rights of the Displaced Tenants’ (2016)2 *The African Resources Development Journal*; Also see, Cletus Ndjovu ‘Understanding Causes of Dissatisfactions Among Compensated Landowners’ in Expropriation Programs in Tanzania (2016) 5(1) *International Journal of Scientific & Technology Research* 160-172 at 165.

³²⁷ See, Ringo Willy Tenga ‘Pastoral Land Rights in Tanzania: A Review’ (London: 1992) 14-17; Also see, J. T. Mwaikusa ‘Community Rights and Land Use Policies in Tanzania: The Case of Pastoral Communities’ (1993) 37(2) *J. Afr. L.* 144-163, 145.

³²⁸ See Chapter Five, section 4.

³²⁹ See Chapter Six, section 5.

3.1.3 Prompt Payment of Compensation

Generally, the LAA does not have any provision providing the time within which compensation should be paid. However, section 3(1)g of the Land Act and rule 9(1) of the Land (Assessment of the Value of Land for Compensation) Regulations, 2001, provide that compensation for the land acquired should be paid promptly. According to rule 13(2) of the Land Assessment Regulations, the period for payment of compensation should not exceed six months from the time the valuations are approved by the Chief Valuer. On the other hand, the Land (Compensation Claims) Regulations rule 9(1) provides that the minimum time for compensation is 30 days. Despite those disparities in the time frame, the Land (Assessment of the Value of Land for Compensation) Regulations, and the Land (Compensation Claims) Regulations agree that in case the state fails to furnish compensation in the prescribed time, interest shall accrue thereon.³³⁰ However, the regulations are also not in harmony on the rate of the interest that will accrue from unpaid compensation. These gaps in the LAA and the Petroleum Act as well as the two regulations that are often applied to fill that gap are thus analysed further in Chapter Five.³³¹

3.1.4 Legal Redress to the Aggrieved

Section 5(2) of the LAA³³² provides that grievances concerning compensation should be made to the Regional Commissioner whose decision is stated to be final.³³³ On the other hand, the Petroleum Act creates an independent dispute resolution mechanism under Part XI of the Act. Section 111(3) of the Petroleum Act states that 'where the amount of compensation to be paid is in dispute, either party may refer the matter to the

³³⁰ See section 52(5) of the Valuation and Valuers Registration Act.; Section 9(1) of Land (Assessment of the Value of Land for Compensation) Regulations; and rule 13(2) of the Land (Compensation Claims) Regulations rule 9(1).

³³¹ See, *Ibid* section, 3.1.

³³² See, section 5(2) of the LAA.

³³³ *Ibid*.

Petroleum Upstream Regulatory Authority (PURA) which shall deal with it per the provisions of Part XI.' Thus, section 111(3) of the Act gives PURA the legal mandate to adjudicate issues of compensation. Section 242(1) of the Petroleum Act further empowers PURA to inquire into and decide all disputes between any person engaged in exploration or development operations and third parties, including landholders.

As is clear from the above, the Petroleum Act and the LAA create separate dispute settlement structures. While the Petroleum Act recognises PURA, the LAA mentions the Regional Commissioner as the body with first instance jurisdiction over land disputes.³³⁴ These provisions create legal uncertainty that begs for further analysis, which is amply done in Chapter Six.³³⁵ It can therefore be concluded that the LAA and the Petroleum Act make provision on how landowners should legally claim for their right to be satisfactorily compensated against the state, but the provisions in the area are contradictory.

4. THE THEORETICAL FOUNDATIONS OF THE COMPENSATION SCHEMES UNDER THE LAA AND THE PETROLEUM ACT

Besides the procedures discussed above, the LAA and the Petroleum Act stipulate several substantive guidelines that govern land compensation. These include:

- the principle that compensation is payable for unexhausted improvement made on the land and not the land itself;
- the Pointe Gourde rule, which holds that the value added to the land due to the petroleum discovery should not be taken into account when determining the amount of compensation that should be paid; and
- the equivalent theory, which requires that compensation should put a person in the very same position that he was in before the property was acquired.

These principles are explained below.

³³⁴ See, Chapter Six, section 9.

³³⁵ See, *Ibid.*

4.1 Unexhausted Improvement

Section 4 of the LAA provides compensation should be paid in respect of any land acquired for petroleum exploration and development. However, the compensation envisaged by the LAA relates to unexhausted improvements only. Other forms of compensation recognised in international human rights law, such as resettlement or provision of alternative land or houses, can only be awarded at the discretion of the President.³³⁶ The LAA defines ‘unexhausted improvement’ under section 12(7) as ‘any quality permanently attached to the land directly resulting from the expenditure of capital or labour by a person holding the land.’³³⁷ As noted earlier, per section 12(1) ‘no compensation shall be awarded in respect of any land which is vacant ground.’ According to the LAA, section 12(1) applies to holders of land under the right of occupancy or any other form of ownership.³³⁸

By contrast, the Land Act and the Village Land Act, both of which are more recent Acts, have a more comprehensive meaning of compensation, which includes compensation for the value of land. Both Acts require that compensation should be ‘full, fair, and prompt as assessed by a qualified valuer’.³³⁹ However, since the LAA’s impugned provisions have never been expressly repealed, and the Petroleum Act in section 186 specifically refers to the LAA, the effect of the Land Act and the Village Land Act begs for further analysis in the coming chapter.³⁴⁰ This is because, while the international standards require that compensation should consider the livelihood rights of the people affected with petroleum projects, the LAA limits compensation to the unexhausted improvements made on the land.

³³⁶ See, rule 10 (1) of the Land (Compensation Claims) Regulations; also see, Chapter Six, section 8.

³³⁷ Section 12(7) of the LAA.

³³⁸ See, *Ibid.*

³³⁹ See the common section 3 of the Land Act and the Village Land Act.

³⁴⁰ See, Chapter Five, section 3.1.

4.2 The Pointe Gourde Rule

The Pointe Gourde rule holds that in 'valuing land for compensation purposes, any increases in the land's value which are entirely due to the scheme underlying the acquisition, are to be disregarded.'³⁴¹ This principle is reflected in the LAA under section 14(d), which states that 'in assessing the value of the land for purposes of compensation, the state shall not consider any probable enhancement in the value of the land in the future.'³⁴² Thus, the viability of the Pointe Gourde rule to the theory of fair compensation discussed in this study remains at large.

As the international law requires compensation to be all encompassing and to take into account the livelihood situation of the worst off, the next chapter will investigate how these principles align to the principles of fair compensation already discussed in this study.³⁴³

4.3 The Equivalent Theory of Compensation

The equivalent theory of compensation maintains that those affected by petroleum projects should be neither enriched nor impoverished because of the compulsory acquisition of their land. This principle is reflected under section 11(2) of the LAA, which states that compensation should not be more than the value of the land acquired. This principle means that in compensating for the land acquired for petroleum activities, the valuation should ignore the enhanced value of land caused by the petroleum discovery when considering compensation. Also, compensation should leave the individuals concerned in the same position as they were in before the land acquisition took place. The extent to which this supports the fair theory of

³⁴¹ See, the origin of this in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* (1947) AC 565 (PC).

³⁴² See, section 14(d) of the LAA; also, the Petroleum Act, under section 111(2) states that where the value of any land has been enhanced by exploration or development operations, the compensation payable in respect of the land shall not exceed an amount which is payable if the value had not been enhanced.

³⁴³ See, Chapter Five, section 3.2.

compensation established in Chapter Three, which requires a compensation scheme to raise the livelihood situation of the worst off will be discussed in Chapter Five.³⁴⁴

5. COMPENSATION STANDARDS IN INTERNATIONALLY FUNDED PROJECTS

As seen earlier, the applicable standards of compensation by petroleum projects in Tanzania tend to vary according to the investor or the lender involved.³⁴⁵ The source of funding to the project developer affects how compensation is made.³⁴⁶ The practice reveals that companies that obtain funding from international lenders such as the World Bank are bound to apply the United Nations Business and Human Rights (UNGP) Guidelines and the IFC Performance Standards on Environmental and Social Sustainability (IPS) Standards in compensating the people affected by the petroleum and other land acquiring projects. These standards are highly inspired by the international human rights protecting the right to property.³⁴⁷ As Komu has stated, 'with a large number of investment projects being funded by donors (sic), a new dictate by valuation for compensation and resulting relocation has been introduced often disguising the respective national laws as being not protective enough for the loss of livelihood of the affected persons.'³⁴⁸ For example, in the Songo Songo Gas to Electricity Project, conducted by the AES Corporation and Pan-African Energy Corporation Limited, the resulting Environmental and Social Assessments and Management Plan³⁴⁹ specifically committed to using the World Bank and human rights standards in the implementation of the project.³⁵⁰ According to the relevant documents, the World Bank, 'through the International Development Agency (IDA), was the lead lender to the

³⁴⁴ See, Chapter Five, section 3.2.

³⁴⁵ See, Felician Komu, *Op Cit*, 41.

³⁴⁶ See, Chapter Five, section 4.

³⁴⁷ See, Felician Komu, *Op Cit*, note 41 at 224-239.

³⁴⁸ *Ibid*.

³⁴⁹ See, Environmental and Social Assessments and Management Plan: Songo Songo Gas to Electricity Project (E65 R.E, April 2001).

³⁵⁰ *Ibid* at 25.

project. Accordingly, the project must comply with the World Bank environmental requirements, as a hierarchy of requirements guides the World Bank Group environmental and social reviews.³⁵¹ The project affected communities across Mtwara, Lindi, Mkuranga, Kilwa, Somanga, Bwera, Bungu and Mazomora. The effect of this document is that, apart from compensating the affected people for the loss of land, these projects resettle the affected people, and the project ensures that the people's livelihoods are not adversely affected by the acquisition.³⁵²

As shall be seen in Chapter Six,³⁵³ the projects that apply international standards in the compensation process are emphatic on respecting fairness principles, the constitutional provisions, favourable local laws as well as the human rights provisions. For example, the IPS standards,³⁵⁴ which are the World Bank's model for applying the UNGP standards,³⁵⁵ require that before acquiring the land, which it states should be a last resort, consent must be obtained from the landholders. In addition, compensation should be based on negotiation, and it should consider other livelihood factors and other uses of land. Furthermore, the IPS and the UNGPs require that the people involved must be put in a better situation.³⁵⁶ On the other hand, local laws are based on compensation that merely puts the affected people in the place that they would have been in if the acquisition was not done.³⁵⁷ This, as shall be seen in Chapter Five, has led to incidents of unfair compensation standards in petroleum projects. Chapter Five will thus analyse in detail how these two different systems of compensation can be viewed legally and their impact on petroleum projects where they have been applied.³⁵⁸

³⁵¹ *Ibid.*

³⁵² See, International Finance Corporation Handbook for Preparing a Resettlement Action Plan (2002) at 33.

³⁵³ Chapter Six, section 7.

³⁵⁴ See, IPS standards, *Op Cit*, note 24.

³⁵⁵ See, principle guideline 17.

³⁵⁶ *Ibid.*

³⁵⁷ See, Chapter Five sections 3.2 & 4.

³⁵⁸ See, Chapter Five section 4.

6. PROTECTION OF LIVELIHOOD RIGHTS RELATED TO LAND

As was seen in Chapter Three, international human rights law supports a compensation scheme that considers broader livelihood factors arising from interference with land or property rights. Case law in Tanzania holds that land is a fundamental human right which aids the realisation of other rights.

*Ibrahimu Korosso and 134 others & LHRC v The D.C. and O.C.D.*³⁵⁹ for example, is an example of cases demonstrating both how land is a key factor to survival and maintaining a livelihood, and the importance of protecting the right to land. This case began at the National Human Rights Institute, the Commission for Human Rights and Good Governance (CHRAGG) that has the constitutional mandate to promote and protect human rights in the country.³⁶⁰ The facts that gave rise to the case are that in 1993 a portion of land in the Serengeti District was registered as Nyamuma Village. However, in the following year, 1994, a big chunk of the village was taken up to make the Ikorongo Game reserve.

What remained was where the complainants were residing and was called Nyamuma Iliyobaki, literally meaning the 'remaining Nyamuma'. On 8 October 2001, an announcement was made through loudspeakers saying villagers residing at the remaining Nyamuma should vacate the area by 12 October the same year. On the same day, they were forcibly evicted, and their properties were set on fire.

The Legal and Human Rights Centre representing the 135 villagers who had suffered from the ordeal filed a complaint with the Commission against the state agents involved.³⁶¹ The Commission investigated the complaints and after an interview with more than 120 witnesses for the complainants on 13 December 2004, the Commission gave its decision that the government had violated the rights of the complainants, who,

³⁵⁹ *Ibrahim Korosso & 134 Others v DC of Serengeti, RPC of Serengeti & Attorney General*, High Court of Tanzania, Civil Case No 49 of 2005 (Unreported) (*Korosso*).

³⁶⁰ Established under the Commission for Human Rights and Good Governance Act, No. 7 of 2001.

³⁶¹ The CHRAGG, Case No HBUB/S/1032/2002.

it ruled, must be resettled on their native land and further the Government of Tanzania should pay them compensation of more than 800 Million Tanzanian Shillings. The Commission's holding was that:

The evictions involved arbitrary deprivation and uncompensated expropriation of property; physical assault, which led in one case to a miscarriage and in another to serious injury; intimidation and confinement of those from the LHRC who initially investigated the circumstances surrounding the evictions; loss of livelihood and failure to provide humanitarian aid to those who were summarily cast out of their homes; denial of education to the affected children following the eviction; and subjection to cruel, inhumane and degrading treatment.³⁶²

The Commission forwarded, its findings and recommendation, to the government for execution. In its written response, dated 18 May 2005, the Government through the Attorney General said that the government had conducted its own independent investigation and found that the District Commissioner and the District Police Commander at Nyamuma village did not commit any human rights violation. The villagers sought further legal redress.

Pursuant to section 28 (3) of the Act, the Commission recommended the LHRC to the 135 villagers to bring an action in the High Court of Tanzania for resettlement and compensation. The LHRC filed one suit in main registry of the High Court to enforce of the Commission's compensation order and another at the Land Division to enforce the Commission's resettlement order.³⁶³ The High Court dismissed both cases on the ground that it did not have the jurisdiction to enforce the recommendations of the Commission.³⁶⁴ This forced LHRC to file an appeal to the Court of Appeal.³⁶⁵ The Court of Appeal held out that it was proper for LHRC to file an application to the High Court to

³⁶² *Ibid.* See also Ruth Buchanan, Hellen Kijo-Bisimba & Kerry Rittich 'The Evictions at Nyamuma: Struggles over Land and the Limits of Human Rights Advocacy in Tanzania' in Lucie E White & Jeremy Perelman (Eds.) *Stone of Hope* (2011) at 590.

³⁶³ *Ibrahim Korosso & 134 Others v DC of Serengeti, RPC of Serengeti & AG*, Civil Case No 49 of 2005.

³⁶⁴ See critique on the enforceability of the CHRAGG recommendations in Aloys Rugazia *Introduction to Judicial Practice and Administration* (Nairobi: Law Africa, 2019) at 97.

³⁶⁵ See, *Legal and Human Rights Center v Thomas Ole Sabaya & Four Others, Court of Appeal of Tanzania*, Civil Appeal No. 88 of 2006, Dated Oct 11, 2008, read on January 22, 2009.

enforce the Commission's decisions. It thus referred the matter back to the High Court before another judge for enforcement.³⁶⁶ By allowing the High Court to enforce the decision of the Commission, *Koroso* indirectly upheld the right of the communities facing eviction to a livelihood.

Responding to this case, some scholars have highlighted the importance of balancing between the development activities that require land and the human rights arising from land deprivation. Buchanan, Kijo-Bisimba and Rittich, for example, have argued that there are alternatives that could reliably have prevented the evictions and subsequent violations from occurring against the Nyamuma villagers.³⁶⁷

Generally, some Tanzanian case law establishes a link between the right to property and other related rights such as the right to work, the right to housing, the right to food and the right to an adequate standard of living.³⁶⁸ Although the right to housing, the right to food, and the right to an adequate living standard are not specifically mentioned in the Constitution, the High Court case of *Nyamuma*³⁶⁹ read Article 24 and other related rights in a way that ties the socio-economic rights to the rights specifically provided in the Constitution.³⁷⁰ Consequently, the right of access to justice and to equality before the law are examples of other rights linked to the right to property. As was seen in the last chapter, the international law creates an obligation on the state to make legal redress accessible to any person whose right to property has been infringed.³⁷¹ This obligation is based on the recognition that human rights are illusory if they cannot be

³⁶⁶ *Ibid.*

³⁶⁷ See *Nyamuma's case, Op Cit*, note 359.

³⁶⁸ See, *Ibrahimu Korosso et al*, *Op Cit*, note 361; Also see, *A.A Sisya v Minister of Finance & the A.G*, High Court of Tanzania at Tabora Case no. 5 of 1994.

³⁶⁹ *Ibrahimu Korosso et al, Ibid.* Also see, *Rev. Christopher Mtikila v Attorney General* [1995] TLR 31 at p. 66; *Attorney General v Rev. Christopher Mtikila*, Civil Appeal No. 45 of 2009 (unreported); *Julius I.F. Ndyababo v Attorney General*, Civil Appeal No. 64 of 2001.

³⁷⁰ See *Christopher Mtikila v Attorney General Ibid.*

³⁷¹ See, Chapter Three, section 2.3.

adequately enforced.³⁷² To that end, Article 13 of the Tanzanian Constitution attempts to protect the right. The Article states that all persons are equal before the law and are entitled, without any discrimination, to equal protection before the law.³⁷³ Another provision on the access to justice is contained in Article 107A of the Constitution, which prohibits the application of legal technicalities at the expense of justice.³⁷⁴

Chapter Five will thus look at how the Tanzanian jurisprudence and more particularly the law on compensation in petroleum projects links these other important laws to the right to property. The Tanzanian Constitution in Article 24(1) provides a general rule that every person should be accorded a right to the protection of his or her property held in accordance with the law.³⁷⁵ It presupposes that there must be clear and certain laws that protect the right to property; hence, Article 24(2) prohibits the arbitrary acquisition of land.

7. CONCLUSION

This chapter sought to identify how the Tanzanian petroleum legal framework protects the right to fair compensation to those whose land the state acquires for petroleum use,

³⁷² The remedies should be 'available, effective, and sufficient'. See *Dawda Jawara v Gambia*, Communication Nos 147/95 & 149/96 (2000).

³⁷³ Here the law requires that every person should be treated equally before the law and this includes women and men; See, *Bernado Ephrahim v Holaria Pastory and Gervazi Kaizilege*, High Court of Tanzania at Mwanza, (PC) Civil Appeal No.70 of 1989, In this decision the judge reasoned that women have been elevated to the same plane as the men, at least in respect of inheritance of clan land., See commentary on this decision in, Chris Maina 'Peter Five Years of The Bill of Rights in Tanzania: Drawing A Balance-Sheet' (1992) 4 Afr. J. Int'l & Comp. L. 131.

³⁷⁴ Article 107(2)(e) provides ad verbatim that 'in delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say (e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice.' despite the enactment of this provision the court of appeal of Tanzania which is the highest in the country as of recent reinstated its ambition on clinging to procedural issues arguing that Article 107A(e) is not intended to override the importance of procedural laws, Thus in the Case of *Zuberi Mussa v Shinyanga Town Council* (Court of Appeal of Tanzania, Civil Appeal No. 100 of 2004).

³⁷⁵ Article 24(1) of the United Republic of Tanzania Constitution, 1977.

in light of the fairness theory discussed in the last chapter. Although it is easy to see that the Tanzanian legislation attempt to protect the right to own land by setting the criteria for which the state can acquire land from its owners and how it should pay compensation to them, there are clear indications that the petroleum compensatory framework is not fair. The theories underlying the principles of compensation are problematic and pose a challenge to the broad object of providing fair compensation. There are also many procedural gaps that contribute to the unfairness. The precise ways in which these principles and procedures are unfair are discussed in the next two chapters.

CHAPTER FIVE

SUBSTANTIVE FAIRNESS IN LAND COMPENSATION IN THE TANZANIAN PETROLEUM LEGAL FRAMEWORK

1. INTRODUCTION

Chapters Two and Three established a theory of fair compensation which has two parts. The first part dealt with substantive justice, dealing with how land compensation facilitates the livelihood rights of the people affected by petroleum projects. The second part advocates for procedural justice by demanding that the compensation process should be participatory.³⁷⁶ Chapter Four introduced the Tanzania petroleum compensation framework. It was shown that the Tanzanian Petroleum Act and the LAA have both substantive and procedural safeguards to ensure that the land rights of the affected people are protected. This chapter analyses in detail the substantive provisions of the Petroleum Act and the LAA, with the aim of ascertaining their effectiveness in protecting the land rights of the people affected by petroleum projects (PAPPs).

2. COMPENSATION UNDER THE PETROLEUM ACT

The requirement that compensation should consider the livelihood situation of the people affected by petroleum projects is not an entirely foreign concept to the Petroleum Act. As will be seen shortly, both the Petroleum Act and the LAA state that compensation is payable where there is a disturbance to the PAPPs' enjoyment of their land. For example, section 80 of the Act restricts licensees from conducting activities on areas inhabited by human settlers and agricultural land without the written consent of the landowner, which also includes an agreement on how compensation should be paid to the landowner.³⁷⁷ However, this positive part of the law is overridden by the claw-back provisions, which take away the safeguards against encroachment on the land

³⁷⁶ See, Chapter Six.

³⁷⁷ See section 80 of the Petroleum Act.

rights of the people affected by petroleum projects without payment of compensation that is based on consent, consensus and consultation. The discussion that follows evaluates the statutory bases for, and the principles governing, compensation for land encroachments made in terms of the Petroleum Act.

2.1 Compensation Based on Disturbances Caused by Petroleum Projects (Sections 110-112 Petroleum Act)

For a better understanding of this part, the meaning of this term should be clarified: 'private designated development area(s)' means land owned by a private person and to which a license holder has been given petroleum rights'.³⁷⁸ Sections 110-112 of the Petroleum Act regulate how licensees and land occupiers can co-own a private land designated for petroleum exploration and development. Also, they regulate how compensation for disturbances of property rights that do not involve the physical acquisition of the land should be done. Overall, these sections do the following: first, they codify the rights of the landowners over the surface of the land. Second, they provide for the rights of the license holders over the subsurface or the petroleum resources in the subsoil. Third, they explain what rights the land occupier does not have as far as the exercise of his right to use the surface of the land is concerned. Fourth, they provide for the remedies available to the land occupier whenever the licence holder interferes with the rights of the lawful occupier. These elements are analysed below.

2.2 Landowners and Surface Rights (Section 10(1) of The Petroleum Act)

Section 110(1) of the Petroleum Act substantively aims at protecting the rights of the PAPPs, but it has its setbacks. It states: 'The lawful occupier of any land in exploration or a development area shall have the right to graze stock or cultivate the surface of land if

³⁷⁸ See Section 2 of the Petroleum Act.

the grazing or cultivation shall not interfere with exploration or development operations in such area.³⁷⁹

This section is inconsistent with both international law and the Tanzanian Constitution.³⁸⁰ As was seen in Chapter Three, the international legal instruments prohibit interference with the property rights of the PAPPs.³⁸¹ Despite that, section 110(1) does just the opposite. It subjects the right of the landowners to the right of the licensees by requiring that landowners should not interfere with the rights of the licensees. The approach in section 110(1) above fails to recognise the right of the PAPPs to use their land freely and their fundamental right to a livelihood.

2.3 The Restrictions Against Landowners (Section 110(2), Petroleum Act)

As shown in Chapter Three, the right to property is one of the most protected rights in international law.³⁸² The only situation in which the right to property in land can be interfered with is when the state needs to acquire land for public use. If such need arises, the state has to provide fair compensation. While section 110(2) of the Petroleum Act purports to define the circumstances in which the licensees can restrict the property and land rights of the PAPPs, it does so without satisfying the constitutional and the international law threshold for acquiring the land. Section 110(2) provides: ‘the lawful occupier of land in a development area shall not erect any building or structure in the area without the written consent of a holder of development licence concerned, and if the Minister considers that the consent is being unreasonably withheld, may give his consent to the lawful occupier.’³⁸³

³⁷⁹ *Ibid* Section 110 (1).

³⁸⁰ See, Article 24 of the Constitution.

³⁸¹ See, Chapter Three, section 1.1.

³⁸² See, Article 14 of the Banjul Charter and Article 17 of the UDHR.

³⁸³ Section 110 (1) The Petroleum Act.

In effect, section 110(2) gives powers to the licensees to decide what the PAPPs are allowed to do on their land. This section constitutes a serious encroachment on landowners' rights to property, to adequate housing, and to a livelihood, by subjecting the use of land to the discretion of the licensees and the minister. As was seen in Chapter Three, international law states that the right to adequate housing is a fundamental livelihood right that must be protected. It would be better for the relationship between the licensees and the landowners or the PAPPs to be regulated by contract. The current legal position gives too much power to licence holders.

2.3.1 Who Pays Compensation in Unforeseen Damages or Land Interference?

Section 111(1) of the Petroleum Act³⁸⁴ provides that if the exploration or development operations undertaken by licence holders or contractors interfere with the rights of a landowner, the license holder shall be liable to pay the lawful occupier fair and reasonable compensation for interference or damage caused. On the other hand, section 111(1) imposes land use limitations on land occupiers in designated petroleum development areas. For example, land occupiers are not allowed to build a house or any structure in the area without the written consent of the holder of the development license concerned. This clearly infringes the landholders right to fully enjoy their right to property, and it also violates their right to housing by subjecting it to the licensees' discretion.

Section 111(1) presupposes that the licence holders are the ones that have the responsibility of paying compensation in cases where the land is interfered with due to petroleum projects. Such an approach ordinarily suggests that the arrangement

³⁸⁴ Section 111(1) of the Petroleum Act, provides, 'where, in the course of exploration or development operations the licence holder and contractor interfere with the rights of the lawful occupier of any land or cause damage to any crops, trees, buildings, stock or works thereon, by virtue of which operations are carried out, the licence holder shall be liable to pay to the lawful occupier fair and reasonable compensation in respect of interference or damage in accordance with the right or interest, if any, of lawful occupier in the property concerned.'

concerned is private since the parties in this arrangement are the landowners and the licensees.³⁸⁵ Although the study did not come across any extractive industry case in Tanzania challenging this section, the Tanzanian High Court case of *Sisi Enterprises v A.G*³⁸⁶ discussed in Chapter Four³⁸⁷ resolved a similar issue. In this case, the United States government sought to buy a piece of land from *Sisi Enterprise*, with a view to building a facility to house the Embassy for the United States in Tanzania. However, the United States government and *Sisi Enterprise* failed to agree on a price. As a result, the government of Tanzania intervened and invoked its statutory powers to acquire the land from *Sisi Enterprise* allegedly for public interest. *Sisi Enterprise* felt aggrieved and filed the matter in the Tanzanian High Court for determination, arguing that building a US Embassy was by no means a public interest. Deciding in favour of *Sisi Enterprise*, the High Court held that the acquisition of land for purposes of building a United States of America Embassy in Tanzania was not an issue of public interest; therefore, invoking the acquisition clause was unjustified. As a result, the Court ruled that the owner of the land was entitled to a negotiated amount, and state interference was unnecessary.

It is puzzling that the Tanzanian Petroleum Act chose to protect the licensees at the expense of the vulnerable communities whose livelihoods are often negatively impacted by evictions and land acquisition. It could be argued that the provisions of section 111(1) of the Tanzanian Petroleum Act are justifiable by the theory of eminent domain, which holds that the state has sovereign powers over land and the duty to pursue development activities. This is because international law recognises the state's duty to foster development activities as one of the means of advancing the livelihoods of the people. However, international law imposes a duty on states not to abuse such power.³⁸⁸ For example, in the *Ogoni's case* already discussed in Chapter Three, the Africa Commission held:

³⁸⁵ See, *Sisi Enterprise, Op Cit*, note 311; Also see, an example *Henwood v Maloma Colliery Limited and Another* (1994) SZHC 68 (30 September 1994).

³⁸⁶ *Sisi Enterprise Ibid.*

³⁸⁷ See Chapter Four, section 2.1.

³⁸⁸ See, Permanent Sovereignty Over Natural Resources, General Assembly resolution 1803 (XVII) of 14 December 1962, Article 4 states: 'Nationalization, expropriation or requisitioning shall be based on grounds or

The [African] Commission does not wish to fault governments that are labouring under difficult circumstances to improve the lives of their people. The situation of the people of Ogoniland, however, requires, in the view of the [African] Commission, a reconsideration of the Government's attitude to the allegations contained in the instant communication. The intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities.³⁸⁹

For lack of a Tanzanian case dealing with this issue, a domestic example of the position held by the African Commission of Human and Peoples' Rights can be seen in the Kenyan case of *Mui Coal Basin Local Community & Another*³⁹⁰ where the Kenyan Constitutional Court held that there is a need to balance the desire to utilise natural resources sustainably to spur economic development and the need to protect the human rights of the affected people.³⁹¹

Apart from delegating the powers of the state to acquire and compensate for land to the licensees, compensation payable under section 111(1) appears to be for interferences with or damage to land but not for the actual acquisition of land. The latter is dealt with by section 111(2) which makes provision for how the licensees should compensate the PAPPs for the land acquired by them. It provides: 'Where the value of any land has been enhanced by exploration or development operations, the compensation payable

reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.'

³⁸⁹ See, *Ogoni's Case*, *Op Cit*, note 228 para 69.

³⁹⁰ See, *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR.

³⁹¹ *Ibid.*

pursuant to subsection (1) in respect of the land shall not exceed any amount which is payable if the value had not been so enhanced.'

As can be seen from above, sections 111 (1) and (2) of the Petroleum Act, read together, give licence holders the power to acquire land and to limit the land rights of the land occupiers. As shown in Chapter Three,³⁹² Article 14 of the Banjul Charter allows the state to acquire the land, but only to advance a public purpose.³⁹³ Neither international law nor the Tanzanian Constitution addresses a situation where the state uses its eminent domain to bestow upon private companies the power to acquire land from the PAPPs.

2.3.2 How is Compensation Paid?

Undoubtedly, the Petroleum Act protects the surface rights of the PAPPs to some degree by avoiding unnecessary physical acquisition of the land, as can be seen in section 110(3), which states thus: 'The rights conferred by a licence or an instrument of consent or permit shall not be exercised so as to affect the interests of any lawful occupier of land subject to proper conduct of operations pursuant to the licence or instrument of consent.'³⁹⁴ However, the same section 110 read together with section 111 of the Petroleum Act creates an asymmetric structure for the ownership of subsoil or the resources in the subsurface, and the rights over the surface of the land. Effectively, they create a land system where one person owns extractive rights, and other persons own the surface rights over the land (the surface owners), in which case the extractive rights are considered to be separate from the surface rights.

Section 110(3) of the Petroleum Act is clearly inconsistent with both the Constitution and the LAA. For example, the LAA, which seeks to implement the property provisions of the Constitution, states in sections 3 and 4 that the President may, 'subject to the

³⁹² See generally Chapter Three discussing Article 14 of the Banjul Charter, and Chapter Four on a discussion of Article 24 Sub-Articles (1) & (2) of the Constitution.

³⁹³ See Chapter Three, section 1.1.

³⁹⁴ *Ibid.*

provisions of the LAA, acquire any land for any estate or term where such land is required for any public purpose'. Section 4(1)(e) states further that land shall be deemed to be required for a public purpose if 'it is needed for or in connection with mining for minerals or oil'. This shows that the assumption in the LAA is that the state will acquire land required for the extraction of petroleum resources. The idea of severing land surface rights from the subsoil resources is thus foreign to the LAA. The LAA then lays down procedures on how the state should compensate for land acquired for the public interest.

Therefore, since sections 110 and 111 of the Petroleum Act purport to create a land system where landowners can own surface rights and the licensees the petroleum resources in the subsoil, there has to be a private contractual relationship between the licence holder and landowners. This is because the LAA does not have provisions on how a private person can acquire and pay compensation for land. In such a case, the state's role is to facilitate the negotiation of a lease agreement between landholders and licensees, instead of imposing limits on landowners in a way that undermines their livelihood.

The Tanzanian High Court case of *Sisi Enterprises v A.G.*,³⁹⁵ discussed earlier, is relevant here. In this case, as was seen, the Court held that the acquisition of land for purposes of building a United States of America Embassy in Tanzania was not an issue of public interest; therefore, that invoking the acquisition clause was unjustified.³⁹⁶ The Petroleum Act and the Land Acquisition Act provide that petroleum activities are to be pursued in the public interest, which constitutionally and legally confers on the state the power to acquire the land. It is out of place that, instead of government authorities invoking this power, the Petroleum Act suggests that the licensees are the ones who pay compensation. As was seen earlier, the Sisi Enterprise case suggests that in that kind of circumstance, there should be a private negotiation between the investor and the landowners on how much the latter should be paid for their land. Therefore, the law

³⁹⁵ *Sisi Enterprise, Op Cit*, note 311.

³⁹⁶ See section 2.1, of this Chapter.

ought to state clearly that the powers to compensate for the land vest in the state, and in the event that the licensees require land for petroleum activities, they should privately negotiate with the communities or the PAPPs based on the willing seller-willing buyer. This is because the LAA only provides procedures on how the state should acquire and pay compensation for the land, and not with how private persons or companies should do so.

2.3.3 What is Compensated?

As noted earlier, section 111(1) of the Petroleum Act provides that ‘the licence holder shall be liable to pay the lawful occupier fair and reasonable compensation’ for any interference with or damage to the property concerned.³⁹⁷ Although this section appears to adopt the conventional language of fair compensation, it is replete with problems. Section 111(1) seems to encourage a form of land interference that is repetitive, such that the licensees can at any time after the inception of a petroleum project interfere with a landholder property in land, provided that the compensation is awarded. The section presupposes that interference with the land is justifiable provided that the licensee pays compensation to the landowners for such interferences.

Furthermore, section 111 of the Petroleum Act does not make specific provision for the extent to which interference with land rights is allowed. As a result, repeated interferences that amount to *de facto* deprivation of the land or make it impossible for landowners to put their land to meaningful use are possibly allowed, provided compensation is paid. This must be considered against the context that the nature of the land occupiers’ rights protected under section 110 includes grazing and agricultural activities. Therefore, the question whether monetary compensation is a suitable alternative to such kind of interferences becomes relevant. It can be argued that where petroleum development activities interfere with the ‘grazing rights’ of communities, it is unlikely that monetary compensation will offer a solution to the PAPPs since in this

³⁹⁷ Section 111(1) of the Petroleum Act.

situation, the affected people might need alternative land to maintain their livelihood, i.e., to graze their herds.

It can therefore be concluded that sections 110, 111 and 112 of the Petroleum Act do not fully address the critical functions of the land to the local communities. An application of the theory of fair compensation, as shall be seen in the next chapter, could help the authorities to follow due process in determining whether to acquire land, where alternative land must be allocated, or what kind of compensation is suitable.

2.3.4 When is the Compensation Paid?

The theory of fair compensation espoused by this study demands that the state should pay compensation to the PAPPs before the acquisition of land takes place.³⁹⁸ The timing of compensation is crucial because it prevents the PAPPs from being rendered homeless or marginalized and allows them to make their resettlement plans. The rationale for conducting an environmental impact assessment is to ensure that an assessment of the potential damage associated with interference with land rights is made beforehand. In *Endorois* case, discussed in Chapter Three, the African Commission said that displaced persons should be '(i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them.'³⁹⁹

Section 111 of the Petroleum Act provides:

- (1) Where, in the course of exploration or development operations the licence holder and contractor interfere with the rights of the lawful occupier of any land or cause damage to any crops, trees, buildings, stock or works thereon, by virtue of which operations are carried out, the licence holder shall be liable to pay to the lawful occupier fair and

³⁹⁸ See Chapter Three, section 3.1.1.

³⁹⁹ See *Ogoni's case, Op Cit*, note 228.

reasonable compensation in respect of interference or damage in accordance with the right or interest, if any, of lawful occupier in the property concerned.

- (2) Where the value of any land has been enhanced by exploration or development operations, the compensation payable pursuant to subsection (1) in respect of the land shall not exceed any amount which is payable if the value had not been so enhanced.
- (3) Where the amount of compensation to be paid pursuant to subsection (1) is in dispute, either party may refer the matter to PURA, which shall deal with in accordance with the provisions of Part XI.⁴⁰⁰

It is clear from this section and others around it⁴⁰¹ that they do not make it clear when the PAPPs should be paid compensation. They also do not say whether the licence holders should assess the expected damage before carrying out their activities on the occupier's land or afterwards.⁴⁰² More specifically, section 111 of the Petroleum Act suggests that the licence holders can acquire or interfere with land rights and pay compensation after the acquisition or interference. Considered together with the fact that the Act allows continuous interference in the PAPPs' land rights, it could be argued that the Act constitutes one of the most flagrant violations of international standards on fair compensation. To that end, Tenga and Mramba have stated that:

Section 3(g) of the Land Act Cap 113 provides payment of compensation in full, fair, and prompt (sic) to persons whose land is revoked or acquired or interfered with by the State. The acquisition procedures are clear and transparent, but the term 'Fair Compensation' is subject to debate. The compensation is decided by the valuations based on certain indicators that solely ignore the rehabilitation aspects. Generally, the persons who lose land do not consider compensation fair. Moreover, in certain acquisitions, compensation is paid after (sic) more than six months after the valuation. Although the law provides that late payments of compensation will attract bank interest rates, but (sic) the government does not abide by the law.⁴⁰³

⁴⁰⁰ Section 111(1)-(3) of the Petroleum Act.

⁴⁰¹ See Chapter Four, section 3.1.1.

⁴⁰² Section 110 and 111 of the Petroleum Act tend to be inconsistent with section 3 of the LAA which states that the power to acquire and compensate land vest on the President.

⁴⁰³ See, Ringo Willy Tenga & Sist J. Mramba 'The Land Governance Assessment Framework (LGAF) Synthesis Report' (World Bank, 2015) at 74.

It can therefore be concluded that the law does not require that compensation should be made before land is acquired. Neither does it indicate whether interest will accrue from unpaid compensation and what the applicable rate is. Even if such interest was legally required, payment of interest for delayed compensation may offer little remedy to the displaced people who need compensation to secure new homes and to start a new life elsewhere. In real life, delayed compensation is one of the very serious problems that the people affected by land acquisition face.

2.3.5 Compensation for Way-Leave (Sections 185-186 of the Petroleum Act)

Sections 185 and 186 of the Petroleum Act make provision for how the state can physically acquire land from the PAPPs for petroleum activities and for the applicable compensation. These sections deal with land acquisition for the construction of petroleum infrastructure such as pipelines transporting petroleum resources from the extractive field to their destination. The Petroleum Act refers to the space used for this thoroughfares as 'way-leave'. The sections provide that a licensee shall, in consultation with the relevant authorities, acquire a wayleave around existing and future gas infrastructure and petroleum installations. According to these sections, the owners of property on or bordering a wayleave shall not interfere with a licensee's acquired rights. On the other hand, section 186 of the Act provides that the licensee shall pay compensation to the property owner for any wayleave granted. The section also provides that the LAA shall apply to any dispute related to the applicable compensation.

Although section 186 of the Petroleum Act is intended to give guidance on how the land acquiring authority should pay compensation to the PAPPs, it does not satisfy the requirements of fair compensation discussed in Chapter Four of this study. It is important to note that section 186 does not expressly state that the LAA is the law governing how the land should be acquired. Instead, the section merely asserts that the LAA shall be used to settle disputes related to the amount of compensation. However, section 4 of the LAA only states that land may be acquired to exploit gas. Section 4 of the

LAA, read together with section 186 of the Petroleum Act, suggests that the LAA regulates land compensation in the context of petroleum projects. If the legislature did not intend that the LAA should apply in the acquisition and compensation of land under section 186, then the problem would even be more serious since section 186 is silent on the question of what procedures should be used in acquiring and compensating for the land.

The failure to lay down the applicable procedures for acquiring and compensating land under section 186 has left a serious lacuna. As was seen in the preceding chapter,⁴⁰⁴ this has created a room for different legal instruments and standards to be used in calculating compensation for land acquired for petroleum activities in Tanzania, depending on who is funding a project.⁴⁰⁵ Though this omission may be exploited to accommodate better standards in compensation, it makes the law on compensation unsettled.

Even if one assumes that the LAA applies when land needed for petroleum activities is acquired and for calculating the resulting compensation, it still leaves unclear 'who' has the power to acquire the land and the responsibility to pay compensation. As seen earlier, the Petroleum Act suggests that a licensee, and not necessarily the state, is responsible. On the other hand, the LAA recognises only the President as the person with powers to acquire and pay compensation for land.⁴⁰⁶ The uncertainty caused by these provisions in the Petroleum Act contributes to lack of fairness in the practice of land acquisition in Tanzania.⁴⁰⁷

⁴⁰⁴ See Chapter Four.

⁴⁰⁵ See Kombe and Komu, *Op Cit*, note 37.

⁴⁰⁶ See, section 3 of the LAA.

⁴⁰⁷ See Chapter Three.

3. COMPENSATION PRINCIPLES UNDER THE LAA

This section analyses the principles of compensation provided under the LAA, since section 186 of the Petroleum Act refers to the LAA. Most of the principles to be analysed under this part are contained in section 12 of the LAA, which provides that:

- (1) No compensation shall be awarded in respect of any land, which is vacant ground.
- (2) Where the development of any land acquired under this Act is inadequate, whether such land is in an urban area or a rural area, any compensation awarded shall be limited to the value of the unexhausted improvements of the land.
- (3) Where the land acquired is a land which, immediately prior to its acquisition, was being used as a cemetery or a crematorium or for any purpose other than for gain or for profit, or personal occupation by the person holding the Government lease or right of occupancy in respect of the land the compensation shall, if the President so directs, consist of the value of any unexhausted improvements of the land and a grant of some public land not exceeding in value the value of the land acquired.

3.1 The Principle of Unexhausted Improvements

Section 12 of the LAA codifies the principle of unexhausted improvements. According to this principle, compensation is limited to unexhausted improvements. It is argued that this principle is incompatible with the tenets of fairness. Not surprisingly, Tanzanian courts have tried to avoid interpreting section 12 of the LAA literally.

For example, in *Attorney General v Lohay Akonaay and Joseph Lohay*,⁴⁰⁸ the Court of Appeal of Tanzania dealt with the question of the inadequacy of land compensation, which focuses on unexhausted improvement.⁴⁰⁹ In this case, the state had acquired a large tract of land that was part of Mulbadaw village in Tanzania, on behalf of the NAFCO, a state farm corporation. The affected people, including Akonay, were not paid any compensation for the loss of their land. Aggrieved villagers challenged the state in

⁴⁰⁸ *Attorney General v Lohay Akonaay and Joseph Lohay* (1995) TLR 80 (CA).

⁴⁰⁹ *Ibid.*

the High Court of Tanzania. The case then escalated to the Court of Appeal of Tanzania. The state's major argument in this case was that land in Tanzania is publicly owned and the state is not obliged to pay compensation when it acquires land in the public interest. Referring to section 12(1) of the LAA the Court of Appeal of Tanzania held that although there were no unexhausted improvements on the land, the PAPPs were entitled to be compensated for the efforts that they had put into clearing and maintaining the land.⁴¹⁰ It said: 'Fair compensation is not confined to unexhausted improvements; where there is no unexhausted improvement, but some effort has been put into the land by the occupier, that occupier becomes entitled to protection under Article 24(2) of the Constitution, and fair compensation is payable for deprivation of property and land.'⁴¹¹

As is clear from this dictum, the Court of Appeal read section 12(1) of the LAA in the light of the Constitution in order to hold that fair compensation for land requires more than the equivalent of unexhausted improvements. Still yet to be recognised is compensation for all essential functions that the land serves to its owners such as cultural and the spiritual uses.⁴¹² In the literature, the social dimension of land is well recognised.⁴¹³ For instance, Gregory,⁴¹⁴ criticising the land acquisition clauses that are based only on the economic aspect of the land, notes that 'the moral dimension of property is that it is basic insofar as it implicates the values of human dignity and self-governance and, on the other hand, the civic dimension of the property is that a property is a material basis for realising a pre-existing understanding of the proper social order'.⁴¹⁵ Also, according to Krause:

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² See *the Endorois case, Op Cit*, note 153 para 237; Also see Chidi Anselm Odinkalu 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights, (2001) 23 Human Rights Quarterly 327-369 at 346-347; Fons Coomans, *Op Cit*, note 241 at 757.

⁴¹³ See, Bryan Lee and Kendra Dupuy, *Op Cit*, note 303 at 94.

⁴¹⁴ See, Gregory S. Alexander *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997) at 1-2.

⁴¹⁵ *Ibid.*

The characteristic of the right to property is that it cannot be classified as an exclusively civil or political right, nor as an economic or social right It is associated with civil liberties, but at the same time, it has strong economic implications Indications of 'dual nature' of the right to property can also be found in the drafting of international human rights instruments... the drafters emphasised that the right to property is subject to immediate implementation...⁴¹⁶

Considering the social function of land is particularly relevant in the context of land held under customary tenure. For example, Corry and Hartnoll have shown that the Haya customary law in Tanzania requires consent to be obtained from the clan members before a person can sell clan land. That almost excludes clan land (Kibanja-kioruganda) from commercial and civic circulation. Clan land cannot be sold to outsiders or non-clan members without consulting the members of the clan.⁴¹⁷ The *Chagga* people of Tanzania also have sacred clan lands referred to as *Kihamba*, which cannot be sold beyond the circle of clan members.⁴¹⁸ The Haya and Chagga customs establish that clan land cannot have direct economic value. This is not addressed by the LAA. At the very least, the Act can be presumed to treat all land as being potentially subject to compulsory acquisition and to financial compensation.

3.2 The Principle of Equivalence (POE)

The principle of equivalence maintains that the compensation given to the PAPPs should neither enrich nor impoverish them.⁴¹⁹ Section 4 of the LAA and sections 11 and 12 of the LAA state that compensation for land, whether monetary or alternative land, should not exceed the value of the land. This does not meet the requirements of fair compensation as it fails to recognise that compensation for land acquired for petroleum

⁴¹⁶ Catarina Krause 'Right to Property' in AsbojoineEide, Catarina Cruise & Allan Rosas, *Economic Social and Cultural Rights* (2nd Ed. 2001) at 191-192.

⁴¹⁷ Hans Cory & M. M. Hartnoll *Customary Law of the Haya Tribe Tanganyika Territory* (7th Ed. 1971) at p. 159 para 557.

⁴¹⁸ See, Sally Falk Moore 'History and the Redefinition of Custom on Kilimanjaro' In: June Starr and Jane F. Collier (eds) *History and Power in the Study of Law* (1989) p. 277-301 at 283.

⁴¹⁹ See, Komu, *Op Cit*, note 37 at 225; See also, Simon Keith, Patrick McAuslan, Rachael Knight, Jonathon Lindsay et al *Compulsory Acquisition of Land and Compensation* (2008) at 7.

projects, should be aimed at raising the living standard of the PAPPs. Recognising this gap in Tanzanian law, Komu argues:

The existing literature on compensation problem (sic) in Tanzania indicates two schools of thoughts, (sic) one that is supportive of the doctrine embodied in 'principle of equivalence' (POE) and the other on 'sustainable livelihood approach' (SLA), which largely borrows from the pro-poor policy interventions discourses and the World Bank Safeguard Requirements. Simply stated and largely borrowing from Keith et al (2008), the basic premise is that those whose land is taken must be compensated for the loss (land, developments on the land and related costs such as disturbance) to the same extent as they would have expected to realize their values on a willing buyer and willing seller arrangements. Again, as Keith et al (2008) observed, the loss suffered by ex-land owners and occupants are not limited to the loss of assets, but there are significant human losses as well.⁴²⁰

Komu observes that the Land Act⁴²¹ provides more benefits that the affected people should be compensated for than does the LAA. Indeed, section 3(1)(g) of the Land Act states that one of the fundamental principles of the Tanzanian national land policy is 'to pay full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State'. The section also requires that attention should be paid to the market value of the real property, disturbance, transport costs, loss of profits or accommodation, the cost of acquiring replacement land, any other loss or capital expenditure incurred, and interest.⁴²²

However, although section 3(1)(g) of the Land Act enumerates more items to be compensated for, it is unclear whether it is applicable to the people affected by petroleum projects. This is because, despite being enacted more recently, in 2015, the Petroleum Act failed to state that the land obtained for petroleum projects should be compensated for in accordance with the Land Act. It instead refers to the outmoded

⁴²⁰ Felician Komu, *Op Cit*, note 37.

⁴²¹ Land Act, No 4 of 1999 (R.E 2002).

⁴²² *Ibid.*

LAA. As a result, Komu finds that, since the standards⁴²³ in the LAA favour the state, the state often applies the LAA in its compensation practices.⁴²⁴

Even if the LAA was applicable, both the LAA and the Land Act⁴²⁵ revolve around monetary compensation and do not adequately codify the pro-livelihood principle of compensation. The ‘principle of equivalence’ as applied in Tanzania seems incompatible with the theory of fair compensation, which holds that land compensation to the PAPPs should improve their condition of life.

4. CLARITY AND CERTAINTY OF COMPENSATION LAWS

As seen in the preceding discussion, the laws governing compensation for land acquired for, or damages caused by, petroleum activities in Tanzania are primarily the Petroleum Act and the LAA. However, as discussed in Chapter Four, in practice, since the LAA is an old law that is substantially out of step with the Tanzanian Bill of Rights adopted in the 1980s,⁴²⁶ some valuers favour the provisions of the Land Act. Overall, there is a considerable degree of uncertainty as to which law is applicable. In practice, this has allowed the state room to pick and choose which Act to apply at a given time depending on the interests it seeks to uphold.⁴²⁷ The inconsistency in the applicable laws is evident from the figure below:

⁴²³ Komu, *Op Cit*, note 37 at 254.

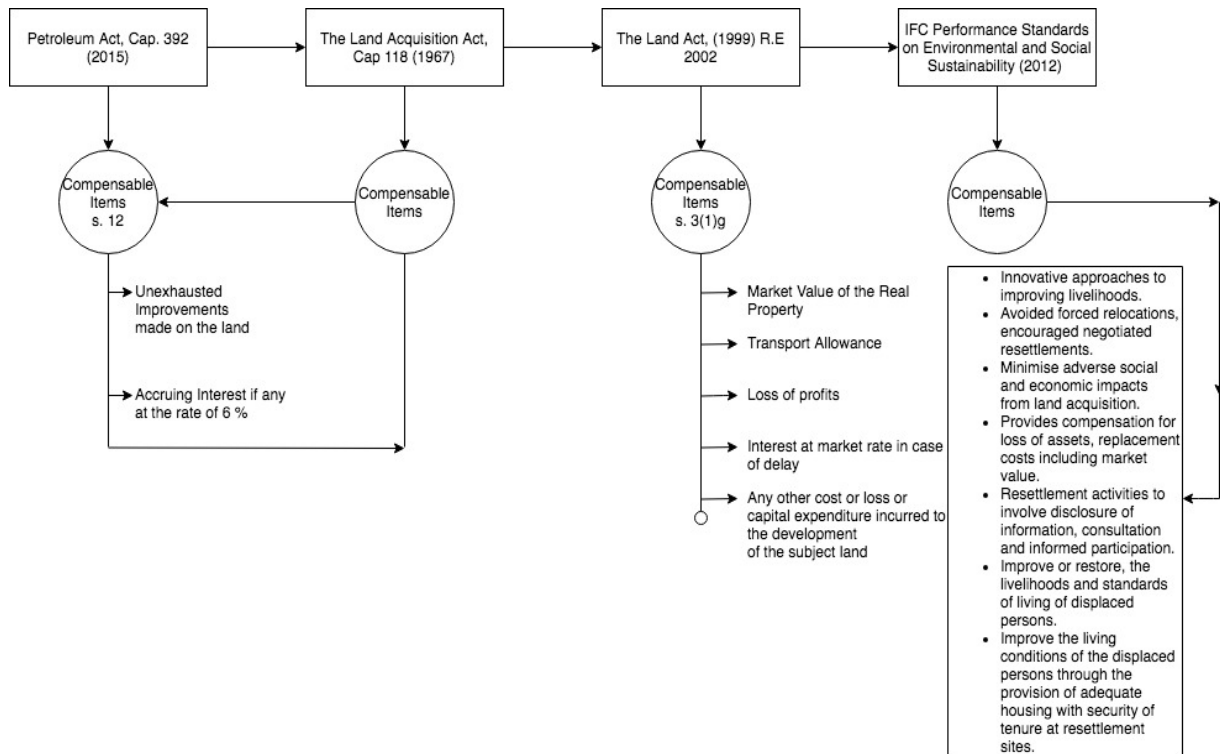
⁴²⁴ See, *Ibid*, note 37.

⁴²⁵ LAA section 3.

⁴²⁶ The Bill of Rights in the Tanzanian Constitution came enforceable in 1988, see, Damian Lubuva ‘Reflection on the Tanzania Bill of Rights’ (1988)14(2) *Commonwealth Law Bulletin* 853-857.

⁴²⁷ See, Komu, *Op Cit*, note 37 at 252-267; Also see, Wilbard Kombe, *Op Cit*, note 37.

Compensable Items Under Different Laws/Guidelines



The LAA provides that compensable items shall not include the value of the vacant land.⁴²⁸ With the land policy changes that took place in 1995, the compensable items were increased.⁴²⁹ These changes were later incorporated into the Land Act under section 3(1)(g) where the list of compensable items was extended to include the market value of the real property and the cost of acquiring it. Despite this, section 32 of the LAA claims exclusive jurisdiction on issues of land acquisition and compensation in petroleum related projects by stating ‘compensation for any land acquired under the LAA shall, notwithstanding the provisions of any other law, be determined in accordance with this Act.’⁴³⁰ Thus, section 32 of the LAA seems to render all other laws

⁴²⁸ See, sections 11 & 12 of the LAA.

⁴²⁹ Government of Tanzania Land policy (Dar es Salaam, Government Printers 1995).

⁴³⁰ See, the LAA section 32 states; ‘Notwithstanding’ is used in a clause that is to take priority over another clause. It tells the reader that the subject clause overrides the clause(s) to which it refers. It is, in effect, the opposite of “subject to”. See, Andrew Nickels ‘Solicitors at Risk’ available at <https://www.vantageinsurance.co.uk/assets/files/atrisk/November%202013.pdf> accessed on 04 October 2018.

inapplicable to land acquired for petroleum projects, cancelling the possibility of applying the better principles of compensation under the more up to date Land Act. This is disappointing given that the LAA is fundamentally inconsistent with human rights and fails to meet the requirements of fair compensation.

Another notable inconsistency between the LAA and the Petroleum Act relates to dispute solving mechanisms. While the LAA provides that complaints regarding land compensation should be submitted to the Regional Commissioner for redress, the Petroleum Act gives such powers to the Petroleum Upstream Regulatory Authority (PURA).⁴³¹ This creates an overlap of mandate between the Regional Commissioner and PURA in relation to disputes arising from land acquisition and compensation.⁴³² This is inconsistent with the theory of fair compensation, which asserts that the law must be specific on how participants shall resolve disputes between them.⁴³³

Adding to the inconsistencies on the applicable standards in compensating for land in Tanzania are inconsistent practices adopted by the state and other actors. Some petroleum projects in Tanzania apply the principles of compensation adopted by the World Bank⁴³⁴ and the United Nations. The UN Guidelines on Business and Human Rights, as well as the International Finance Corporation Performance Standards on Environmental and Social Responsibility are applied in Tanzania in the donor or internationally funded projects, usually to respond to conditions imposed by the funders. In the petroleum projects where the funding is locally sourced, the authorities are at liberty not to apply these standards. One report on the Songo Songo project states:

Tanzania Petroleum Development Corporation (TPDC) stated use of `domestic standards` in the calculation and payment of compensation (sic). The standards provided for by the Land Policy and Land Act was not applied consistently across the project area. Community members

⁴³¹ See, section 242 (1) of the Petroleum Act.

⁴³² Compare section 242 (2) of the Petroleum Act and section 5(2) of the LAA.

⁴³³ See, Rawls, *Op Cit*, note 153 at 178.

⁴³⁴ IFC Performance Standards on Environmental and Social Sustainability (2012).

complained that in Msimbati ward the compensation package involved disturbance allowance and rent payments, while in Kiranjeranje, some project affected people had to spend their own funds to travel to Kilwa district headquarters to collect their compensation, and yet, no refunds were made. The research findings revealed that TPDC did not fully disclose compensation terms. This lack of transparency, inevitably contributed to the feelings of dissatisfaction amongst the people affected by the project.⁴³⁵

This lack of clarity and certainty affects the predictability of the law, as the people affected similarly are compensated on different standards. This violates the principle of equality before the law, which provides that the law must apply equally to all people. As Rawls puts it, fairness requires that similar opportunities should be equally provided to all.⁴³⁶

The Petroleum Act itself establishes a contradictory compensation structure. On the one hand, it provides that the compensation procedure should be the one provided under the LAA, where the power to acquire land is vested to the President. On the other hand, it allows the licensees to exercise control over the land owned by the PAPPs. For example, the Petroleum Act appears to create a co-ownership structure between the land occupiers (who have the right over the surface of the land) and the licensees (who have the right over the subsoil resources) without firmly protecting the rights of the landowners. The Petroleum Act also deals with issues of compensation regarding the limitation imposed on or disturbances caused to the landholders under section 110-112 of the Petroleum Act, as well as compensation regarding land which has been physically acquired by the licensees, in a way that is not constitutionally and internationally tenable.

⁴³⁵ Hakirasilimali *Balancing Infrastructure Development and Community Livelihoods: Lessons from Mtwara – Dar Es Salaam Natural Gas Pipeline* (Oxfam Tanzania: 2017) at 6.

⁴³⁶ See, Article 13 of the Constitution; Also see, *A Sisy & 35 Others v Principal Secretary Ministry of Finance & the Attorney General*, Civil Case N0.5 of 1994 (unreported); *Legal and Human Rights Centre (LHRC) & Others v Attorney General (1)* (Miscellaneous Civil Case No 77 of 2005) [2006] TZHC 1 (2006).

5. COMPENSATION AND THE CORRELATED NATURE OF RIGHTS

As was seen in Chapter Three, livelihood rights are correlated to and indivisible from civil and political rights, including the right to property. The right to property is critical to survival in that it plays a critical role in facilitating the realisation of other rights. At the same time, access to other livelihood rights is critical to the enjoyment of the right to property. Chapter Three demonstrated that international law establishes the connection between property rights and other livelihood rights.⁴³⁷ While the right to property has been historically regarded as a civil and political right, it is also a livelihood right.

Chapter Four demonstrated that Tanzanian courts read socio-economic rights, including livelihood rights, into the Constitution.⁴³⁸ Failure by the land protection and compensatory legal framework for petroleum projects to take into account livelihood rights beyond the economic value of the land matters could be said to constitute a violation of the right to property. It could also lead to serious negative impacts. As Kombe remarks:

One of the most valuable lessons drawn is that the processes involved in land acquisition for public use, i.e. alienation, valuation and compensation, unless supported by clear, institutionalised and inclusive protocols, which are transparent and predictable, may result in unintended and undesirable negative consequences and grievances triggering conflicts between government and landowners. These could potentially escalate and assume political dimensions that may further undermine socio-economic sustainability, particularly of the poor, as well as constituting a threat to peace and stability.⁴³⁹

How the petroleum laws providing for land acquisition and compensation take into account other essential livelihood rights will be considered in relation to the right to food, the right to water, the right to education, cultural rights, the right to work, the right to a healthy environment, and the right to adequate housing.

⁴³⁷ See, the *Endorois case*, *Op Cit*, note 153 para 237.

⁴³⁸ See, Chapter Four section 6.

⁴³⁹ Kombe (2010), *Op Cit*, note 37 at 1.

5.1 Rights to Food and Water

International and comparative jurisprudence recognises the relationship between health, food, water and life and the importance of land as a source of livelihood. Sections 80 and 33 of the Petroleum Act in Tanzania protect to some degree the agricultural activities of the PAPPs.⁴⁴⁰ Parts of section 33 of this Act provide:

- (2) Prior to opening of areas for petroleum activities, the Minister shall, in collaboration with relevant authorities and in consultation with the Minister responsible for environment, undertake evaluation of various interests in the areas which shall be contained in the evaluation report.
- (3) The evaluation report shall include –
 - (a) an assessment of the potential for petroleum accumulation in the area; and
 - (b) a strategic assessment of the social and environmental impact of the potential petroleum activities on:
 - (i) national development;
 - (ii) local communities;
 - (iii) environment and risk of pollution.
 - (iv) trade and tourism;
 - (v) agriculture and fisheries; and
 - (vi) potential economic and social impact of the petroleum activities.

This is a positive provision since it represents an attempt to protect agricultural activities and fisheries which correlate to the livelihood rights of the PAPPs, particularly, the right to food, right to health, the right to work, as well as the right to culture. Also, section 80 of the Petroleum Act is an attempt to protect burial grounds, which correlate to cultural rights. This section states that the licensees must seek consent from the PAPPs before acquiring their agricultural land or the land they use as burial grounds. This is an attempt to involve the people affected by petroleum projects in decision-making.

⁴⁴⁰ See also Chapter Four.

However, studies in Tanzania have shown that the government has sometimes used force to acquire land, inflicting serious human rights violation on landowners. An Oxfam-Tanzania sponsored study, for example, looked at the impact of the Mtwara-Dar es Salaam gas pipeline on local communities living close to the pipeline route in Lindi and Mtwara, and found that some missed a farming season due to the disruption caused by the petroleum activities and misinformation on the scope of the project, which ultimately denied the affected households the opportunity to farm.⁴⁴¹ The report states: ‘the Land Policy and Land Law provide for timely payment of compensation. Yet, there were cases of delays, which were accompanied by inadequate communication and led to avoidable losses. For example, in Ziwani ward, over six-month delay and miscommunication led to a missed farming season.’⁴⁴²

Other studies have reported that the extractive activities have depleted water sources for communities.⁴⁴³ Fear of soil and water contamination is also a reality in these areas.⁴⁴⁴ The people living in petroleum areas are often concerned that intensified extractive activities could lead to high consumption of water and land by the companies involved and consequently affect both water levels and the amount of land available for food production. A Tanzanian case launched in a UK High Court of *Magige Ghati Kesabo & Others v African Barrick Gold Plc & Another*⁴⁴⁵ sheds light on this concern. In this case, the government of Tanzania gave Africa Barrick Gold Mine (ABG) a concession to extract minerals in North Mara region in Tanzania (Nyamongo). That was allegedly done without consulting the members of the local community who were forcefully evicted from the mining area. In the long run, the local communities complained that the drainage from ABG mining sites contaminated the nearby water sources and the soil. Furthermore, the locals claimed that the soil and water contamination affected their

⁴⁴¹ See, *Op Cit*, note 435 at 9.

⁴⁴² *Ibid* at 9.

⁴⁴³ Elisa Morgera, Kati Kulovesi & Ambra Gobena *Case Studies on Bioenergy Policy and Law: Options for Sustainability* (2009) at 251-282.

⁴⁴⁴ *Ibid*.

⁴⁴⁵ The High Court of Justice, Queen’s Bench Division, *Ghati Kesabo & Ors v African Barrick Gold Plc & Anor* (2013) EWHC (QB) (*Kesabo*).

agricultural activities, as their crops withered away and some people experienced skin burns after using the contaminated water. Consequently, between 2010 and 2012, the affected community engaged in a series of protests against the extractive activities of the ABG, protests that were always met with police force, leaving some killed and others injured.

In 2013, twelve claimants, assisted by a UK based law firm, filed a suit at law for loss and damage against ABG (now Acacia Mining based in London), relating to incidents between 2010 and 2012. According to the claimants, the company failed to prevent the use of excessive force by mine security and the police, who shot at protestors and used tear gas and live ammunition. In the Court, several attempts by the ABG to persuade the UK High Court to dismiss the case failed, a result which pressured the ABG to settle the dispute out of court which included damages for the loss the local communities suffered.

In general, rural communities rely on land as a primary means of subsistence and survival. They mainly engage in peasantry and agricultural activities such as hunting, fishing and timber activities. With such means of livelihood, the fact that the LAA and the Petroleum Act have weak provisions protecting agricultural land, and economic and social interests associated with it, is a serious concern for local communities. Also, it is ironic that the LAA mentions agriculture as one of the reasons for acquiring land in the public interest⁴⁴⁶ while at the same time allowing the acquisition of agricultural land for petroleum activities.⁴⁴⁷

While the right to water is not expressly mentioned in the Tanzanian Constitution, this right could be read into the right to life protected under Article 12.⁴⁴⁸ While that is so, it

⁴⁴⁶ See, s. 4(1) of the LAA.

⁴⁴⁷ See, *Ibid*; also see, sections 33(3) b (v), 33(6) & 33(7) of the Petroleum Act, Cap. 392 (2015).

⁴⁴⁸ See, *Festo Balegele & 794 Others v Dar es Salaam City Council*, High Court of Tanzania, Miscellaneous Civil Cause No. 90 of 1991; See also, Greenwell Matchaya, ID, O'Brien Kaaba and Charles Nhemachena 'Justiciability of the Right to Water in the SADC Region: A Critical Appraisal' (2018) *MDPI Law Reviews* 1-21 at 13; Catarina De Albuquerque, UN Special Rapporteur on: *The Human Right to Safe Drinking Water and*

is time that the Tanzanian legislation specifically protected the right to food and water when considering land acquisition.

5.2 Right to Education and Cultural Rights

The only place where the Petroleum Act protects land for its cultural value is in section 80 where it sets special procedures for acquiring land that has been used as a burial ground. In that regard, the Petroleum Act suggests that such land can still be acquired from its owners if needed for petroleum use by financing exhumation of the buried bodies and relocating them to another burial ground. This provision neglects other cultural aspects of land, such as its spiritual use, and its value as the ancestral home of local communities. As Tenga and Karonde state in their report:

Displacement often disturbs the family composition, cultural and social values norms and bonds of families who may get dispersed in different locations as opposed to the human rights ideals. In other words, compulsory land acquisition has far reaching socio-economic impacts on the lives of the persons whose land gets acquired including income levels, land utilisation, land ownership structure, farming practices, familial composition and cultural and social values, and norms and bonds.⁴⁴⁹

Therefore, the lack of strong provision protecting land for its sacred cultural use does not match the international standards discussed in Chapter Three which recognises land as being key to culture.⁴⁵⁰ Access to education for children in the petroleum communities is yet another right that is likely to be affected by failure to have a comprehensive resettlement action plan. Education as a human right is affirmed in the Constitution, and the obligation to ensure everyone in Tanzania gets basic education is

Sanitation, Realizing the Human Rights to Water and Sanitation: A Handbook by the UN Special Rapporteur Catarina de Albuquerque: Introduction (2014) Vol. 15; See also, *Mosetlhanyane & Matsipane v AG* (2011) Civil Appeal No. CACLB-074-10 (Bots); *City of Cape Town v Strümpher* (2012), 104/2011 ZASCA 54 (S. Afr.); *Mazibuko & others v City of Johannesburg* (2010) (3) BCLR 239 (CC) para 169 (S. Afr.).

⁴⁴⁹ See Tenga and Kironde, *Op Cit*, note 43.

⁴⁵⁰ See this point in Chapter Three, 3.2.5.

laid upon the state.⁴⁵¹ It is common knowledge that resettlement, which often accompanies major, land-based development projects, causes physical or economic displacement, or both. Ensuring fair, transparent and justified compensation is an obligation that governments have to fulfil.⁴⁵² Failure to uphold this fundamental requirement means that projects aimed at bringing development may end up undermining the rights of those that should be benefiting.⁴⁵³

Despite this, Tanzania compensation laws do not have legal provision which comprehensively caters for a resettlement plan. For example, in the Lindi-Mtwara gas pipeline construction, the government did not resettle the affected people. According to the Hakirasilimali report:

The pipeline project implementation involved physical displacement of people. However, TPDC did not prepare nor implement a Resettlement Action Plan (RAP). People affected by the project did not receive alternative land. TPDC stated that community members received 'full (monetary)' compensation. International standards, especially those recommended by International Finance Corporation (IFC), suggest substitute land instead of monetary compensation when dealing with poor and vulnerable households. This is the case because money is easily wasted and for rural and agrarian communities, land is central to recovering and sustaining livelihoods.⁴⁵⁴

As long as the Tanzania compensatory regime continues to ignore the need to have a robust resettlement plan, which takes into account the livelihood situation of the landholders, the affected people may miss important social services including their children's access to education. A robust resettlement plan could, among other things, ensure that resettled people are provided with all necessary infrastructures including school in their new residences. One of the practical challenges facing those affected by land acquisition is that sometimes they are forced to move to places which are quite far from social services, including schools.⁴⁵⁵ For example, a report by the IWGIA shows

⁴⁵¹ See Article 11 of the United Republic of Tanzania Constitution, 1977.

⁴⁵² See section 4 of the LAA; also, Article 14 of the Banjul Charter.

⁴⁵³ See, Hakirasilimali Report, *Op Cit*, note 435 at 4.

⁴⁵⁴ *Ibid* at 8.

⁴⁵⁵ *Ibid*.

that pastoralist communities which have been forced to vacate their land in Tanzania for a public purpose have experienced challenges regarding access by their children to their schools.⁴⁵⁶

5.3 Right to Work

Land acquisition for extractive industries can hurt the employment rights of members of communities as most people in local communities engage in traditional livelihood activities such as farming, hunting, fishing and pastoralism.⁴⁵⁷ While labour is a critical asset for all individuals and households, it is strongly correlated with other rights: a person's health status will determine their capacity to work, and the level of skills and education they possess will also determine the returns they are able to get from their labour. Most workers in Tanzania are unskilled. More particularly, studies⁴⁵⁸ show that 70 percent of the people live in the rural areas, and agriculture is their main source of livelihood.⁴⁵⁹ Agriculture provides 95 percent of the food consumed in the country, 25 percent of the GDP and 30 percent of the foreign exchange earnings. It is a major source of raw materials for agro-based industries. It is proper therefore to assert that 'agriculture holds a unique position with respect to the socio-economic wellbeing of the people of Tanzania.'⁴⁶⁰

Therefore, protecting agricultural industry is a critical factor in the efforts to reduce and, ultimately, eradicate poverty in the country. A balance must be struck between the need to invest in the extractive industry and the need to protect jobs and food security. The Petroleum Act has some positive parts, such as section 80 which states that the

⁴⁵⁶ See, IWGIA Report 23, *Tanzanian Pastoralists Threatened: Evictions, Human Rights Violations and Loss of Livelihoods* (East Africa: IWGIA, 2016) at 43; See also, *Report by Southern Agricultural Growth Corridor of Tanzania (SAGCOT) Investment Project Strategic Regional Environmental and Social Assessment (SRESA)* (Tanzanian Prime Minister's Office: E3075V3REV, 2013) at 61.

⁴⁵⁷ Kennedy Gastorn, *Op Cit*, note 319 at 23-24.

⁴⁵⁸ See *SAGCOT Report*, *Op Cit*, note 456 at 19 & 140.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

state should not acquire land used for pastoralism and agricultural activities without the written consent of the PAPPs. However, the problem lies in the claw-back clause, which states that the Minister may dispense with the requirement for consent. Moreover, section 111 of the same Act suggests that section 80 applies only to land that has pre-existing crops or which is already inhabited by a person. In some communities in Tanzania extractive activities have disrupted agricultural activities and the locals' way of living.⁴⁶¹ For example, the *Hakirasilimali* report⁴⁶² records complaints about the Songo Songo gas project interfering with farming activities.⁴⁶³

Because work is so crucial to livelihood, arbitrary interference with the economic and cultural activities of the local communities can have serious consequences. For example, in Kibiti, many people were for years involved in peasantry and other local economic activities. However, the discovery of petroleum has intensified the government presence in Kibiti, leading to the imposition of controls over land use in the area. As a result, the conflict between the people and the government has intensified, making Kibiti a security risk zone due to persistent killings of locals.⁴⁶⁴ Generally, the Constitution of Tanzania recognises the right to work in satisfactory, safe and healthy conditions. However, there is nothing in the petroleum-related land compensation laws suggesting that the state is committed to ensuring that, even after acquiring land from the PAPPs for petroleum activities, the acquisition will not impair the economic and cultural activities intended to support their livelihood.⁴⁶⁵

5.4 Right to a Healthy Environment

The right to a clean and healthy environment in Tanzania could also be derived from the right to life.⁴⁶⁶ The Petroleum Act reflects the spirit and aspirations of the National

⁴⁶¹ See, *SAGCOT Report, Op Cit*, note 456 at p 6.

⁴⁶² See *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ See, Louis Kolumbia 'Unanswered Questions on Rufiji killings' *The Citizen*, May 25 2017.

⁴⁶⁵ IFC Performance Standards on Environmental and Social Sustainability (2012) performance standard 2.

⁴⁶⁶ See, Article 12 of the Constitution.

Environment Management Act, which obliges a licensee to carry out an environmental impact assessment (EIAs) of proposed operations and to take all necessary steps to ensure the prevention or minimisation of environmental pollution, through environmental management and restoration plans.⁴⁶⁷

Like the right to a clean and healthy environment, the right to health is not expressly recognised in the Constitution.⁴⁶⁸ However, this right has been read into the right to life.⁴⁶⁹ Also, in some ways, this right is protected through legal provisions that require that companies must undertake EIAs.⁴⁷⁰ However, as was seen earlier, the law does not make adequate provision for how EIA reports should be shared with or explained to communities in the language they understand. This leaves the affected communities incapable of holding the companies and authorities to account and of participating effectively in decision-making.⁴⁷¹

On the other hand, the Petroleum Act states that communities are entitled to compensation whenever particular acts by the company cause physical damage to their property.⁴⁷² However, the Petroleum Act is silent on the adverse effects of oil exploitation on people's health. Some health issues that may be occasioned by the

⁴⁶⁷ See, The Environmental Management Act (EMA), Act no. 20 of 2004 (CAP 131), sections 8, 64 & 161.

⁴⁶⁸ See the High Court decision in *Festo Balegele and 794 Others v Dar es Salaam City Council*, (1992) Miscellaneous Civil Cause No. 90 of 1991: In this case applicants were residents of of Kunduchi Mtongani seeking for Orders of Certiorari, prohibition, Mandamus and costs thereto, to quash the decision of the Dar es Salaam City Council to dump the city's waste and refuse in the locality. The city council was burning the dumped waste emitting much smoke covering wide area and offensive smell which attracted swarms of flies. In reply, for the respondents it was submitted that in depositing refuse at Kunduchi Mtongani they were performing a statutory duty lawfully. The Court held that it was not proper for a public authority, or an individual to pollute and thereby endanger people's lives. To do so would be contrary to Article 14 of the constitution which guarantees the right to life and its protection by the society.

⁴⁶⁹ See, *Festo Balegele & 794 Others v Dar es Salaam City Council*, *Ibid*.

⁴⁷⁰ For example, section 33 of the Petroleum Act.

⁴⁷¹ Lee and Dupuy, *Op Cit*, note 303.

⁴⁷² See section 101 of the Petroleum Act.

petroleum activities are water and soil pollution.⁴⁷³ The experience from the mining industry has shown that when local communities are affected by pollution, as *Kesabo* states, it becomes difficult for those communities to hold the companies accountable.⁴⁷⁴

5.5 Right to Adequate Housing/Resettlement and Gender Equality (Vulnerable Groups)

Internationally, the right to adequate housing is considered as one of the fundamental livelihood rights.⁴⁷⁵ Chapter Three demonstrated that a poor resettlement and compensation plan mostly affects women, children and people with disability.⁴⁷⁶ However, while the standard provided internationally is that resettlement should be based on consent, in Tanzania, relocating the PAPPs is considered one of the serious challenges in the extractive industry.⁴⁷⁷ The Tanzanian Energy Policy 2015 acknowledges that one of the challenges in developing hydro systems is relocation and resettlement of affected persons.⁴⁷⁸

As it was held in the *Endorois case*, discussed in Chapter Three,⁴⁷⁹ there must be an option of 'resettlement' for the people displaced from their lands. The affected people are at liberty to choose between monetary compensation and resettlement. For example, Uganda has recognised resettlement and restoration of livelihood as mandatory remedies owed to the affected people.⁴⁸⁰ The advantage of this is that unlike monetary compensation, resettlement ensures that the affected people are provided

⁴⁷³ See, Jessie Boylan 'Tanzania: Community Still Worried by Mine Contamination' Inter Press Services News Agency available at <http://www.ipsnews.net/2009/12/tanzania-community-still-worried-by-mine-contamination/> accessed on July 3, 2019.

⁴⁷⁴ See *Kesabo*, *Op Cit*, note 476.

⁴⁷⁵ See Chapter Three, section 3.2.4

⁴⁷⁶ See *Ibid*.

⁴⁷⁷ See *Endorois case*, *Op Cit*, note 153 para 237.

⁴⁷⁸ Tanzania Energy Policy 2015, para 3.1.1 at 11.

⁴⁷⁹ See Chapter Three.

⁴⁸⁰ See comparatively, the Ugandan Environmental Impact and Assessment Guidelines for Energy Sector at 86; Also, the Ugandan National Environmental Act, Cap. 153, 1995.

with the right to shelter. This avoids incidents where the money given to the affected people fails to build new homes, leaving the families, mostly women and children, destitute.⁴⁸¹

Despite this, the Land Acquisition Act, as was seen earlier, provides that alternative settlement can be provided. However, such alternative settlement is only provided at the discretion of the President.⁴⁸² Section 111 of the Petroleum Act states that the PAPPs are not allowed to build a house on the land whose subsoil has petroleum resources over which licensees have concession rights without the consent of the licensee.⁴⁸³ As argued earlier, this approach ignores the livelihood rights of the PAPPs, including the right to adequate housing.

6. CONCLUSION

This chapter has considered the extent to which the substantive provisions of the petroleum laws governing compensation reflect the principle of fairness as defined by international law and Rawls' theory of fairness. The main finding is that Tanzanian laws on land acquisition are not aimed at raising the livelihood standards of the PAPPs as

⁴⁸¹ See this incident generally in: Mtoni, *Op Cit*, note 318; In response, the IFC Performance Standards on Environmental and Social Sustainability (2012), performance standard 5(2): provides: '... where involuntary resettlement is unavoidable, it should be minimized and appropriate measures to mitigate adverse impacts on displaced persons and host communities should be carefully planned and implemented. The government often plays a central role in the land acquisition and resettlement process, including the determination of compensation, and is therefore an important third party in many situations. Experience demonstrates that the direct involvement of the client in resettlement activities can result in more cost-effective, efficient, and timely implementation of those activities, as well as in the introduction of innovative approaches to improving the livelihoods of those affected by resettlement'.

⁴⁸² Some authors have correctly advised that resettlement in the sense of giving alternative land and housing to the affected individuals benefits should be introduced in Tanzanian laws: See for instance, Cletus Eligius Ndjovu 'Compulsory Land Acquisitions in Tanganyika: Revisiting the British Colonial Expropriation Principles and Practices' (2015) 4(12) *International Journal of Scientific & Technology Research* 17. Ndjovu states: 'Introducing into current laws the ability to build as a requirement of getting alternative plot during expropriations if effective development of urban plots is to take place in resettlement areas.'

⁴⁸³ Petroleum Act section 111.

required by international law. These national laws are, instead, contradictory and ambiguous and make it easy for the state and the licensees to access land whenever they need it for petroleum projects, to the detriment of the PAPPs. The right to livelihood, which forms a major pillar of fairness, is not sufficiently contained in the petroleum laws, and the relevant provisions are frequently contradictory and favour the state and the licensees.

The extent to which the Tanzanian petroleum framework protecting the right to own land is cognisant of other human rights that are linked to livelihood is limited as the framework relies on the LAA, which is outmoded and rooted in the socialist ideologies of the 1960s. The Tanzanian land compensation laws that apply now were made under the auspices of the socialist command economy, which assumed that land was entirely the property of the government and its holders were merely occupiers. Such perception is seemingly responsible for a land compensation scheme that neglects the livelihood and other rights of the PAPPs and contravenes international human rights. A compensation legal framework that follows the fair theory of compensation suggested in this study, and which is clear and certain would help to assuage the problems identified in this chapter. The next chapter focuses on the procedural aspects of compensation.

CHAPTER SIX

PROCEDURAL FAIRNESS IN LAND COMPENSATION UNDER THE TANZANIAN PETROLEUM LEGAL FRAMEWORK

1. INTRODUCTION

Having considered the substantive aspects of fair compensation, this chapter focusses on the procedural aspects. The central question revolves around the degree to which the procedural provisions of the petroleum laws reflect the core elements of procedural fairness: namely, consent, consensus and consultation in relation to compensation. Several more specific questions are investigated: whether the PAPPs are informed about the extractive activities taking place in their vicinity; whether they are invited to participate in decisions concerning the opening of the petroleum areas; whether they are involved in the process of valuation, and the related process of compensation; whether there are negotiations with the PAPPs on resettlement and dispute resolution. The answers to these questions will clarify how fair the processes are, and how they compare with international standards.

2. THE RIGHT TO INFORMATION

An essential component of fairness is that the PAPPs must know about decisions that affect their lives. This means that when state requires their land, they must be informed of the reason, how they will benefit from the project and how they will be compensated for the loss. The rights to education and to be informed are both constitutional rights.⁴⁸⁴ In the context of the petroleum industry, the lack of public awareness, and community members' low levels of knowledge regarding petroleum exploitation have been cited as sources of tension over land and land resources.⁴⁸⁵ Studies show that the protest in Mtwara Tanzania region, which led to the destruction of properties and

⁴⁸⁴ See Articles 11 & 18(b) of the Constitution.

⁴⁸⁵ See Chapter One, at page 4-5.

deaths, was due to lack of information about the Songo Songo gas project.⁴⁸⁶ The local people in Mtwara did not understand why after all the sacrifices they had made by giving up their lands to make way for the gas project, the resources were transported to Dar es Salaam instead of being processed in Mtwara, where the state and the respective licensees were developing gas.⁴⁸⁷ Later the government explained that it was necessary to transport the gas to Mtwara to feed the country's main electricity grid at Ubungo in Dar es Salaam. This explanation came after the violence, which led to the deaths of women and men. Had this information been shared before the havoc, the state could have avoided the protest. Another important study, the Bomani Report, commissioned by the government (President's Office) to ascertain the problems with the extractive legal regime, found that 'The people are not enlightened about the compensation process, their rights, and the responsibility of the new land owner in compensating them so as to avoid the current inconveniences during payments (sic).'⁴⁸⁸

Despite the importance of knowledge dissemination as part of a participatory approach,⁴⁸⁹ the LAA, which the Petroleum Act relies on, does not make sufficient provision for public awareness about petroleum projects.⁴⁹⁰ For its part, section 33 of the Petroleum Act stipulates how the environmental impact assessment will be done. The Minister responsible must publish a report in the Government Gazette listing the land and the communities that will be affected by the petroleum projects and inviting their views. Without prior information about their rights and government development projects and plans, the public cannot participate in this process in an informed manner. There are also challenges of access to the Government Gazette, which limit the public's involvement in the impact assessment process. Moreover, since the licensee may acquire and interfere with the land at any time, the environmental impact assessment

⁴⁸⁶ See Chapter One, at page 8.

⁴⁸⁷ See *Ibid.*

⁴⁸⁸ *Report of The Presidential Mining Review Committee to Advise the Government on Oversight of the Mining Sector* (United Republic of Tanzania: vol. 2, Translated Edition, 2008) at 25.

⁴⁸⁹ FAO Land Tenure Studies: *Compulsory Acquisition of Land and Compensation* (Food and Agriculture Organization of the United Nations. Rome: 2009) at 45 para 5.2.

⁴⁹⁰ *Endorois case, Op Cit*, note, 153 at 169.

procedure provided for in section 33 is incapable of facilitating the effective participation of the PAPPs in decision making about petroleum projects, because decisions made at the first consultation may be overtaken by subsequent action of the state.

There is, in a word, a general failure of the law to provide for a clear information structure between the government and the PAPPs. Reports show that there has been minimal to no effort to enable the PAPPs to understand the legal requirements, procedures, processes and the entire management framework of the land acquisition and compensation process.⁴⁹¹ For example, the environmental impact assessment report, which is the essential document detailing how the state should resettle and compensate the PAPPs, is not made available to them, because as was seen in Chapter Four, the PAPPs, who have a vested interest in the matter, cannot access the report in rural areas, and it is also unavailable to them because of language barriers.⁴⁹² Also, the law does not give guidance on how a comprehensive resettlement plan should be prepared in consultation with the PAPPs.⁴⁹³

The absence of a suitable information system that allows timely and sufficient information to engage the PAPPs in meaningful consultation prior to starting operations has an adverse impact on the ability of these communities to demand and defend their land rights against the government and the licensees.⁴⁹⁴ Moreover, this has led to misunderstandings between the people, the government and the investors. The state

⁴⁹¹ Komu, *Op Cit*, note 423 at 78.

⁴⁹² See, Chapter Four, section 3.1.2.

⁴⁹³ See Chapter Five, compare with IFC Performance Standards on Environmental and Social Sustainability (2012) performance standard 5(18).

⁴⁹⁴ See Article 8(1) of the Constitution; Also see section 10(2)(i) of the Tanzania Extractive Industries (Transparency and Accountability) Act, 2015; These are in line with Article 9 of the African Charter on Human and Peoples' Rights, 1981, which provides for the right to give and receive information thus:

'(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law'.

See also, the United Nation Declaration on the Rights of Indigenous People (2007), Articles 10,11,18, 19, 20, 21, 22, 23, 28,29 & 32.

could promote public awareness and participation by adopting a law that requires it, when it seeks to acquire land, to prepare a resettlement action plan and share it with the PAPPs and their local representatives in languages that the people understand, so that they can make informed decisions.

Like the Petroleum Act, the Valuer Regulation Act⁴⁹⁵ fails to require that petroleum communities should be informed about the rates used for the valuation of their property. In practice, there is no well-defined channel through which feedback on the value of the communities' property is given, even after the completion of the valuation. As a result, property valuation relies solely on the information obtained by the valuer about the amount of compensation that the PAPPs should get. The person responsible for valuation is normally the government valuer or an agent engaged by the government.⁴⁹⁶ This has raised questions about the independence of the valuation process and about its failure to afford an opportunity for the PAPPs to be heard before final decisions on compensation is made.

Another barrier to sharing information is that the compensation agreements are often written in Kiswahili and English. There is usually a presumption that all Tanzanians are fluent in Swahili, which is not always the case.⁴⁹⁷ Tanzania is a multi-lingual society with many vernacular languages used by its people. As the law does not recognise the issue of the language barrier, signing compensation agreements whose terms they do not fully understand disadvantages the communities.⁴⁹⁸ The language barrier (especially

⁴⁹⁵ Act No 7 of 2016.

⁴⁹⁶ The Government appoints valuers. There are opinions that affected populations should be allowed to hire private valuers in order to have the basis on which to challenge the valuations done by government-hired valuers; See, eg, Cletus Ndjovu 'Understanding Causes of Dissatisfactions among Compensated Land Owners in Expropriation Programs in Tanzania' (2016) 5(1) *International Journal of Scientific & Technology Research* 166.

⁴⁹⁷ See, Suleman Sumra & Joviter K Katabaro 'Declining Quality of Education: Suggestions for Arresting and Reversing the Trend' (Dar es Salaam: The Economic and Social Research Foundation (ESRF), Special THDR Issue, ESRF Discussion Paper 63, 2014) at 5.

⁴⁹⁸ Often the language barrier has been used against local communities. See, in Kerbina Joseph Moyo 'Women's Access To Land In Tanzania: The Case of the Makete District' (PhD Thesis: Royal Institute of Technology,

with English) is sometimes a cause for a significant communication gap between the PAPPs and the state in land-acquiring projects in Tanzania.⁴⁹⁹

3. OPENING OF THE PETROLEUM AREAS

Section 33 of the Petroleum Act⁵⁰⁰ stipulates the procedure for opening an area for petroleum activities.⁵⁰¹ It defines in general and imprecise terms how the PAPPs should

Stolkhom: 2017) at 156, a finding that language barrier is cause for land rights infringement is made and a suggestion that decipherable language should be used is made; See, Tenga and Mramba, *Op Cit*, note 423.

⁴⁹⁹ See generally Hakirasilimali Report, *Op Cit*, note 462.

⁵⁰⁰ This section provides:

‘(1) A decision to open an area for petroleum activities shall be made by the Minister upon approval of the Cabinet.

(2) Prior to opening of areas for petroleum activities, the Minister shall, in collaboration with relevant authorities and in consultation with the Minister responsible for environment, undertake evaluation of various interests in the areas which shall be contained in the evaluation report.

(3) The evaluation report shall include - (a) an assessment of the potential for petroleum accumulation in the area; and (b) a strategic assessment of the social and environmental impact of the potential petroleum activities on: (i) national development; (ii) local communities; (iii) environment and risk of pollution; (iv) trade and tourism; (v) agriculture and fisheries; (vi) potential economic and social impact of the petroleum activities; and (vii) any other activities related to petroleum industry.

(4) The Minister shall publish the evaluation report in the Gazette and website of the Ministry and PURA.

(5) The evaluation report shall specify areas proposed to be opened for petroleum activities, nature and extent of petroleum activities, and effect of the petroleum activities on relevant interest activities and communities.

(6) An interested person under this section may submit views and comments on evaluation report to the Minister within a period of sixty days from the date of publication.

(7) The Minister shall, after taking into consideration on the report and any views of an interested person, submit recommendation to the Cabinet for approval on whether or not to open an area for petroleum activities.

(8) The Minister shall submit to the Cabinet for information, a report detailing areas to be opened up for petroleum activities, evaluation and assessment conducted based on the impact on social and environment.

(9) The Minister shall publish the decision in the Gazette, website of the Ministry and PURA or in any other manner as the Minister may determine.

(10) The decision to redefine boundaries or close an area for petroleum operations shall be made by the Minister.

(11) Sub section (1) to (9) shall apply similarly on the decision of the Minister to redefine or close an area for petroleum operations except the period of receiving views from the public under sub-section (6) shall be at least forty-five days.

participate in decision-making. As fairness includes consulting the PAPPs to seek consensus or obtain consent from them, for this to be fair participation means that the state must consult the PAPPs and obtain their views including, where possible, consent or consensus before opening an area for petroleum activities.

Section 33 of the Petroleum Act represents an attempt to ensure the PAPP's participation in decision-making by stipulating that before opening an area for a petroleum project, the Minister must evaluate how the PAPPs will be affected by a petroleum project.⁵⁰² Subsection (2) asserts that the Minister of Energy, in collaboration with the Minister Responsible for the Environment, shall undertake the evaluation of various interests and prepare 'a report showing how the PAPPs will be affected by the petroleum project.' This subsection further requires the Minister to gazette the evaluation report to allow the PAPPs an opportunity to offer their views within 60 days from the time of gazetting.⁵⁰³ In the material part, section 33(2) of the Petroleum Act states:

Before the opening of areas for petroleum activities, the Minister shall, in collaboration with relevant authorities and in consultation with the Minister responsible for environment, undertake an evaluation of various interests in the areas, which shall be contained in the evaluation report.⁵⁰⁴

The above underscores the point that the Minister responsible should seek to consult and seek input from the PAPPs on whether the state should open the areas earmarked for petroleum projects or not. Section 33 thus offers positive support to the rights of the PAPPs, since, through consultation, the communities are given the opportunity to be heard on whether a particular area should be opened for petroleum activities or not,

(12) Where a decision to redefine the boundaries or to close an open area have detrimental effects to another area covered by a licence existing at the time of the decision, the licence holder shall be consulted by PURA before the decision of the Minister.⁷

⁵⁰¹ See, *infra* note 550.

⁵⁰² *Ibid.*

⁵⁰³ See section 33(4) of the Petroleum Act.

⁵⁰⁴ This somewhat responds to the international requirement discussed under Chapter Three, section 2.1.

based on the inherent use to which the communities concerned have put the subject land.

However, the primary concern with section 33 is that the invitation for the PAPP's opinion looks like a rubberstamping process. First, the PAPP's opinions are considered only after the environmental impact assessment has been done and not in the process of doing that assessment. In the words of the Act, the views are collected after publishing the report on the environmental impact assessment. Subsections 33(4)(7) state:

- (4) The Minister shall publish the evaluation report in the Gazette and website of the Ministry and PURA.
- (5) The evaluation report shall specify areas proposed to be opened for petroleum activities, nature and extent of petroleum activities, and effect of the petroleum activities on relevant interest activities and communities.
- (6) An interested person under this section may submit views and comments on the evaluation report to the Minister within a period of sixty days from the date of publication.
- (7) The Minister shall, after taking into consideration on the report and any views of an interested person, submit a recommendation to the Cabinet for approval on whether or not to open an area for petroleum activities.⁵⁰⁵

As seen from these provisions, the views of the public are considered by Cabinet which has the final say on whether the state should open an area for petroleum activities or not.⁵⁰⁶ In their current form, the provisions do not oblige Cabinet to give due consideration to the views expressed by the people. They also do not create any opportunity, once the Minister has considered the views, for the people to give further input before Cabinet considers the Minister's recommendation. It should be recalled that Chapter Three demonstrated that, internationally, failure to seek free, prior and informed consent or consensus between the state and the local communities could lead to the annulment of a petroleum project.⁵⁰⁷

⁵⁰⁵ See section 33(4)-(7) of the Petroleum Act.

⁵⁰⁶ See, section 33(8) Petroleum Act.

⁵⁰⁷ See Chapter Three section 1.1 discussing *James v the United Kingdom* (1986) 8 EHRR 123. As was seen, this case laid a principle that whenever the state interferes with someone's property rights without observing the 'in accordance with the law' requirement, the court does not need to consider the legitimacy of the state's

Also glaringly missing from the law are provisions requiring the national authorities to involve the local authorities that represent the people at the grassroots level in deciding which land the state should earmark for petroleum activities. The local authorities have no voice in this decision-making process. Section 43 of the Petroleum Act specifically excludes the voices of local authorities by stating that the minister 'has the powers to grant licence in consultation with the Petroleum Upstream Regulatory Authority.'⁵⁰⁸ In that regard, the Bomani Report has pointed out that the existing practice merely allows extractive companies to collaborate with the leadership at the ministerial and district level and not the affected people who bear the burden of production by finally giving away their land. This report states, in addition, that the process does not allow the PAPPs to have an adequate say on the amount of compensation they will receive.⁵⁰⁹

As argued previously, fairness requires that the communities should participate in decisions that affect their rights. This discussion has shown that the Petroleum Act does not make adequate provision for meaningful participation by the PAPPs in decisions concerning which areas should be opened for petroleum activities. There is a small window of opportunity for the PAPPs to give input after an impact assessment has been conducted, but no other chance is available before Cabinet decides and there is no assurance that Cabinet will seriously consider the views of the people after the Minister has presented recommendations. Also particularly concerning is the exclusion of local authorities from this aspect of decision-making.

objective; in such instances, the court automatically infers the violation of the right to property. See also, in that regard, *Iatridis v Greece*, (1999) ECHR App No 31107/96, ECHR 1999-II 75 para 14; *Belvedere Alberghiera v Italy* (2000) Application no. 31524/96 para 7; See also, *Silver & others v The United Kingdom* (1983) Series Application no. 61 para 90; *Malone v The United Kingdom* (1984) Series Application no. 82 para 67 that were all discussed in Chapter Three.

⁵⁰⁸ This is against the participatory principles discussed generally in Chapter Three.

⁵⁰⁹ Bomani, *Op Cit*, note 488 at 25.

4. IS NOTICE USED FOR ENGAGING THE PAPPS?

The process of land acquisition under the LAA begins with section 5, which provides for a preliminary survey.⁵¹⁰ The survey is done whenever the President considers it desirable that land in any locality should be examined for acquisition for any public purpose.⁵¹¹ Section 5 authorises an examining officer, upon giving three days' notice, to enter and survey any land and perform any other activity relating to the investigation of the suitability of the land for the desired purpose.⁵¹² The section does not seem to provide for any requirement as to giving notice if the land is not occupied or enclosed. For occupied land, subsection 1(d) of section 5 states that 'no person shall enter into any building or any enclosed court or garden attached to a dwelling house (except with the consent of the occupier thereof) without giving such occupier at least three days' notice.'

This section implies that surveyors could enter unenclosed land without notice or the consent of its owner. Moreover, section 5 does not state that the people affected by petroleum projects will be compensated during the period when the exploration is taking place. This is important because petroleum exploration usually takes a long time. It is therefore not clear whether the owners of the land have to wait until exploration is over and a decision to acquire the land made for compensation to be considered. In cases where the exploration itself affects people's livelihoods, such interference requires justification and compensation.

⁵¹⁰ See Chapter Four, section 3.1.1.

⁵¹¹ The LAA provides under section 5(1) thus: 'If the President considers it desirable that land in any locality should be examined with a view to its possible acquisition for any public purpose, it shall be lawful for any person either generally or specially authorised by the Minister in this behalf, and for his assistants and workmen, to do all or any of the following things— (a) to enter upon and survey and take levels of any land in such locality; (b) to dig or bore under the subsoil; (c) to do all other acts necessary to ascertain whether the land is adapted for such purpose; (d) to clear, set out and mark the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon'.

⁵¹² *Ibid* Section 5.

Also, section 33(4) of the Petroleum Act requires the minister to publish the report of the environmental impact assessment process in the Gazette and website of the ministry and PURA as discussed in section (2) of this Chapter above. Moreover, section 6 of the LAA⁵¹³ provides that:

[i]f the President resolves that any land is required for a public purpose, the Minister shall give notice of intention to acquire the land to the persons interested or to claim to be interested in such land, or to the persons entitled to sell or convey the same, or to such of them as shall, after reasonable inquiry, be known to him.

Section 7 of the LAA on the other hand defines how the Government will proceed with taking possession of the land from a private person. The section requires a notice of not less than six weeks to be given to the land occupier. The section states:

Notice of intention to yield possession and power to take possession

(1) The Minister may, by notice under section 6 or intention by any subsequent notice, direct the persons upon whom the notice is required to be served under section 6 to yield possession of such land after the expiration of the period specified in the notice, which period shall not be less than six weeks from the date of the publication of the notice in the Gazette in accordance with subsection (3) of section 8: Provided that where the President has certified that the land is urgently required for a public purpose such persons may be required to yield up possession of the land within such lesser period as the President may direct.⁵¹⁴

Six weeks is insufficient time within which the PAPPs can be expected to relocate. It is ironic and deeply problematic that while the law expects the PAPPs to vacate the acquired lands within six weeks, the law stipulates that the state has a minimum of six months to pay compensation. The law does not indicate whether the Minister should consult the PAPPs with a view to arriving at a consensus on what land the state should acquire, or consider the personal circumstances of the landowners and other dwellers in the area, their livelihood needs and how the PAPPs should be resettled.

⁵¹³ Land Acquisition Act.

⁵¹⁴ Section 7(1) *Ibid.*

Moreover, according to section 7(1) of the Land Acquisition Act,⁵¹⁵ the President has the powers to direct that the Minister should acquire the land in less than six weeks if the President certifies that the state urgently requires the land for a public purpose. This means that the President has the discretion to decide how soon the PAPPs should vacate the acquired land. With the section granting such powers, a period of evacuation can be extremely short. This is contrary to what is contemplated by the fair theory of compensation advocated in this thesis. Generally, the notice-giving process for evictions under the LAA is not consultative. Rather, the Act seems to allow the state to use notice as an ultimatum against the affected people.

5. IS THE VALUATION PROCESS FAIR?

The LAA lays down the procedure for assessing the value of the land the state needs to acquire for purposes of calculating compensation.⁵¹⁶ Studying the valuation process is important because the outcome of valuation determines the amount of compensation that the state or the licensees will pay to the PAPPs. More stringent principles of fairness are needed at this stage because landowners and users face deprivation of their rights more directly than when decisions are made about which areas should be exploited for petroleum. A participatory valuation system is critical to ensuring fair compensation.

The LAA does not offer much direction on how land should be valued. Section 14 of the LAA merely outlines what the valuer should and should not consider when assessing compensation.⁵¹⁷ Section 18 of the LAA⁵¹⁸ expressly states that the Minister may pay the

⁵¹⁵ Land Acquisition Act, 1967.

⁵¹⁶ See Chapter Four section 3.1.2.

⁵¹⁷ See, section 7, Land Acquisition Act, 1967.

⁵¹⁸ Section 14, Land Acquisition Act, 1967 states: In assessing compensation for any land acquired under this Act the Minister or the Court. as the case may be shall subject to section 12-

(a) take into account the value of such land at the time of the publication of notice under section 8 without regard to any improvement or work made or constructed thereon thereafter or to be made or constructed in the implementation of the purpose for which it is acquired; (b) when part only of the land belonging to any person is

compensation to the PAPPs or to the court, but the Minister 'shall not be responsible for any misapplication of the compensation paid'.⁵¹⁹

In 2016, Parliament enacted the Valuation and Valuers Registration Act.⁵²⁰ The Act establishes the office of the Chief Valuer.⁵²¹ This office employs valuers to undertake valuation functions in the public sector and with local authorities.⁵²² The role of the valuers is to advise the government on what to pay as compensation in the case of compulsory land acquisition. However, the Regulations to the Valuation and Valuers Registration Act⁵²³ are still in the process of being adopted. The Act gives powers to the Chief Valuer to approve valuation work by valuers in both the private and public sectors. Generally, the Valuation and Valuers Registration Act requires the Chief Valuer to approve the valuation undertaken for compensation.⁵²⁴

Neither the LAA nor the Valuation and Valuers Registration Act mentions the notion of participatory valuation. Currently, the government valuers or government-commissioned valuers have a final say on what should be compensated.⁵²⁵ This is against the international standards, which require that the compensation process should be participatory. The cost of this is high. People could be given compensation that fails to take full account of the value of their land and its meaning to them. There

acquired take into account any probable enhancement of the value of the residue of the land by reason of the proximity of any improvements or works made or constructed or to be made or constructed on the part acquired; (c) take into account the damage if any sustained by the person having an estate or interest in the land by reason of the severance of such land from any other land or lands belonging to the same person or other injurious effect upon such other land or lands; (d) not take into account any probable enhancement in the value of the land in future; (e) not take into account the value of the land where a grant of public land has been made under the provisions of subsection (2) of section 11; (f) assess such compensation in accordance with such principles in addition to and not inconsistent with the principles specified in this section as may be prescribed.

⁵¹⁹ See section 8 of the LAA.

⁵²⁰ Which is probably intended to supplement the LAA.

⁵²¹ See, section 4 of the Valuation and Valuers Registration Act no. 7 of 2016.

⁵²² See, section 9 of the Valuation and Valuers Registration Act no. 7 of 2016.

⁵²³ Valuation and Valuers Registration Act no. 7 of 2016.

⁵²⁴ Section 9.

⁵²⁵ See, *Ibid.*

have also been reports that some valuers received bribes from the PAPPs to assess the values of their lands favourably.⁵²⁶ This could be a result of lack of public confidence that the process is fair and takes the views of the PAPPs seriously.

Section 110 of the Petroleum Act does not state clearly whether the state or the licensees should do the valuation of expected damages before the license holders start their exploration activity on the occupier's land or after the licensees cause any damage or interference. Sections 110-112 and 185-186 of the Petroleum Act⁵²⁷ are unclear on who will do the valuation in cases where the licensees interfere with the land rights of the PAPPs.

Another area of contention concerns the type of property that warrants compensation. The fundamental land policy provided for under section 3(1)(h) of the Land Act,⁵²⁸ and section 3(1)(g) and (h) of the Village Land Act,⁵²⁹ is that both the unexhausted improvements made on the land and bare land deserve compensation.⁵³⁰ The problem, as noted in Chapter Four is that the Petroleum Act only refers to the LAA. Further, the two regulations promulgated under the Land Act, which elaborate local standards for compensation, are similarly not in harmony on the compensable items under the Tanzanian land compensation laws. The Land (Compensation Claims) Regulations, 2001, provide in Regulation 5(2) that items to be compensated are the value of unexhausted improvements on the land and grazing land while the Land (Assessment of the Value of Land for Compensation) Regulations, 2001, lists more items such as loss of any interest in land, the value of unexhausted improvements, disturbance allowance, transport allowance, and accommodation allowance and loss of profits.

⁵²⁶ See, *CMI Report on Land Tenure and Mining in Tanzania*, by Siri Lange (Bergen: R 2008:2, 2002) at 7; Also see, Tenga and Mramba, *Op Cit*, note 423; P. Kamuzora, C. Ngindo & L. Mutasingwa *Ethical Issues in Urban Land Administration* (Dar es Salaam: A Research Report Strategic Studies on Corruption, Submitted to Prevention and Combating Corruption Bureau (PCCB), 2009).

⁵²⁷ *Ibid.*

⁵²⁸ Which is de facto at times applied in surveyed land for purpose of land acquisition.

⁵²⁹ This applies in village lands.

⁵³⁰ See, Mwesigwa, *Op Cit*, note 40 at 252.

Lack of clear guidelines on compensation has enabled corruption. Some people have bribed valuers to have favourable assessment. For example, the government itself through the Ministry of Lands undertook a study of Housing and Human Settlements Development in the whole country, looking at the Tanzanian land tenure system and land acquisition practice for development activities, and arrived at a finding that causes of land conflicts in the country include corruption.⁵³¹

Valuation is clearly an important process in land acquisition. Significant gaps in the land valuation guidelines, including the fact that the applicable laws do not make adequate provision for input from the affected people during and after the valuation, show that the legislation is inadequate .

6. EVICTION PROCESS

The main challenge reported to be facing the extractive industries in Tanzania is the displacement of communities from their land. This, it was stated, leads to further human rights abuses and, in some cases, violent conflicts. Mihanjo,⁵³² for example, relates the on-going conflict in Kibiti, Rufiji, where there have been severe clashes between the state and the people over land issues since the state discovered gas in that area.⁵³³ Moreover, studies attribute clashes in extractive areas such as Mwadui to failure to consider the importance of the land to the livelihood of the affected communities.⁵³⁴

⁵³¹ See, *Report by Ministry of Lands, Housing and Human Settlements Development Environmental and Social Management on Framework (ESMF) For Land Tenure Improvement Project (LTIP)* (The United Republic Of Tanzania: April 2020) at 52.

⁵³² See, Eginald Pius Mihanjo 'Security and Development: a case of Growing Restlessness in Rufiji - Kibiti - Kilwa Area' *The Citizen* 29 May 2017; Also see, Land Rights Research & Resources Institute *Accumulation by Land Dispossession and Labour Devaluation in Tanzania The Case of Biofuel and Forestry Investments in Kilwa and Kilolo* (Dar es Salaam: 2010).

⁵³³ See, Mihanjo *Ibid*.

⁵³⁴ See, Land Rights Research & Resources Institute, *Op Cit*, note 532 at 23-24; See also, A. L. Tesha 'Cooperation Between Small-Scale and Large-Scale Mining Paper Presented at the 'Growth and Diversification

International human rights law provides safeguards against arbitrary evictions including the right to be heard and provision of alternative accommodation in cases where the affected persons could be rendered homeless.⁵³⁵ It is of interest to see how the legislation of Tanzania compares with the international norms.

Section 7 of the LAA⁵³⁶ makes it possible, after the President declares that the state needs the land for a petroleum project, for the PAPPs to be compelled to vacate those lands in six weeks. It also makes it possible for the President to shorten that time depending on how urgently the state needs the land. Neither the LAA nor the Petroleum Act makes provision for consulting, seeking consent or arriving at some form of consensus on the best way to relocate or move the affected people from their land.

The only attempt to avoid conflict is section 110 of the Petroleum Act, which creates a system that avoids unnecessary evictions of the PAPPs with an attempt to create a structure of co-ownership of land between the licensees and the PAPPs⁵³⁷ where the landholder has the rights over the surface of the land and the PAPPs have the subsurface rights. There is in this situation no need to evict the PAPPs; the licensees and the PAPP could co-own the same land.

However, this arrangement is not without challenges. First, section 110 provides that the landholders can only enjoy the right of use over the land subject to the licensees' written consent.⁵³⁸ More specifically, the law restricts the PAPPs from erecting buildings in a petroleum development area without the consent of the licensees.⁵³⁹ The arrangement created under the Petroleum Act is detrimental to the rights of the PAPPs

in Mineral Economies Regional Workshop for Mineral Economies in Africa' (Cape Town, 7-9 November 2000) at 2.

⁵³⁵ See Chapter Three, section 2.1.

⁵³⁶ Section 7(1) of the LAA.

⁵³⁷ See, section 110(1) of the Petroleum Act.

⁵³⁸ See sections 80 and 110(2).

⁵³⁹ Section 110(2) of the Petroleum Act.

in two ways: their land ownership rights are entirely dependent on the licensees, and this interference with their land use right is without compensation.

*Nyamuma*⁵⁴⁰ show how the authorities sometimes resort to violent and forceful methods to evict lawful occupiers of land. For example, in the *Nyamuma's* case, it was alleged that the police used force, which included brutalising villagers, burning their huts and indicting protestors on criminal charges.⁵⁴¹ Again, in *Jackson Rwehumbiza & Others v The Republic of Tanzania*,⁵⁴² the state attempted to evict indigent communities from their land, which the state had acquired for a forest reserve after the members of that community refused to vacate it. The state then arraigned some of the adamant residents on criminal charges alleging that the residents were in contravention of sections 84 and 84(1) and (2) of the Forest Act. In the Magistrates' Court, the residents were found guilty and sentenced to 6 months jail terms. They then appealed to the High Court, arguing that the state was using criminal charges to scare them and acquire their land without paying them compensation. Ruling in favour of the residents, the High Court held:

Going by the submissions in this appeal ... it is clear that both the Government and the Appellants claim to be the rightful owners of the land. There is a dispute over ownership of the land, which ought to have been resolved before one could resort for criminal proceedings... As there is an outstanding dispute over ownership of the land, the government could have properly moved the court for Eviction Orders obtainable under civil proceedings or else, the charges for trespass, as the case was here, cannot be proved ... against the accused persons... As a result, I quash the conviction and set aside the sentence imposed by the trial court.⁵⁴³

Although this case did not relate to eviction from a petroleum project, it demonstrates how the state in some cases act in a highhanded manner in the eviction process. Such action is clearly against the human rights standards advocated in this study.

⁵⁴⁰ See, *Nyamuma's case*, *Op Cit*, note 361.

⁵⁴¹ See for example, *Ibid*.

⁵⁴² *Jackson Rwehumbiza & Others v The Republic*, Criminal Appeal No 178 of 2015, High Court of Tanzania, at Dar es Salaam, District Registry (Unreported).

⁵⁴³ *Ibid* at 7.

7. IS COMPENSATION PAID WITHIN A REASONABLE TIME?

The international standard for paying compensation is that it should be paid within a reasonable time.⁵⁴⁴ In Tanzania, the compulsory acquisition of land or any interest in or right over property of any description is only permissible within the framework established under Articles 24(1) & (2) of the Constitution⁵⁴⁵ and section 15(1) of the LAA. Both the Constitution and the LAA provide that land may not be acquired without prompt payment of fair and adequate compensation.

According to the current procedure, once the state identifies a potential land for a petroleum project, the state surveys the land and determines how many households will be affected, the measurements of their land and its value. After the valuation process, the state provides compensation claim forms to those who accept the valuation results and acknowledgement of payment forms. As noted earlier, the state could evict the PAPPs before paying them compensation.⁵⁴⁶

Section 5(1) of the LAA, read together with the Land (Assessment of The Value of Land for Compensation) Regulations (2001),⁵⁴⁷ requires that the compensation be paid within six months.⁵⁴⁸ However, the state has the option of paying compensation at any time beyond six months as long as it pays accruing interest.⁵⁴⁹ This is so even though the Constitution requires that the land can only be acquired 'upon payment' of fair compensation.⁵⁵⁰ The fact that the state may evict the PAPPs before paying them compensation leaves the PAPPs vulnerable to evictions contrary to Article 24(2) of the Tanzanian Constitution and the international standards discussed in Chapter Three.⁵⁵¹ As was seen earlier, this was a concern in the Songo Songo project, for example, where

⁵⁴⁴ See Chapter Three, section 1.1.

⁵⁴⁵ Which is somewhat similar to Article 14 of the Banjul Charter.

⁵⁴⁶ See, Chapter Four, section 3.1.3.

⁵⁴⁷ LAA section 5(2) and Regulation 13(1) of the Land (Compensation Claim) Regulations.

⁵⁴⁸ See, LAA *Ibid*.

⁵⁴⁹ See section 7 of the LAA.

⁵⁵⁰ Article 24(2).

⁵⁵¹ See Chapter Three, section 5.5.

the affected communities complained that they were stopped from carrying out their agricultural activities long before being paid compensation.⁵⁵²

Furthermore, the laws are contradictory on the period within which the PAPPs are required to vacate their land. While the regulations⁵⁵³ made under the Land Act say that the PAPPs should vacate their land within two weeks after the state declares that the land is needed for petroleum activities, the LAA states that they should vacate within six weeks. Also, the effect of section 33 of the Petroleum Act is that after the President declares that land will be acquired for petroleum activities, the PAPPs are legally barred from erecting buildings or permanent structures and from doing agricultural activities.⁵⁵⁴ Government bureaucracy is often cited as a reason for the delayed resettlement process and payments. The obvious outcome of the delay in the payment of compensation is anxiety and economic stagnation among the PAPPs.⁵⁵⁵

8. RESETTLEMENT ACTION PLAN

Internationally, a resettlement action plan is highly encouraged.⁵⁵⁶ International human rights standards require that the resettlement plan must be comprehensive. For example, in *Endorois* case, the African Commission on Human and Peoples' Rights said:

[F]or compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them.⁵⁵⁷

⁵⁵² See, *Hakirasilimali Report, Op Cit*, note 435.

⁵⁵³ Land (Assessment of the Value of Land for Compensation) Regulations. Regulation 13(1) & 13(3).

⁵⁵⁴ See note 552 *Ibid*.

⁵⁵⁵ See, *Ibid*.

⁵⁵⁶ See, eg, *Endorois Case, Op Cit*, note 153 para 237.

⁵⁵⁷ See *Ibid*, para 237.

An examination of the compensation laws in Tanzania reveals that they do not make resettlement mandatory. Section 11(2) of the LAA states that the state may occasionally resettle the PAPPs if upon being consulted, they consent to the resettlement.⁵⁵⁸ In such circumstances, the LAA states that the land of resettlement should not exceed the value of the land that the state acquired.⁵⁵⁹ Section 11(2) of the LAA provides:

[T]he President may with the consent of the person entitled to compensation under subsection (1) and shall, in cases where it is so required by subsection (3) of section 12 make to the person entitled to compensation a grant of public land not exceeding in value the value of the land acquired, for an estate not exceeding the estate acquired and upon the same terms and conditions as the land acquired was held so far as the same may be practicable in lieu of or in addition to any compensation payable under this section.⁵⁶⁰

This section suggests that resettlement is not considered essential. In the rare circumstances where there is a resettlement action plan, it is often not presented for deliberation with the people, partly because there is no statutory provision in the local laws making this a requirement.⁵⁶¹ The only law that provides circumstances in which the affected people may be resettled is rule 10(1) of the Land (Compensation Claims) Regulations. The rule gives unilateral power to the government to resettle or give alternative compensation to the affected people at the government's will. The rule states:

10 (1) Compensation shall take the form of monetary compensation.

(2) Without prejudice to the generality of the above, compensation may, at the option of the government, take the form of all or a combination of or any of the following –

(a) a plot of land of comparable quality, extent and productive potential to the land lost;

⁵⁵⁸ Section 11(2) of the LAA.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ See section 11(1) of the LAA.

⁵⁶¹ Access to information is a constitutional right under Article 18(b) of The United Republic of Tanzanian Constitution, 1977.

- (b) building or buildings of comparable quality, extent and use comparable to the building or buildings lost;
- (c) plants and seedlings;
- (d) regular supplies of grain and other basic foodstuffs for a specified time.

For Tanzanian laws to comply with the requirements of fairness in land acquisition, resettlement of the people where necessary should be wholly encompassing. Such a resettlement action plan must be developed in a participatory manner, it must consider the livelihood needs of the people and it must provide details of how the state will resettle them.

9. DISPUTE SETTLEMENT MECHANISM

The crux of the Rawls' fairness theory discussed in Chapter Two is that the question of fairness is usually relevant when there are competing interests.⁵⁶² Rawls then asserts that participants must agree on how the dispute between them will be solved from the point of an imagined veil of ignorance.⁵⁶³ What Rawls means by this is that neither party should know whether the likely outcome of the agreement between them will disadvantage either of them nor should either participant be unfairly benefited by the judicial system. In other words, the legal system should be impartial. This, it was seen in Chapter Three, is reflected internationally by interconnecting the land rights with other rights including the right to legal and other redress.⁵⁶⁴

The Tanzanian Constitution relates land rights to the right to legal redress thus:

Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.⁵⁶⁵

⁵⁶² See Chapter Two, section 3.

⁵⁶³ See, Chapter Two, *Ibid.*

⁵⁶⁴ See, See Chapter Three, section 3.2.

⁵⁶⁵ Article 30(3).

However, the Petroleum Act⁵⁶⁶ and the LAA,⁵⁶⁷ as seen in Chapter Four,⁵⁶⁸ do not have effective and harmonised provisions regarding how disputes between the PAPPs and the state will be resolved in cases where an individual is dissatisfied with the compensation proposed or paid. By contrast, the LAA, as was seen in Chapter Four, provides that grievances concerning compensation should be made to the Regional Commissioner and his decision 'shall be final'.⁵⁶⁹ On the other hand, section 111(3) of the Petroleum Act⁵⁷⁰ states that where the amount of compensation to be paid is in dispute, either party may refer the matter to Petroleum Upstream Regulatory Authority (PURA) which shall deal with it under the provisions of Part XI of the Act.⁵⁷¹ Under Part XI, the Act stipulates how disputes between the licensees and the PAPPs will be resolved.⁵⁷² Accordingly, section 242(1) states that PURA may inquire and decide all disputes between a person engaged in exploration or development operations and third parties, which includes the PAPPs.

The challenge with this arrangement is that PURA falls under the Ministry of Energy and can therefore be said to lack independence. Furthermore, while the Petroleum Act states that PURA cannot entertain issues involving the Government,⁵⁷³ the same Act⁵⁷⁴ states that the PURA shall entertain compensation disputes. The foregoing creates contradictions because the state is always involved in the land acquisition process, either directly when the state acquires the land for petroleum projects, or indirectly,

⁵⁶⁶ See Chapter Four, section 4.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ See Chapter Four, section 3.1.4.

⁵⁶⁹ See, section 5(2) of the LAA.

⁵⁷⁰ The section provides: 'Where the amount of compensation to be paid pursuant to subsection (1) is in dispute, either party may refer the matter to PURA which shall deal with in accordance with the provisions of Part XI.'

⁵⁷¹ *Ibid.*

⁵⁷² See, part XI section 242(1)c of The Petroleum Act, states: 242.-(1) 'PURA may inquire and decide all disputes between a person engaged in exploration or development operations, either among themselves or in relation to themselves and third parties other than the Government not so engaged, in connection with- ... (c) the assessment and payment of compensation pursuant to this Act...'

⁵⁷³ Act No. 21 of 2015. .

⁵⁷⁴ *Ibid.*

through the Tanzanian Petroleum Development Cooperation (TPDC). Another problem is that sections 242(2) and (3) of the Petroleum Act provide that PURA may refuse to decide any dispute referred to it by notifying the parties in conflict in writing about the refusal, without giving any reason. Section 24(2) states that 'PURA may refuse to decide any dispute referred to under this Part and, if it does so, shall notify the parties to the dispute in writing accordingly.' Section 242(3) in turn provides that 'no appeal lies to a court against a refusal of PURA made under subsection (2) to determine matters.' This means that after parties have submitted a complaint to the PURA, it may refuse to determine the matter. The litigant can then decide to go to the Court. Clearly, that creates room for unnecessary wastage of time to the detriment of the PAPPs.

Perhaps the most serious concern is that section 245 of the Petroleum Act⁵⁷⁵ states that the jurisdiction of the courts is excluded on issues that involve obstruction of the activities of licensees. This section also makes obstruction of the activities of the licensees a criminal offence.⁵⁷⁶ This section presents several problems. First, it contradicts Article 30(3) of the Constitution, which says that land rights violation could be challenged in the High Court. Second, it presupposes that PURA could entertain criminal matters connected to the obstruction of the licensees' activities. This raises the question whether the legislature intended to vest powers to entertain criminal matters to PURA. Given the vagueness of the offence created under the Act, the PAPPs' attempt to protect their lands could be regarded as a criminal offence. The law should therefore be clear on how a dispute between the PAPPs and the state will be resolved. This is one of the issues that need to be addressed at the stage of developing a resettlement action plan. Furthermore, the unclear parts of existing legislation need to be reviewed and rewritten.

⁵⁷⁵ Section 245, *Ibid.*

10. CONCLUSION

The Tanzanian petroleum laws laying down the procedures for acquiring land from the PAPPs for petroleum projects are by and large contrary to the international standards on fairness. This discussion has shown that the President and the Cabinet exercise important powers without according communities a hearing and without consulting them. In particular, this problem manifests itself when the President and the ministers decide to open an area for petroleum activities, when and how to acquire the land, and what compensation to pay to the PAPPs. In the rare cases where the law makes provision for consulting the PAPPs, there is a claw-back clause which empowers either the responsible minister or the Cabinet to override the need to obtain consent from, or consult with, the PAPPs.

Chapter Five⁵⁷⁷ showed that the PAPPs' livelihood rights are not sufficiently embedded in the substantive legal provisions governing compensation in the context of petroleum projects. This chapter has established that the legal framework also fails to meet the requirements of procedural fairness in the decision making about compensation. This gap puts the PAPPs at risk of human rights abuses, such as violations of their land rights and associated violations. Like the substantive provisions seen in the last chapter, the procedural provisions tend to lack robust provisions that assure the PAPPs' participation in the land acquisition and compensation process as per the international norms discussed in this study.

The next chapter makes final conclusions and some recommendations that could help to improve the current legal system.

⁵⁷⁷ Section 245 of the Petroleum Act states thus: 'A person shall not commence proceedings in a court in respect of any dispute of a kind referred to in section 240 unless PURA has refused pursuant to subsection (2) of that section to decide the dispute.'

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

1. SYNOPSIS OF THE STUDY

This thesis' focus was to examine the fairness of the procedural and substantive laws governing land compensation in the petroleum projects in Tanzania. The study analysed the extent to which the petroleum legal framework for land compensation in Tanzania respects and complies with the values of fairness codified in the Tanzanian Constitution and international human rights law, drawing from John Rawls' theory of fairness.

2. CONCEPTUAL FRAMEWORK

Chapters Two and Three make up the conceptual framework. These chapters described the conceptual underpinnings of 'fairness' drawing on the work of John Rawls.⁵⁷⁸ According to Rawls, fairness has both procedural and substantive elements. The procedural dimension centres on facilitating participatory decision-making that can make possible the realisation of just outcomes. The substantive dimension is meant to ensure that those people likely to wind up in poor circumstances are given due consideration in the distribution of public resources. In particular, Rawls' principles highlight the need for land acquisition policy to raise the standard of living of the worst off.⁵⁷⁹ As was seen in Chapter One, petroleum communities are often the least advantaged, which has been a cause for impoverishment, human rights abuses and violent conflicts.⁵⁸⁰

International human rights law was discussed in Chapter Three investigated the extent to which it codifies both aspects of fairness advocated by Rawls. According to

⁵⁷⁸ See Chapter Three, section 2.

⁵⁷⁹ See Chapter Two, section 5.

⁵⁸⁰ See Chapter One, section 1.

international human rights law, in order for land acquisition and compensation to be fair, the people affected must be given the opportunity to participate in the decision-making process.⁵⁸¹ The compensation process itself must consider the loss of their land and improve their livelihood situations.⁵⁸² Those are the critical components of fairness Chapter Three found to be particularly relevant to this thesis.⁵⁸³ With specific reference to compensation, this study has argued that ensuring the continuing livelihood of those whose land has been acquired is critical to fair compensation. This approach provided the framework for critiquing Tanzania's LAA and Petroleum Act.

3. CONCLUSIONS

The study has established that the Petroleum Act, which is supposed to be the major law that regulates petroleum activities in Tanzania, relies on the outmoded LAA, which predates both the Tanzanian Constitution of 1977 and the Bill of Rights (which was incorporated into the Constitution in 1985). As could be expected, the LAA, which was enacted during the socialist period of the 1960s, has weak provisions on procedural and substantive fairness.

More specifically, the Tanzanian petroleum legal framework does not adequately stipulate how the state should consult and, where applicable, seek consent from or reach consensus with the PAPPs, before acquiring their land and paying compensation. Some of the notable provisions of the Petroleum Act include section 33(2) of the Petroleum Act, which alludes to the need to seek the opinions of the PAPPs before opening petroleum fields. However, as was discussed in Chapter Six,⁵⁸⁴ section 33(2) does not codify a process that allows the PAPPs to participate meaningfully in decisions concerning land acquisition and compensation. Language barriers and the channels used to disseminate information to the PAPPs about projects also impede meaningful

⁵⁸¹ See Chapter Three, section 2.

⁵⁸² See Chapter Three, section 3.

⁵⁸³ See Chapter Three, sections 2-3.

⁵⁸⁴ See, Chapter Six, section 3.

participation by excluding PAPPs who cannot read and write or do not have access to technology.

Another procedural challenge lies in the mechanism for giving notice of the acquisition of the land and of the applicable compensation. The study has shown that under the Land Acquisition Act and the Petroleum Act, the state has no obligation to invite the PAPPs to participate in the land acquisition process (as the President may order a land to be acquired summarily), nor to participate in decisions about resettlement or compensation. Instead, the notices under these Acts are sometimes used as an ultimatum for the PAPPs to vacate their lands. The notice period can be as short as the President wishes. This arbitrariness, the study has observed, endangers the landowners' livelihood rights.⁵⁸⁵

Particularly problematic is the valuation process. The Government Valuer has power to determine compensation without consulting the affected persons. The law does not allow the PAPPs to challenge the state's valuation, making it difficult for compensation to be calculated in a manner that fully considers the livelihood situation of the affected persons. The Tanzanian petroleum-compensation fairness threshold is problematic because it is based on the equivalent theory of compensation, which does not recognise the totality of land interests and functions. It overly focuses on monetary compensation and largely ignores resettlement.

For the premium given to monetary compensation, the provisions on land compensation in Tanzania are surprisingly contradictory. For example, the Land Acquisition Act provides that the state cannot pay compensation for the acquisition of vacant land, while the Land Act provides that compensation should be paid for the value

⁵⁸⁵ See, Sammy Awami 'In Pictures: Tanzania Anger over Dar es Salaam Demolitions' BBC Africa, Dar es Salaam 14 January 2016. Available at <https://www.bbc.com/news/world-africa-35303212>: an analogous example is when the Government of Tanzania ordered demolition of houses in the slums of Jangwani, Dar es Salaam. According to the BBC, over 1000 people were rendered homeless. Most of the people came home to find that their residences had been destroyed. People lost their possessions, including academic certificates, money, accessories and everything that they had left in their house.

of the land. In practice, compensation schemes follow international standards or local standards depending on who is sponsoring the development project for which land is being acquired. This has resulted in unequal treatment and enabled corruption.

Equally important is the question of dispute resolution. While Tanzanian petroleum laws do address it, they leave several areas unclear. Whereas the Petroleum Act provides that PURA shall deal with complaints related to land compensation, the LAA, which the Petroleum Act states will apply whenever disputes concerning compensation arise, provides that the Regional Commissioner has original jurisdiction to entertain compensation complaints, and his decision is final. An effective and independent dispute resolution mechanism is critical to a fair compensation regime. It is hard to say that there is one in Tanzania at present.

It can thus be concluded that the Petroleum Act and the LAA do not provide a robust framework to ensure that those whose land has been acquired in connection with the implementation of petroleum projects receive fair compensation.

4. RECOMMENDATIONS

Much of what can be recommended to improve the petroleum compensatory legal framework in Tanzania is provided at the international level, particularly in the United Nations Guiding Principles on Business and Human Rights (UNGPs), (2011), which deal with how land should be acquired and compensated for through engaging with those affected. It is advisable that the Tanzanian government should consider the adoption of the principles laid down in those documents. As was seen in Chapter One, weakness that exist in the institutions of governance and the contradictions in the existing legal frameworks, together with lack of organisation and effective participation among those affected has exacerbated conflicts over payment of compensation and the plight of those affected. As such, the law ought to empower individuals and communities with information, participation and representation at the community level, within the project and within structures of the government.

More specifically, the study recommends that legal changes should be made to both the LAA and the Petroleum Act so that they codify consistent procedures to be applied in the compensation process. To do this, the study recommends that there should be a one-stop regulation stipulating when, what, who and how land for petroleum projects should be acquired and compensated for. Section 258(1) of the Petroleum Act states:

The Minister may make regulations providing for matters, which under this Act are required or permitted to be prescribed for giving effect to this Act.

....

(2) Without prejudice to subsection (1), the Minister shall make regulations providing for the-

....

(ix) powers of entry for purposes of inspection, including entry into premises during continuance and on discontinuance of supply;

...

(x) powers of entry for replacing, repairing or altering pipes;

...

(xiv) provisions for environmental matters;

Furthermore, section 258(2)(xvi) of the Petroleum Act gives the Minister ‘the powers to make any other regulation for better carrying out of the provisions and purposes of the Act.’ The Minister should use the explicit provisions of section 258(2) and make the regulations that govern how land required from petroleum projects should be acquired and compensated for.

In addition to promulgating regulations, the study also recommends some amendments to the Petroleum Act, Land Act, and the LAA.

Below are some of the specific recommendations:

- The Tanzanian legislature should make amendments to remove inconsistencies between the Land Act, the LAA and Petroleum Act regarding the applicable procedural and substantive principles governing compensation.
- The Tanzanian legislature should amend section 110 of the Petroleum Act to state that in any case where there are private elements to the interference or demand of land for extractive purposes by the licensee, the PAPPs should be allowed to negotiate benefits with the state since that is more likely to allow them to negotiate fair terms that will improve their livelihood situations.⁵⁸⁶
- The Minister responsible should promulgate regulations to the Petroleum Act to state specifically that communities must be informed of the applicable land laws and policies and rights before petroleum projects are implemented. The regulation should provide for awareness programmes in local languages and for engagement with local communities before implementing a petroleum project.
- The government should use the notices currently provided under section 5 of LAA to serve as an important information-giving tool rather than as an ultimatum for the affected people to vacate their land. For example, the notices could be used to invite the affected people to participate in decisions concerning land acquisition and compensation.
- Regulations to the Petroleum Act should build on section 33 of the Petroleum Act, which already gives a window for communities to participate during the environmental impact assessment, to intensify participatory approaches. The recommended regulation should specifically state that the PAPPs have a right to participate in the decisions about what land should be designated for extractive activities and how they should be compensated.
- The Tanzania legislature and the Minister responsible should specify in the Petroleum Act and regulations the applicable compensation principles that are

⁵⁸⁶ See this suggestion in Hobart M. King ‘Mineral Rights Basic Information About Mineral, Surface, Oil And Gas Rights’ available at <https://geology.com/Articles/mineral-rights.shtml> accessed on 4 July 2019.

consistent with international and comparative human rights practices. In particular, a provision stating that in calculating compensation consideration must be given to the need to improve the existing living standards of the affected people should be codified in the law.

- The Tanzanian legislature and the Minister responsible should amend the Petroleum Act or introduce a regulation that recognises resettlement as an alternative or complement to monetary compensation. Resettlement plans should be designed to mitigate the negative impacts of displacement and identify development opportunities.
- The Tanzanian legislature and the Minister responsible should make provision in the Petroleum Act and the Regulation that specifically states that where the PAPPs are displaced they should be compensated not just for the loss of their land but also other assets such as dwellings and improvements to the land at full replacement cost, and for the loss of profits or livelihoods.
- With the view of framing the compensation scheme that pays particular attention to the needs of the poor and the vulnerable, the legislature and the Minister responsible should make provision in the Petroleum Act and the Regulation stating that, if people living in a project area are required to move to another location, the state should offer those to be displaced a choice among several options, including adequate replacement, housing or cash compensation where appropriate. The provision must also require the state to provide relocation assistance suited to the needs of each group of displaced persons. New resettlement sites built for displaced persons must offer improved living conditions.
- The Tanzanian legislature and the Minister responsible should make provision in the Petroleum Act and the Regulation which ensures that decisions concerning compensation do not discriminate against, or do not have a discriminatory effect on women. Where land acquisition affects married persons, both must be consulted, heard and compensated fairly.

- The Tanzanian legislature should amend Section 110(1) of the Petroleum Act to provide that the licensees must exercise their right over the subsoil resources in a way that does not interfere with the rights of the PAPPs to enjoy surface rights on their land and not the other way around, since the licensees do not have the power to acquire land. The power to acquire land for public interest as contemplated under Article 24 of the Constitution is only vested in the state.
- The Minister responsible should, building on section 110 of the Petroleum Act, enact a provision in the proposed regulations stating that burial grounds and other lands that the people hold sacred are excluded from compulsory acquisition.
- The Tanzanian legislature should introduce a provision into the Petroleum Act to allow, in cases of a conflict relating to land acquisition and compensation, the PAPPs and the state to agree on a dispute settling mechanism. The grievance mechanism should be scaled to the risks and adverse impacts of the project and have PAPPs as its primary users. It should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible, and at no cost and without retribution to the party that originated the issue or concern. The mechanism should not impede access to judicial or administrative remedies. The affected communities must be involved in establishing the mechanism.
- The Tanzanian legislature or the Minister responsible should promulgate guidelines to Local Government Authorities on how they can address issues related to land rights abuses and compensation in their locality.
- The Tanzanian legislature should also make provision in the Petroleum Act for the legal representation of indigent PAPPs. The law should bestow upon the government the duty to facilitate the establishment of community-based organisations and legal clinics in villages to assist the affected people with legal representation or assistance. The law should encourage the formation of such

organisations with gender-balanced membership to reduce power imbalances among the affected communities.

5. FINAL REMARKS

Adopting an appropriate legal framework that enables citizens to participate in decisions concerning the distribution of proceeds from petroleum resources can help to prevent resource extraction-related conflicts. If the Tanzanian petroleum compensation framework was reformed to incorporate the theory of fairness discussed in this study, it could lead to a diversified economy where petroleum activities do not shut down other economic activities. It could also enhance respect for the human rights of the communities living within the vicinity of the petroleum fields.

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