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FOREGROUNDING HUMAN DIGNITY

A FRAMEWORK FOR ENHANCING PROTECTION OF INDIGENOUS PEOPLES' RIGHTS IN AFRICA'S PROTECTED AREAS

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Abstract

This article will unpack the conceptual causal link between pervasive indigenous peoples' rights violations in Africa and implementation of protected areas legislation devoid of respect for human dignity as an interpretive principle to guide implementation of the laws in question. Specifically, I will examine the extent to which protected areas laws of six selected Southern and Eastern African countries namely Botswana, Namibia, South Africa, Kenya, Tanzania, and Uganda foster respect for human dignity as a means of protecting rights of indigenous communities. A key finding of this article is that most of the laws enacted to establish and manage protected areas in Eastern and Southern Africa are human-dignity blind. This is because, despite occasionally undergoing cosmetic amendments since the attainment of political independence, the laws in question are largely relics of colonialism.

In order to establish the causal link and draw the above conclusion, I will first explore the legal foundations of human dignity as exemplified by the UN Charter, the Universal Declaration on Human Rights, and Constitutions of the six study jurisdictions. I will also look at the disproportional targeting of indigenous peoples in protected areas as documented in two reports submitted by the UN Special Rapporteur on the Rights of Indigenous Peoples to the UN General Assembly. Relatedly, I will address a central question namely who indigenous peoples are in the African setting, followed by a survey of protected areas legislation, juxtaposed with framework environmental laws of the six study jurisdictions. Lastly, I will explore the potential change of storylines or value addition of enshrining human dignity in protected areas legislation.

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This article recommends inclusion of provisions on human dignity as a global prescription for remedying both the historical and continued injustices and discriminatory practices against indigenous peoples in the context of protected areas establishment, management, and expansion.

INTRODUCTION

Human dignity has long been a question of great interest in a wide range of academic disciplines.[2] In the field of law, it is widely considered the foundation of modern international law.[3] This explains why the constitutive Charter of the United Nations unambiguously reaffirms the indispensability of respect for "the dignity of the human person" as a pre-condition to saving "succeeding generations the scourge of war, which… has brought untold sorrow to mankind."[4] Similarly, the Universal Declaration of Human Rights (UDHR), which is considered the most influential normative document in the World,[5] confirms that all human beings are born free and equal in dignity, and that recognition of dignity is the foundation of freedom, justice, and peace.[6] Inclusion of dignity in constitutions of countries from all legal traditions, accompanied by robust

[2] See Pirson, Michael, Claus Dierksmeier & Kenneth Goodpaster, Human Dignity and Business 501–503 (*Cambridge University Press* 2015); See also Maarten Biermans, *The political economy of dignity: monitoring the advancement of socio-economic human rights in the globalized economy*, UvA-DARE, 2005.
[3] Patrick Capps, Human Dignity, and the Foundations of International Law (Hart Publishing, 2009).
[4] Preamble to the United Nations Charter, 1945.
[5] Dicke Claus, *The founding function of Human Dignity in the Universal declaration of Human rights*, The Concept of Human Rights in the Human Rights Discourse 111–120 (Brill Nijhoff, 2001).
[6] Preamble to the Universal Declaration of Human Rights, 1948.

court jurisprudence generated by judges in courts of records, is testament to the UDHR's unparalleled normative influence and inspiration.[7] For example, the Constitution of the United Republic of Tanzania obliges the state to ensure that "human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights."[8] Broadly, dignity entails respecting the inherent worth of every member of the human family; and calls for treating everyone equally, irrespective of one's race, sex, language, political or other opinion, national or social origin, property, birth or other status.[9]

However, while human dignity is firmly grounded in authoritative international instruments and is currently inscribed in written constitutions of almost all nations, protected areas legislation and their implementation call to question and cast doubts on the perceived universality of human dignity, including protection of equality and non-discrimination.[10] Most of protected area laws underscore a growing body of evidence contending that lives of marginalized communities self-identifying as indigenous peoples all over the world are not valued the same way as the lives of mainstream communities in relation to conservation [11], and this contravenes human dignity. Yet paucity of literature exists, unpacking the conceptual causal link between pervasive indigenous peoples' rights violations in Africa, and implementation of protected areas legislation devoid of respect for human dignity as an interpretive principle to guide implementation of the laws in question.

The objective of the present article is to examine the extent to which protected areas laws of six selected Eastern and Southern African countries foster respect for human dignity as a means of protecting rights of indigenous communities. While the African continent comprises five sub-regions namely Northern Africa, Western Africa, Central Africa, Eastern Africa and Southern Africa, the focus of this article is two sub-regions namely the Southern and the Eastern African sub-regions. The main criterion for the selection of the two sub-regions is linguistic, meaning most publicly available literature and data analyzed in this article are available in English. Further, the present article focuses on only six countries in the two selected sub-regions namely Botswana, Namibia and South Africa for Southern Africa and Tanzania, Kenya, and Uganda for Eastern Africa. In addition to the linguistic criterion, the six countries have been selected due to being on the international limelight for massive violations of indigenous peoples' rights in the context of protected areas or conservation.[12]

The research on which this article is based hence involved *inter alia*, a comprehensive review of laws governing protected areas in the six selected countries, with the view to determining the extent to which they embed the concept of human dignity. The use of the term 'human dignity' as a reference or conceptual framework of analysis underscores its foundational and all-encompassing usage under International Human Rights Law, to include *inter-alia*, the right to equality and non-discrimination. The choice of the term is thus premised on the fact that

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[7] James R. May & Erin Daly, *Why Dignity Rights Matter*, 19 European Human Rights L. Rev. 129 (2019).
[8] See Article 9(f) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time).
[9] Rinie Steinmann, *The Core Meaning of Human Dignity*, 19 Potchefstroom Electronic L. J. 1 (2016).
[10] See for example Obiora L. Amede, *Symbolic Episodes in the Quest for Environmental Justice*, 21 Human Rights Quarterly 464 (May 1999). Obiora posits that, "Apparently, when environmental questions are matched against economic and ecological interdependence, and rapid change and conflict, they emerge as complex geopolitical syndromes that challenge existing forms of governance." *Id.* at 482-483.
[11] See Marcus Colchester Marcus, *Conservation policy and indigenous peoples*, 7(3) Envtl. Sci. & Pol'y 145-153 (2004).
[12] See Report of the UN Special Rapporteur Victoria Tauli Corpuz on Conservation. The Report lists under paragraph 14 five out of the six countries selected as being "among the African countries in which large parts of the protected areas are located on the indigenous peoples' ancestral domains."

violation of indigenous peoples' rights in the context of protected areas, largely happen due to their indigenous identity, hence implicating universality of human dignity. This means that most of the human rights violations committed against indigenous peoples can rarely happen in relation to mainstream communities in the same countries. For example, it is common for homes of indigenous communities to be reduced into ashes by game-scouts on the pretext of advancing conservation objectives. In contrast, demolition of a kiosk belonging to a city-based entrepreneur, if it happens, is often preceded by some due process's initiatives, including securing a court decision endorsing the step. Additionally, whereas sacred sites and other spaces of spiritual significance to indigenous peoples are increasingly being annexed to create protected areas, demolition of places of worship in towns and cities rarely happens, if at all.

The present study is crucial in today's revitalized concerns about conservation and Indigenous peoples' rights following among other developments, submission of two reports on conservation and indigenous peoples' rights, to the UN General Assembly by the UN Special Rapporteur on the rights of Indigenous Peoples. The article is hence relevant to policy makers and indigenous peoples advocates as a guide to designing suitable legal and administrative frameworks to implement the UN Special Rapporteur's recommendations. For example, one of the recommendations of UN Special Rapporteur Jose Francisco Cali Tzay is adherence to the human rights-based approach in the establishment and expansion of existing protected areas. Further, the present article contributes to the growing body of inter-disciplinary scholarship on the subject of conservation and human rights, by providing a better understanding of underlying factors for disproportional and a selective targeting of Africa's indigenous peoples in the context of protected areas establishment, expansion, and management.

A key finding of the present article is that most of the laws enacted to establish and manage protected areas in Eastern and Southern Africa are human-dignity blind. This is because, despite occasionally undergoing cosmetic amendments since the attainment of political independence, the laws in question are largely relics of colonialism. Jim Igoe and Dan Brockington wonder why, "in spite of the negative impacts of protected areas on local resource management systems, they were never redefined to suit an African context in the years following independence."[13] Quoting Gamassa, Igoe contends that newly independent governments 'accepted wholesale the imported conservation philosophy which more often than not sought to alienate local people from wildlife resources without alternative."[14] Consequently, these laws advance the "Yosemite Model" as evidenced by recuring incidences of forceful evictions of stewards of the lands and territories in question in a manner that "fosters incredible violence, hardship and harm not only through the loss of land through dispossession but also through the interruption of indigenous lifeways that are tied to the lands themselves."[15]

The remainder of this Article will proceed in the following order: Part Two provides an overview of human dignity under International Law and pursuant to the Constitutions of the six

[13] Jim Igoe and Dan Brockington, Pastoral Land Tenure and Community Conservation: A Study from north-East Tanzania, Pastoral Land Tenure Series 11 (1999).
[14] *Id.* at 11.
[15] Esme G. Murdock, *Conserving Dispossession? A genealogical account of the colonial roots of western conservation*, 24(3) Ethics, Pol'y & Environment 235, 249 (2021).

studied countries. Part Three summarizes key findings and recommendations of two reports that the UN Special Rapporteurs presented to the UN General Assembly relating to conservation and the rights of indigenous peoples. The aim is to indicate how Africa's indigenous peoples have featured in the global reports on violations of indigenous peoples' rights. Part Four answers the key question -who Africa's indigenous peoples are.

Part Five surveys protected areas laws in the six study countries in relation to inclusion of provisions on human dignity as a tool for protection of indigenous peoples' rights. Framework environmental laws are also analysed in this part to further illuminate the comparative study. Part Six discusses value addition of including human dignity as an interpretive guide for implementation of protected areas legislation in Africa. Part Seven contains the conclusion and recommendations.

I. LEGAL FOUNDATIONS OF HUMAN DIGNITY: AN OVERVIEW

A. The UN Charter and the Universal Declaration on Human Rights

The UN Charter is the constituting document for the United Nations Organization ("the UN") and the first international legal document to comprehensively enshrine the concept of dignity.[16] For example, its preambular paragraphs reaffirm "faith (...) in the dignity and worth of the human person."[17] In addition to the UN Charter, the Universal Declaration on Human Rights (the UDHR) of 1948 underscores centrality of human dignity.[18] The United Nations General Assembly adopted the UDHR and marked the official 'internationalization' of the human rights agenda.[19] Prior to the UDHR's adoption, human rights, including human dignity were viewed largely as domestic concerns, and were relegated to municipal law as the framework for resolving competing values.[20] Internationalization of the human rights agenda thus elevated the concept of dignity into a central subject of constitutional and legal discussions.[21]

While the debate about the legal status of the UDHR as a matter of International Law continues,[22] the rights and freedoms set out in it "have become international customary law through state practice and *opinio juri*s."[23] Contestations of its legal status notwithstanding, the UDHR forms the bedrock for the contemporary international human rights system and has inspired UN member states to align their written constitutions to its spirit. The UDHR does not define the term dignity but offers a helpful guide for its better consideration. For example, the

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[16] Arthur, Chaskalson, *Human Dignity as a Constitutional Value* in The Concept of Dignity in Human Rights Discourse 133–144 (Brill Nijhoff, 2001).
[17] B. Simma et al., The Charter of the United Nations (3rd Edition): A Commentary 2 (Oxford 2002).
[18] Klaus Dicke, *The founding function of human dignity in the Universal Declaration of Human Rights* in The Concept of Dignity in Human Rights Discourse 111-120 (Brill Nijhoff, 2001).
[19] Alina Kaczorowska-Ireland, Public International Law (Routledge, 2015).
[20] *Id.*
[21] May and Daly, supra note 6.
[22] See Hurst Hannum, *The status of the Universal Declaration of Human Rights under international law*, 25 Ga. J. Int'l & Comp. L. 287 (1995).
[23] Alina Kaczorawaska-Ireland, Public International Law 508 (4th Edition, Routledge 2010) (quoting the Commission on Human Rights' Special Rapporteur on the Situation in Iran, Mr. Galindo Pohl).

UDHR confirms that dignity is "inherent... to all members of the human family" [24]; adding that all human beings are "free and equal in dignity and rights.[25]

Relatedly, the UDHR stresses that human rights "derive from the inherent dignity of the human person."[26] By linking human rights to human dignity the UDHR has attempted to answer a key conceptual question namely why human beings have rights. According to the UDHR, human beings are entitled to rights because they have intrinsic worth: "all human beings are born free and equal in dignity and rights."[27] This explains why the UDHR stresses the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"[28]. Another implication of linking human rights to human dignity is a logical inference that all human beings possess equal basic rights[29].

Correspondingly, by stressing that human rights originate in human dignity the UDHR implies that human rights are pre-existent values which are inherent in every human being. Consequently, governments cannot unjustifiably limit their enjoyment by citizens[30] as it is now becoming the norm rather than the exception when it comes to indigenous peoples' rights in the context of protected areas establishment and expansion of new ones.

B. Constitutions of selected African countries

Four out of six Constitutions of Southern and Eastern African countries surveyed, make explicit reference to dignity, suggesting that they were inspired by contents of the Universal Declaration of Human Rights (UDHR). Apart from inviolability of dignity,[31] three other themes can be delineated from the constitutional provisions on dignity appearing in Constitutions of four out of the six jurisdictions studied. These themes are the universality of dignity; responsibilities of state organs to preserve and protect human dignity; and dignity as a cornerstone of due process and protection of vulnerable groups. In the next paragraphs, this article summarizes the themes.

1. Dignity as a universal value

The Constitution of the United Republic of Tanzania of 1977 (as amended occasionally) provides that "all human beings are born free and are all equal", adding that "Every person is

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[24] United Nations, *Universal Declaration of Human Rights*, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Apr. 27, 2024).
[25] *Id.* at Article 1.
[26] *Id.*
[27] *Id.*
[28] H. Hannum, *The UDHR in National and International Law*, 3(2) Health and Human Rights 144-158 (1998).
[29] *Id.*
[30] O. Schachter, *Human dignity as a normative concept*, 77(4) Am. J. Int'l L. 848-854 (1983).
[31] See Article 8(1) of the Constitution of Namibia which states that "the Dignity of all persons shall be inviolable." See also the list of non-derogable rights appearing in a table on Article 37 of the Constitution of South Africa which lists dignity as being entirely protected. Similarly, Article 36(1) of the South African constitution provides that the Bill of Rights may be limited only based on observance of human dignity.

entitled to recognition and respect for his dignity."[32] To reinforce the universal conceptualization of dignity, the constitution of Tanzania further directs dignity to be "preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights."[33] Tanzania's constitutional provisions are consistent with the drafting of the Constitution of South Africa which stresses that "Everyone has inherent dignity and the right to have their dignity respected and protected."[34] Reference to human-dignity in the context of South Africa has been hailed to assume the Ubuntu-based conception.[35]

The South African Bill of Rights, which is described by the constitution as "a corner stone of democracy" comprise robust provisions for protection of human dignity. Significantly, the Constitution "enshrines the rights of all people" in South Africa as well as "the democratic values of human dignity, equality, and freedom."[36] In its extensive preambular paragraphs, the Constitution of Namibia confirms that "recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice, and peace."[37] The Constitution of Uganda is outstanding in this respect. It extends coverage to special groups in the society namely women and people with disability who have historically been left behind. It states that "women shall be accorded full and equal dignity of the person with men."[38] It also confirms that "Persons with disabilities have the right to respect and human dignity."[39]

2. Responsibility to state authorities

Based on the centrality of international cooperation in the realization of human rights, including human dignity, the Constitution of Namibia is broadly drafted to include "the people of Namibia" as well as "in association with the nations of the world", as having the "desire to promote…the dignity of the individual and the unity and integrity of the Namibian nation."[40] The Constitution of Uganda also states responsibilities to promote and protect human dignity, albeit in generic terms. It requires for example "the state" to promote and preserve "those cultural values and practices which enhance the dignity and well-being of Ugandans." Further it directs in optional terms and without specifying any institution, the need for incorporation in aspects of Ugandan life "cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution."[41]

On the other hand, the Constitution of South Africa is more specific. It directs South African courts, tribunals, and related forums to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" when the institutions in question are called to interpret the Bill of Rights.[42] This pointedness in the division of labour is also conspicuous in the Constitution of the United Republic of Tanzania. It obliges "State authorities and all its agencies" to direct "policies and programs towards ensuring that the human

[32] Constitution of the United Republic of Tanzania, Article 12 (1) and (2) (1977).
[33] *Id.* at Article 9(f).
[34] Article 10 of the Constitution of South Africa.
[35] Thaddeus Metz, *Ubuntu as a Moral theory and human rights in South Africa*, 11(2) African Human Rights Journal 532-559 (2011).
[36] Article 7(1) of the Constitution of South Africa.
[37] Preamble to the Constitution of Namibia.
[38] Article 33 (1) of the Constitution of Uganda.
[39] Article 35 (1) of the Constitution of Uganda.
[40] Preamble to the Constitution of Namibia.
[41] Part XXIV of the Constitution of Uganda.
[42] Article 39(1)(a) of the Constitution of South Africa.

dignity and other human rights are respected and cherished."[43] Considering that Tanzania is a union of two formally independent African States, the Constitution further requires "Structure of the Union" to discharge its duties while preserving "national dignity."[44]

3. Dignity as a cornerstone of due process and prohibition of torture

Article 24 of the Constitution of Uganda sub-titled "Respect for human dignity and protection from inhuman treatment" prohibits subjection of any person to any form of torture or cruel, inhuman, or degrading treatment or punishment. In a move to protect women who have historically been left behind, the constitution provides that "laws, cultures, customs, or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited"[45] by the constitution. It is noteworthy that some customs and traditions subject women to torture, inhuman and degrading treatment.

The constitution of Namibia lays emphasis on the judicial proceedings. It states in part: In any judicial proceedings or in other proceedings before any organ of the state, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.[46] This is consistent with the constitutional requirement in South Africa which stresses that "Everyone who is detained, including every sentenced prisoner" has the right to conditions of detention that are consistent with human dignity."[47] Similarly, the Constitution of South Africa requires human dignity to be promoted "in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence."[48]

The foregoing discussion is testament that constitutions of study jurisdictions intended to build states founded on respect for the values of dignity, human rights, democracy, social justice, and the rule of law. However, a rift exists between the constitutional provisions on dignity on the one hand, and the contents and implementation of protected areas legislation on the other hand. This mismatch justifies questioning the perceived universality of human dignity. In the next paragraph, this article discusses selective targeting of indigenous peoples as documented in reports submitted to the UN General Assembly.

II. THEMATIC REPORTS OF THE UN SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES

Between 2016 and 2022, the United Nations General Assembly received two thematic reports pertaining to the rights of indigenous peoples in the context of nature conservation. The UN Special Rapporteur on the Rights of Indigenous Peoples Vicky Tauli-Corpuz and Joze Francisco Cali Tzay presented the thematic reports in 2016 and 2022 respectively. The 2016 report confirms that the impact of conservation on indigenous peoples has been "a recuring

[43] Article 9(a) of the Constitution of the United Republic of Tanzania.
[44] Article 8(2) of the Constitution of the United Republic of Tanzania.
[45] Article 33(6) of the Constitution of Uganda.
[46] 8(2)(a).
[47] 35(2) (e) of the Constitution of the United Republic of Tanzania.
[48] 13 (6) (d) of the Constitution of South Africa.

theme since the establishment of the mandate of the UN Special Rapporteur on the rights of indigenous peoples in 2001."[49]

The report lists human rights violations on indigenous peoples resulting from conservation to include "the expropriation of land, forced displacement, denial of self-governance" and "lack of access to livelihoods and loss of culture and spiritual sites" as well as, "non recognition of their own authorities and denial of access to justice and reparation, including restitution and compensation."[50] UN Special Rapporteur Jose Francisco Cali Tzay submitted to the UN General Assembly a thematic report on the same subject in 2022. He informed the General Assembly that "indigenous peoples across the globe have overall not seen a concrete improvement in the realization of their rights in the context of conservation initiatives."[51] To back up this claim, the UN Special Rapporteur indicated continued receipt of several cases of human rights violations resulting from conservation initiatives.

While the 2022 Report confirms the list of violations as documented in the 2016 report, it adds that "such violations have had particularly negative impacts on women and girls who are primarily responsible for gathering food, fuel, water and medicine and are therefore exposed to risks of sexual violence at the hands of militarized security forces, park rangers and law enforcement."[52] Drawing from the Yellowstone and Yosemite experiences, research indicates that up to 50% of all protected areas worldwide have been established in indigenous peoples' lands and territories.

In Africa for example, the 2016 UN Special Rapporteur report describes Botswana, Cameroon, Kenya, Namibia, South Africa, and the United Republic of Tanzania as "among the African countries in which large parts of the protected areas are located in indigenous peoples' ancestral domains."[53] This resonates with the 2022 report which posits that, "the persistent practice of forced evictions for conservation purposes is particularly worrying in Africa."[54] Regarding Tanzania, the report provides:

> In the United Republic of Tanzania, the Maasai have a long history of being violently evicted from their lands, and the Government has plans to displace a further 150,000 Maasai from the Ngorongoro Conservation Area and the Loliondo Division of Ngorongoro District. In 2022, the Special Rapporteur publicly called for the planned evictions to be halted and consultations with the Maasai to be initiated, and urged the UNESCO World Heritage Committee to reiterate to the Government of the United Republic of Tanzania that plans concerning the Ngorongoro Conservation Area must comply with relevant human rights standards.[55]

The Tanzanian case highlighted above is a microcosm of the global trends of evictions of indigenous peoples from their ancestral lands, hence decimating their livelihoods. For example, a

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[49] UN Human Rights Special Rapporteur Victoria Tauli-Corpuz, Rights of indigenous peoples (July 2016) at ¶ 8.
[50] *Id.* at ¶ 9.
[51] *Id.* at ¶ 18.
[52] *Id.*
[53] *Id.* at ¶ 14.
[54] UN Human Rights Special Rapporteur Francisco Cali Tzay, Conservation and indigenous peoples' rights (October 2022), ¶ 24.
[55] *Id.* at ¶ 24.

2018 UN Permanent Forum on Indigenous Issues report entitled "A study to examine conservation and indigenous peoples' human rights" posits that "conservation interventions around the world have far too often resulted in gross violation of human rights of indigenous peoples."[56] Specifically, the report indicates that indigenous peoples' rights are violated through "forced displacement from their territories; the destruction of livelihoods; the loss of access to lands, resources and sacred sites; the loss of culture; and extra judicial killings."[57] Paradoxically, protected areas laws of most jurisdictions, sanction the atrocities committed against indigenous peoples in the name of conservation. Professor Robert Williams, Jr., recently published an article in the New York times, which confirms this assertion:

> Countries frequently regard these abuses as legally defensible because, unlike in the United States and most other Western nations with significant tribal populations, many African, Asians and Latin American Indigenous Peoples have not been granted secure tenure and rights in their traditionally occupied lands. But wildlife officials and others initiating and supporting large-scale relocation of Indigenous communities are too often ignoring another far better way of protecting biodiversity that does not require destroying lives and livelihoods in the process.[58]

A relevant question at this juncture is, who are indigenous peoples in Africa? In the next paragraph, this article addresses that recurrent question, albeit briefly.

III. WHO ARE INDIGENOUS PEOPLES IN AFRICA? ADDRESSING A CENTRAL QUESTION

To understand the contextual applicability of the concept of Indigenous Peoples in Africa, reference to the African Charter on Human and Peoples Rights (the African Charter)[59] is central. The African Charter establishes the African Commission on Human and Peoples Rights (the African Commission)[60] and tasks it to supervise the African Charter's implementation. In line with this mandate, the African Commission has for decades engaged in discussions on the human rights situation of African communities on the margin (mostly hunter-gatherers and nomadic pastoralists) that self-identify as Indigenous Peoples.[61] These communities also constitute the most vulnerable and highly marginalized groups in the continent and attribute their marginality

[56] United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, Study to Examine Conservation and Indigenous Peoples' Human Rights 2 (2018).
[57] *Id.*
[58] Robert Williams, *Kicking Native Peoples Off Their Land is a Horrible Way to Save the Planet*, Opinion Guest Essay, the New York Times (Feb 20, 2024).
[59] African Charter on Human and Peoples Rights. Adopted 27 June 1981 (entered into force 1986). Organization of African Unity (OAU Document CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)). Retrieved on April 29, 2024, from *http:// www. achpr .org/ files/ instruments/ achpr/ banjul charter .pdf*
[60] *Id.* at Article 30-44.
[61] Elifuraha Laltaika, *Indigeneity, national unity, modernity, and public policy* in Africa in Handbook of Indigenous Public Policy (Edward Elgar Publishing 2024) at 35-52.

to "their distinct livelihoods that are at odd with their countries development priorities".[62] For example, while these communities have spiritual and cultural connections to their communally owned lands, their countries target the lands in question for exclusive photographic tourism and trophy hunting. Additionally, these communities, live in remote areas, and have *inter alia*, linguistic barriers due to low literacy levels, making it hard for them to effectively participate in development planning and other public affairs of the countries in which they live.

A watershed moment was 2001. The African Commission formed a Working Group on the Right of Indigenous Populations/Communities to advance and coordinate the discussions on whether there are indigenous peoples in the continent. After conducting extensive research, the Working Group issued a report, which is considered "a highly important instrument for the advancement of Indigenous populations' human rights situations"[63] in Africa. Launched in 2004, the report confirms that indeed there are Indigenous Peoples in Africa. Significantly, the report provides that (unlike in jurisdictions such as Canada, New Zealand, Australia, and the United States where indigeneity is assessed in terms of land occupancy prior to colonialism), the term Indigenous Peoples in the African context puts more emphasis on continued marginalization in line with the modern analytical and emancipatory connotation of the term.[64] Correspondingly, the report indicates that the question of aboriginality is irrelevant and undesirable in understanding who Indigenous Peoples are in Africa.

The Report further clarifies that communities that self-identify with the concept aim to showcase the structural relationships of inequality that have persisted after liberation from colonial dominance, mainly attributed to the communities' traditional livelihoods and land holding systems that are at variance with public policy priorities of most African countries.[65] Generally, African communities that self-identify as Indigenous Peoples have disproportionally experienced and continue to experience subjugation, marginalization, dispossession, exclusion, or discrimination based on different cultures, ways of life or modes of production than the national hegemonic or dominant models.[66] Nevertheless, they strive to maintain traditional livelihoods, culture and spiritual connection that intricately depend on communal ownership of land and natural resources, in the face of strong opposing forces that put primacy on modernization and individual land ownership as well as on other land uses that are perceived to contribute more to the economy.

Accordingly, the African Commission (the intergovernmental organization charged with the protection and promotion of human rights on the continent) has settled the debate on whether there are Indigenous Peoples in Africa, at least conceptually. The practical importance of its report hinges on the report's adoption by the African Union. It is therefore correct to say that the report is an official document for African Governments. While some African countries still contest the applicability of the concept (mainly due to lack of understanding of its contextual applicability in the continent as discussed by the inter-governmental institution), it has gained tremendous traction globally, largely as an international legal platform. Under international law, the indigenous peoples' forum enables claimant communities to seek justice as well as treatment

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[62] *Id.* at 36.

[63] As envisaged during its adoption, the report has facilitated constructive dialogue between the Commission and member states and has served as a platform for the commission's activities on promotion and protection of human rights of indigenous populations.

[64] See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, IWGIA and ACHPR 92 (2005).

[65] *Id.* at 88.

[66] *Id.*

aligned to their spirituality, culture, communal land ownership, and a distinctive and vulnerable status compared to other mainstream communities within their countries. Indigenous Peoples of Africa (like Indigenous Peoples elsewhere) do not agitate for special rights or treatment but insist on conditions that enable them to exist as distinct groups, free from discrimination or unfair targeting by their governments and other actors such as transnational corporations and international conservation non-governmental organizations. It is noteworthy that the use of the indigenous platform by the marginalized groups in the continent does not aim at questioning the identity of other groups. The African Commission report puts this fact in broader perspectives:

> When some particular marginalized groups use the term *indigenous* to describe their situations, they use the modern analytical form of the concept (which does not merely focus on aboriginality) in an attempt to draw attention to and alleviate the particular form of discrimination they suffer from. They do not use the term in order to deny all other Africans their legitimate claim to belong to Africa and identify as such. They use the present day wide understanding of the term because it is a term by which they can adequately analyze the particularities of their sufferings and by which they can seek protection in international human rights law and standards.[67]

IV. PROTECTED AREAS LAWS IN SOUTHERN AND EASTERN AFRICA IN RELATION TO HUMAN DIGNITY

In a seminal essay entitled *"Radical Environmentalism and Wilderness Preservation: A Third World Critique*,"[68] Ramachandra Guha cautions that implementation of "wilderness" conceptualized to entail natural habitats "untrampled by man" can be harmful in the context of the Third World. Citing India as an example, Ramachandra contends that restricting rural communities from accessing the natural resources they need for their survival implies that resources are directly transferred from the poor to the rich. This contention resonates with the situation in most African countries where globalization-driven nature conservation results in significant and disproportional impacts on communities self-identifying as indigenous peoples. With pressure from international conservation organizations, most African governments use forceful evictions to achieve nature exclusion guised as conservation objectives hence technically transferring resources from the poor to the reach who access them by way of trophy hunting, for example.

Paradoxically, most Africa's legislative frameworks justify the evictions largely due to their colonial roots. This explains why "to rid themselves of colonial laws governing natural resources"[69] has been described as the main challenge confronting African countries. For example, the colonial laws in question expressly suppressed indigenous peoples and local

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[67] *Id.* at 88

[68] Ramachandra Guha, Radical American Environmentalism and Wilderness Preservation: A Third World Critique, 11(1) Envtl. Ethics 179–191 (2017).

[69] Kameri-Mbote, Annie Patricia, and Phillipe Cullet, *Law, Colonialism and Conservation in Africa*, 6 Rev. Eur. Comp. Int'l Envtl. L. 23, 23 (1997).

communities' needs by placing "greater emphasis on the reservation of forests and their exploitation for timber production," while disregarding and in most cases outlawing "the needs of the local communities in terms of fuel wood and non-timber forest products such as deadwood and medicinal plants."[70] Further, it is noteworthy that colonial protected areas policies were used to forcefully evict and relocate local communities to new areas "against their wishes and without compensation for the loss of property and other rights, such as hunting and gathering from the reserved areas."[71] This problem persists today because as indicated above, most laws are a replica of colonialism.

Specifically, a survey of legislation governing protected areas in six study countries confirms that upon attainment of political independence, African governments largely continued the colonial conservation policies. Using human dignity as a frame of analysis, the survey examined protected areas legislation in Botswana, Namibia, South Africa, Kenya, Uganda, and Tanzania. The objective was to find out whether the laws embody provisions fostering (expressly or by necessary interpretation) respect for human dignity. A key finding of the survey is that no single legislation in the six study countries, contain sections requiring implementors of the laws in question to abide by respect for human dignity. Further the survey established that there is a paucity of other terms that could foster values of equality and non-discrimination in line with the constitutions of the respective countries. This paucity explains why implementation of the laws in question often result in total disregard of indigenous peoples' dignity.

The survey found out that most of the laws in question establish "fortress" protected areas through implementation of "extinguishment" provisions which derecognize prior rights once an area is declared a protected area, most notably a national park. The provisions are widely used in the study countries to forcefully remove indigenous peoples from their homelands, while simultaneously laying considerable emphasis on imposition of excessive fines and, or imprisonment for re-entry into an area declared protected. For example, the Namibian Nature Conservation Ordinance[72] prohibits entry into and carrying on of certain activities in the parks and reserves without the permission of the executive committee. It is noteworthy that some of the prohibited activities are central to the cultural integrity and spirituality of Namibia's indigenous peoples, comprising the remaining Africa's hunter-gatherer communities.

For example, the law prohibits picking "any indigenous plants", including medicinal and sacred plants the San hunter-gatherers need for their cultural and spiritual wellbeing. The Namibian legal provision is almost similarly worded with a section in the Tanzanian Wildlife Conservation Act, which prohibits entry into a game reserve without a written permit of the director of wildlife previously sought and obtained.[73] Most of the Tanzanian game reserves and other protected areas categories such as National Parks are formally Maasai indigenous peoples grazing lands, comprising not only pastures but also saltlicks, water sources for people and livestock, as well as medicinal and sacred plants.[74] The prohibition theme is replete in the wildlife conservation laws and policies of other study countries. These legal frameworks enforce fortress conservation notwithstanding numerous research findings demonstrating that "the enclosure of common resources by, and for, the benefit of the state and certain individuals, which had previously been sustainably managed by local communities, has contributed to ecological

[70] *Id.* at 27.
[71] *Id.* at 23.
[72] Nature Conservation Ordinance, 1979 (as amended by the Nature Conservation Amendment Act, 2017).
[73] Section 15 of the Wildlife Conservation Act no. 5 of 2009 (Tanzania).
[74] Notable examples include Serengeti, Manyara, Tarangire and Mkomazi National Parks.

crises currently discernible in Africa."[75] Pervasive resource utilization prohibitions also ignore the fact that indigenous peoples have for generations been stewards of the ecosystems due to the intrinsic connection they have with the earth and predominant dependence on the earth's fruits. Research indicates for example that:

> Indigenous peoples' social organization, material culture, confluence of aesthetic and spiritual values, long history of interaction with the terrain that they inhabit as well as their reliance on the ecosystem for subsistence, and their intimate acquaintance with its frailty, tend to predispose them to revere its integrity and to strive for a modicum of balance in nature.[76]

To illuminate the comparative analysis of the legislative frameworks of the six study countries, the survey on which this article is based further examined framework environmental laws of the six selected countries. The objective was to decipher whether legal provisions exist, fostering respect for human dignity. Enactment of framework environmental laws in many jurisdictions across the globe was largely inspired by two mega international environmental conferences namely the United Nations (UN) Conference on the Human Environment of 1972 and UN Conference on Environment and Development of 1992, also known as the Rio Conference.[77]These conferences ushered in a new international development philosophy that balances the environment preservation and poverty eradication through sustainability.[78]

The survey verified that in keeping with the themes of the two conferences and other global trends, framework environmental protection laws in most of the study countries contain provisions listing "principles of environmental management." These principles are in most cases drafted in mandatory terms and are aimed at guiding the implementation and interpretation of the framework environmental legislation. The Tanzania's Environmental Management Act, 2004 exemplifies this finding. It requires every person exercising powers under the Act to observe a set of principles of environmental management, including ensuring access to justice enabling individuals and communities "to contest decisions that do not take their interest into account."[79]

The strength of the principles of environmental management hinges on their strong wording-they create legislative duties to officials to abide by the principles in question when interpreting and enforcing the framework environmental laws. In addition, contents of the principles indicate that they foster human dignity, including equality and non-discrimination. For example, one of the principles of South Africa's NEMA states, "environmental management

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[75] Mbote, *supra* note 69, at 23.
[76] Obiora, *supra* note 10 at 488.
[77] Ebbesson Jonas, *The notion of public participation in international environmental law*, 8(1) Yearbook of Intl Envtl L. 51 (1998).
[78] David D. Gow, *Poverty and natural resources: Principles for environmental management and sustainable development*, Environmental Impact Assessment Review at 49-67 (1992).
[79] Section 7(3)(f) of the National Environmental Management Act, 1998 (South Africa).

must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural, and social interests equitably."[80]

Theorizing the disparity

Several theories can elucidate why while framework environmental laws embed principles of environmental management- mandatory provisions that foster human dignity, laws governing protected areas are devoid of similar provisions. Firstly, the disparity helps to prove that despite undergoing cosmetic amendments after the attainment of political independence, protected areas legislation largely remain relics of colonialism. Secondly, since many protected areas in Africa are found in lands belonging to communities self-identifying as indigenous peoples, paucity of human dignity-fostering provisions in protected areas legislation is a microcosm of disproportional targeting of indigenous peoples when it comes to land dispossession spanning over a hundred years, mainly attributable to conservation.[81] Thirdly, since protected areas laws are mainly enforceable against a smaller section of the community unlike framework environmental laws which cover the entire country, those unaffected by the protected areas laws have the incentives to legislate discriminatory practices. L. Amede Obioara puts this theory in broader perspectives:

> Presently, discriminatory environmental policy decisions are enabled by a certain special and emotional gap between those who make and possibly benefit from the decision and those who bear the brunt of the decision. The decision-making process does not have to cater to the poor and disaffected, not just because the site of socioeconomic power lies elsewhere but also because the decision maker is often an outsider who does not inhabit the locus that mostly suffers the consequence of the decision."[82]

Based on the above, it is clear that protected areas laws are human-dignity blind not only due to their colonial origins but also because they are mostly enforced against communities self-identifying as indigenous peoples who are main targets of discriminatory land dispossession practices despite being custodians of the lands in question. In the next part, this article discusses potential value-addition of including human dignity fostering provisions in protected area legislation in relation to addressing discrimination against indigenous peoples.

V. CHANGING STORY LINES? VALUE ADDITION OF INVOKING RESPECT FOR HUMAN DIGNITY IN PROTECTED AREAS LAWS IN AFRICA

Scant evidence exists to prove that better laws in terms of relative compatibility with social justice can automatically improve the welfare of subjects of the laws in question.[83] This

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[80] Section 2(2) of the National Environmental Management Act, 1998 (South Africa).
[81] See Mark. Dowie, Conservation refugees: the hundred-year conflict between global conservation and native people (MIT Press, 2011).
[82] Obiora, *supra* note 10 at 480.
[83] Cees J. Hamelink, *Human rights: The implementation gap*, 18(2) J. Intl Communication 245–65 (2012)

can partly be attributed to possible mismatch between legal rules on books and 'on the ground' implementation.[84] However, based on the tenets and varied perspectives of the concept of the rule of law, the importance of better laws compared to their unjust counterparts cannot be overemphasized. This is because, once norms in a bill are passed into law, they become enforceable irrespective of compatibility to the local sense of justice. Compounding this, research suggests that enactment of rules that are misaligned with a sense of justice to indigenous peoples is inspired by 'outsideness', meaning the makers of the laws in question are usually distinct from those who suffer the consequence of their implementation.[85] This contention properly describes the situation of many indigenous peoples in Africa who mostly inhabit biodiversity-rich landscapes, hence enforcement of protected areas legislation disproportionally affects them by fostering discrimination and targeted land dispossession.

The practice above notwithstanding, the UDHR is unambiguous: every member of the human family was born free and is inherently entitled to dignity. This unambiguous position is conspicuously absent as a standard of law enforcement and interpretation in the realm of protected areas in the study jurisdiction. Consequently, indigenous peoples who inhabit or border the protected areas in question have almost permanently, since the colonial times, been at the receiving end of violation of the right to human dignity. In contrast, inclusion of respect for human-dignity enhancing provisions in the protected areas legislation will significantly reinforce values of equality and non-discrimination against indigenous peoples. Accordingly, a strong case is merited in favour of ensuring that protected areas legislation foster respect for human dignity.

CONCLUSION AND RECOMMENDATIONS

The tension between respect for human dignity and enforcement of protected area legislation in Africa is never ending. This is largely because, most of the laws in question while they were originally enacted during colonialism, have remained largely the same after the attainment of political independence. Significantly, congruent to the purpose of the colonialism-dehumanization, dispossession and looting- among many atrocities- the laws in question have no regard to human-dignity. For decades, Africa's communities self-identifying as indigenous peoples whose lands have been converted to protected areas have struggled to invoke the human-dignity deficient and discriminatory laws, combined with the language of human rights to challenge the *status quo.* However, indigenous peoples have increasingly recorded more losses than gains due to the inbuilt limitations of the laws they intend to challenge. Specifically, the protected areas laws are not only devoid of human dignity-fostering provisions but are also characterized by supporting extinguishment of ancestral land rights of the indigenous communities.

Accordingly, foregrounding dignity as an interpretive tool will significantly re-frame the spirit of the protected areas laws to foster inherent equality of members of the human family, indigenous peoples included. Incidences of evictions of indigenous peoples from their lands in the study countries are likely to decrees because they are currently powered by unfair targeting

[84] Daniel A. Farber, *The implementation gap in environmental law*, 16 J. Korean L. 3 (2016).
[85] Obiora, *supra* note 10 at 480.

and discriminatory practices against indigenous peoples. This article thus recommends inclusion of robust provisions on human dignity as a global prescription for remedying both the historical and continued injustices and discriminatory practices against indigenous peoples in the context of protected areas establishment, management, and expansion. This recommendation is consistent with the UN Special Rapporteur on Indigenous Peoples report discussed above, which recommends, among others, abiding by human-rights based approach in the establishment of protected areas and expansion of new ones.