A COMPARATIVE STUDY OF LEGISLATION RELATING TO THE ESTABLISHMENT AND MANAGEMENT OF WILDLIFE PROTECTED AREAS IN SOUTH AFRICA AND TANZANIA

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DECLARATION

I, Elifuraha Isaya Laltaika, do hereby declare that, unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other University in full or partial fulfillment of the academic requirement of any other degree or qualification.

Signed in Pietermaritzburg this 11th day of December 2006.

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SUPERVISION

This dissertation was supervised by Professor Michael Kidd in the School of Law, University of KwaZulu-Natal, Pietermaritzburg.

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DEDICATION

This work is dedicated to my brother and friend the late Eliapenda Zacharia Mungaya (1976 to 2005). May the Almighty God rest his soul in eternal peace.

ABREVIATIONS

AU	African Union
BC	Before Christ
CA	Court of Appeal
Cap	Chapter of the laws of a country
CBD	Convention on Biological Diversity
CC	Constitutional Court
Ch	Chapter
CITES	Convention on the International Trade in Endangered Species of Fauna and Flora
DC	District of Columbia
Ed.	Editor
Eds.	Editors
EPL	Environmental Policies and Laws
Ibid	*Ibidem*
IUCN	International Union for the Conservation of Nature
MTNR	Ministry of Tourism and Natural Resources
NCA	Ngorongoro Conservation Area
NCAA	Ngorongoro Conservation Area Authority
No.	Number
OAU	Organization of African Unity
Op.cit	*opera citato (*in the work mentioned)
p.	Page
PINGOS	Pastoralists Indigenous Non Governmental Organisations

pp	pages
R.E	Revised Edition
SAJELP	South African Journal of Environmental Law and Policy
SANPARKS	South African National Parks
Stat.	Statute
TANAPA	Tanzania National Parks
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Program
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
Vol.	Volume

ABSTRACT

In the last two decades, conservation of biodiversity has moved from being a preserve of wildlife enthusiasts into forming a lead agenda in the world conferences. Many Conventions and declarations also came into being within this time frame. In the national level, different jurisdictions have enacted pieces of legislation that are in line with the Conventions.

To delineate part of a country's territory as a Protected Area and manage it by a legislative enactment is the most reliable way of conserving the said biodiversity. This is because; well managed, Protected Areas have a proven capacity to preserve diversity of species as well as their respective genetic materials in their natural state.

This thesis is an attempt to study laws relating to the establishment and management of Protected Areas in a comparative perspective. South Africa and Tanzania have been chosen as case studies. The two countries are endowed with abundant biodiversity and have signified their willingness to conserve the said biodiversity by enacting pieces of legislation and by signing various regional and international Conventions.

An assessment of the current laws of the two countries reveal that the new constitutional dispensation in South Africa has enhanced the enactment of (despite some pitfalls) exemplary provisions that are worthy emulating by Tanzania whose many laws are a relic of its colonial past.

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CHAPTER ONE

1. GENERAL INTRODUCTION AND OVER VIEW

> "No longer is biodiversity an issue confined to a handful of conservationists and wildlife enthusiasts. Its critical importance to farming methods and communities, to indigenous peoples and their livelihoods, and to human rights, political dispensations and global trade issues, are now well recognized. Biodiversity has moved from the realms of 'saving the rhino' to affect us all by encompassing politics, culture and economy." Rachel Wynberg[1]

1.1 Introductory Remarks and Scope

In order to conserve biodiversity[2] governments of the world enact different pieces of legislation that set aside blocks of lands namely protected areas.[3] The said protected areas are crucial in that they form bedrocks for conservation of living organisms due to their capacity to preserve diversity of species as well as various genetic materials within them.[4]

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[1] Wynberg, R. 2002: 'A decade of Biodiversity Conservation and Use in South Africa: Tracking Progress from the Rio Earth Summit to the Johannesburg World Summit on Sustainable Development'. *South African Journal of Science*, 98(2002) p.233

[2] Biodiversity has been defined as a variety of genetically distinct populations and species of plants, animals and micro-organisms with which human beings share the earth, and a variety of ecosystems of which they are functioning parts. See Annie Kameri-Mbote, P and Philip Cullet 'Agro-biodiversity and International Law-A conceptual Framework' *Journal of Environmental Law* 1999 11(257) p.1

[3] Available records show that there are more that 100,000 Protected Areas in the world that occupy 11.5% of the terrestrial areas of the planet. See Graeme, L et al, 2005. "Protected Areas Management: Principles and Practice." 2nd edition, London: Oxford University Press, p. v.

[4] Van Heijnsbergen, P.1997. *International Legal Protection of Wild Fauna and Flora*. Amsterdam: IOS Press.

Protected Areas also enhance the productive capacities of ecosystems since they safeguard habitat that is critical for sustainable use of species.[5] Another importance of protected areas relates to providing opportunities for scientific research.[6] Furthermore, many Protected Areas are important to local communities, especially indigenous peoples,[7] who depend on them for a sustainable supply of resources, apart from being places for people (usually the privileged members of the community) to find peace in a busy world. Many protected areas as will be shown elsewhere in this thesis, contain important cultural heritage and values.

Often, such legislation forces local people to leave areas that in many cases they have occupied for generations.[8] In most cases therefore, the act of evicting people marks the initial stage in the creation of Protected Areas such as National Parks. A challenge that follows almost immediately, relates to sustainable management[9] of such areas, for the benefit of the present and future generations.

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[5] 10 EPL 2, 1983 at p. 62

[6] *Ibid*

[7] There is no agreed definition of "Indigenous peoples", both the United Nations and Indigenous organizations argue strongly against a strict definition fearing that a universal definition would inevitably exclude some peoples. Moreover, it is cautioned that many governments may use a strict definition as an excuse for not recognizing indigenous peoples within their own territories. However, their defining features are the same: numerical minority, non-dominance or lack of influence over policy formulation in the respective nation states, and a relationship to land that is not reflected in the regulations for land use as laid down by the nation state. Other features include the voluntary perpetuation of cultural distinctiveness as well as an experience of subjugation, marginalization and dispossession of resources. See Saugestad, S: The Indigenous Peoples of Southern Africa: An Overview. In Hi Robert Hitchcock and Diana Vinding (eds). 2004: *Indigenous People's Rights in Southern Africa.* Copenhagen: International work Group for Indigenous Affairs p. 22

[8] Hitchcock, R. 2004. Natural Resource Management among Kalahari San: Conflict and Cooperation. In: Robert Hitchcock and Diana Vinding (eds) 2004. Ibid.

[9] Sustainable management in this context refers to management that integrates consideration of environmental, economic, and social factors such that the advancement of one does not degrade the quality of another. It is linked to the notion of sustainable development which has been described as "development which meets the needs of the present without compromising the ability of the future generations to meet their own needs." See World Commission on Environment and Development, *Our Common Future,*

This thesis examines laws relating to the establishment and management of wildlife Protected Areas. It compares and contrasts such laws as they operate in two jurisdictions namely the United Republic of Tanzania and the Republic of South Africa. In particular, the study looks at the problems that are embedded in creating such areas and weaknesses that make the subsequent management of such areas difficult.

To achieve the above objective, the thesis is organized into six chapters. This chapter, namely chapter one deals with the General Introduction, it also looks at the creation of Protected Areas from the historical perspective. Chapter two focuses on global and regional initiatives related to the establishment of Protected Areas. Chapter three covers an overview of Tanzania's legal framework for the creation and management of Protected Areas.

Chapter four contains laws relating to creation and management of Protected Areas in the Republic of South Africa. In chapter five, the thesis makes a critical comparison of strengths and weaknesses in the provisions of legislation of the two study countries. Chapter six contains the conclusion and recommendations.

Before embarking on the historical development of Protected Areas, it is informative to define this term since it features prominently in this thesis. The guidelines for classifying Protected Areas promulgated by the International Union for the Conservation of Nature

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Oxford: Oxford University Press. See also Bell, S and Morse, S. 2003. "Measuring Sustainability: Learning from Doing." London: Earthscan.

(IUCN) will also be provided in order to lay the basis for understanding those of the two study countries.

1.2 Definition of "Protected Area"

1.2.1 The Global and Regional Context

Globally and regionally there are a number of differences with regard to the use of the term Protected Areas[10].This reflects the fact that the national systems of Protected Areas have developed uniquely in accordance with the individual country's social-political history as well as the type and amount of human activities permitted in the particular Protected Area.[11]

In the Convention on Biological Diversity, "Protected Area" means "a geographically defined area which is designated or regulated to achieve specific conservation objectives."[12] Meanwhile recommendation 34 of the Stockholm Conference on the Human Environment of 1972 refers to the management of parks **and** protected areas.[13]

In the Regional context, the Revised African Convention on the Conservation of Nature and Natural Resources refers to "Conservation areas" to denote "protected natural resource areas, including national parks **and** reserves".[14] On its part, the Nairobi Protocol refers to protected areas "such as parks and reserves."[15]

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[10] See Van Heijsberg, P.1997 supra note 4. p. 172-173

[11] Graeme, L, et al 2005 "Protected Areas Management and Practice" 2nd Ed. New York: Oxford University Press, p. 91

[12] Convention on Biological Diversity. 22 EPL 4, p.251, Art. 2

[13] See IUCN, The 1985 UN list of National Parks and Protected Areas (Gland: IUCN, 1985)

[14] Art. III(4) of The Revised African Convention on the Conservation of Nature and Natural Resources 2003, Maputo- Mozambique

[15] Art 10 Nairobi Protocol Concerning Protected Areas of Wild Fauna and Flora

1.2.2 South African Context

In South Africa, the use of the term "Protected Area" is not confined to the natural environment that ordinarily has nature conservation value. Rather, the term also connotes areas (such as ancient sacred burial grounds) which have been modified or built by people in a manner that commands protection for cultural, scientific and aesthetic value.[16]

Protected areas can be found either on state owned land, in which case they include National Parks, Nature Reserves and Heritage Areas or on privately owned land, including Private Reserves.[17] However, authors have pointed out that "there are a confusing number of terms used to describe protected areas or areas with conservation value".[18]

1.2.3 Tanzanian Context

As in South Africa, various terms are used to describe Protected Areas in Tanzania. The choice of words depends on the degree and nature of land use and wildlife resources utilization permitted in each particular area[19]. The terms include National Parks where no permanent human settlements are allowed except non-consumptive tourism, education and research.[20]

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[16] Glazewski, J. 2005. *Environmental Law in South Africa*. 2nd edition.Durban: LexisNexis Butterworths. p.325

[17] *Ibid*

[18] Henderson, P. 1996. *Environmental Laws.* (Service Issue 10, 2004) at 4-4. Quoted in Glazewski, J ibid note 16

[19] Kameri-Mbote, P. 2004. Sustainable Management of Wildlife Resources in East Africa: A Critical analysis of the Legal, Policy and Institutional Frameworks. *Eastern Africa Law Review.* 31-34(2004) p.152

[20] The principle legislation relating to the administration of National Parks in Tanzania is the National Parks Act Cap 282 R.E 2002. The relevant provision prohibiting human habitation is Section 21. It states in part: "[I]t shall not be lawful for any person other than (a)the trustees, and the officers within the national Park and his servant to enter or be within a National Park except under and in accordance with a permit in that behalf issued under regulations made under this Act,"

Other terms include Game Reserves,[21] Game Controlled Areas,[22] Partial Game Reserves[23] and Conservation Areas. So far there is only one "Conservation Area" in Tanzania namely Ngorongoro Conservation Area (NCA).[24] This is the country's most visited Protected Area which is also home to Maasai pastoralists.[25] In 2002, the Area's budget was six billion Tanzanian Shillings (US$ 6Million) but "some local maasai state that the annual revenues are twice this figure with official figures being under-reported to cover up money lost through corruption."[26] This contextual meaning of "conservation area" is different from the one in the 2003 Revised African Convention which defines it as any protected natural resource area, be it strict natural reserve, a national park or a special reserve.[27]

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[21] In Tanzania, there are currently a total of 34 Game Reserves covering 13% of the total land surface. They are administered by the wildlife Conservation Act Cap 281 R.E 2002 and managed by the wildlife division of the Ministry of Tourism and Natural Resources (MTNR). Permissible uses in the Game Reserves are the same as those in the National Parks namely non consumptive tourism, education, and research. The practice is to the effect that once infrastructural development is effected in a Game Reserve, it is declared a National Park. See Severe, L.M "Tourism Gate way to Poverty Reduction" Paper Presented at the second African Conference on Peace through Tourism organized by the International Institute for Peace through Tourism (IIPT) Dar-Es-Salaam, Tanzania, 7-14 December 2003 .Available at http://www.iipt.org/conference. Accessed on 5th. of November 2006.

[22] As the Game Reserves, Game Controlled Areas are administered by the wildlife Conservation Act, Cap 283, R.E 2002. Human settlements and licensed hunting are permitted in the game Controlled Areas. However, the Director of Wildlife is empowered to cancel any license, permission, or permit. See Section 55(2) of the Act.

[23] This Category of wildlife Conservation is provided for under the provisions of Section 13 and 14 of the Wildlife Conservation Act Cap 283, *ibid.* The Act vests power to the director of wildlife to declare an area to be a Partial Game Reserve for the protection of species of a National or International conservation importance. However, no area has been designated so as yet. See, Severe, L.M "Tourism Gate way to Poverty Reduction." Supra note 21.

[24] Ngorongoro Conservation Area is administered by the Ngorongoro Conservation Act cap 284, R.E 2002 under the management of the Ngorongoro Conservation Area Authority (NCAA) which is governed by a board of Directors.

[25] See Chanley, S. 2005: "From Nature Tourism to Ecotourism? The Case of the Ngorongoro Conservation Area-Tanzania." Available at http://www.findarticles.com. Accessed on 5th November 2006.

[26] *Ibid*

[27] See Article III(4) of The Revised African Convention on the Conservation of Nature and Natural Resources, Maputo-Mozambique 2003

1.2.4 The IUCN Definition

The IUCN has formulated the following succinct definition of a Protected Area:

"An area of land/and or sea especially dedicated to the protection and maintenance of biological diversity and of natural and associated cultural resources, and managed through legal or other effective means."[28]

This definition is undoubtedly comprehensive. It highlights two important points: what is being protected (biological diversity and natural and cultural resources) as well as the fact that legal management is integral to the concept of Protected Areas. In addition, the IUCN has recommended categorization of such Protected Areas in order to clarify the definition of Protected Areas as used in different countries.[29]

This is a useful categorization because it can be resorted to in order to know positions of Protected Areas in other countries that might be using other terminologies. It also facilitates uniform national reporting and inter-jurisdictional comparison.[30] This thesis now turns to the same.

[28] IUCN.1994: "Guideline for Protected Areas" p 7.
[29] Graeme, L et al. 2005 supra note 11 p. 91
[30] *Ibid* p.92

1.2.5 The IUCN Classification system for protected Areas[31]

CATEGORY 1: **Strict Nature Reserve/Wilderness Areas: Protected area managed mainly for science or wilderness protection.**

Definition Area of land and/or sea possessing some outstanding or representative ecosystem, geological or physiological features and/or species, available primarily for scientific research and/or environmental monitoring.

CATEGORY 1(b) **Wilderness Area: Protected mainly for wilderness protection**

Definition: Large area of unmodified or slightly modified land, and/or sea, retaining its natural character and influence, without permanent or significant habitation, which is protected and managed so as to preserve its natural condition.

CATEGORY II **National Park: Protected Area managed for ecosystem protection and recreation**

Definition: Natural areas of land and/or sea, designed to (a) protect the ecological integrity of one or more ecosystems for present and future generations (b) exclude exploitation or occupation inimical to the spiritual, scientific, educational, recreational and visitor opportunities, all of which must be environmentally and culturally compatible.

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[31] Adopted from Michael J.B et al. State of the World's Protected Areas at the end of the 29th century. Paper presented at IUCN World Commission on Protected Areas symposium on "Protected Areas in the 21st Century: From Islands to Networks", Albany Australia. November 24-29, 1997 p. 2

CATEGORY III **Natural Monument: Protected area managed mainly for conservation of specific natural features.**

Definition: Area containing one, or more, specific natural or natural/cultural features which is of outstanding or unique value because of its inherent rarity, representative or aesthetic qualities or cultural significance.

CATEGORY IV **Habitat/species Management Area: Protected area managed mainly for conservation through management intervention**

Definition: Area of land and/or sea subject to active intervention for management purposes so as to ensure the maintenance of habitats and/or meet the requirements of specific species.

CATEGORY V **Protected landscape/seascape: protected area managed mainly for landscape/seascape conservation and recreation.**

Definition: Area of land, with coast and sea as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such an area.

CATEGORY VI	**Managed Resource Protected Area: protected area managed mainly for the sustainable use of natural ecosystems**
Definition:	Area containing predominantly unmodified natural systems, managed to ensure long term protection and maintenance of biological diversity, while providing at the same time, a sustainable floor of natural products and services to meet community needs.

1.4 The Establishment of Protected Areas in the Historical Perspectives

Historically, Protected Areas, were set aside specifically for protection of natural resources over two millennia ago[32]. In Africa, there is evidence to the effect that Nature Reserves were established in Egypt as far back as 1370 BC.[33] It is therefore misleading to attribute, as some authors have done,[34] the earliest attempts to protect and conserve nature, and more specifically wildlife, in the African continent to the coming of European colonialists.

On his part, Emperor Ashoka of India issued a decree in the third century BC that was directed at prohibiting killing of some animals and destruction of forests.[35] This prohibition can be deduced from what the emperor wrote towards the end of his reign as documented by Lyster:

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[32] Eagles, P et al. 2002. *Sustainable Tourism in Protected Areas: Guidelines for Planning and Management.* IUCN-The World Conservation Union.p.18 http//www.iucn.org/ourwork/ppet/programme/pa2002/doc. (Accessed 18th, October 2006)

[33] See Lyster, S. 1985. *International Wildlife Law*. Cambridge: Grotious Publications. p. xii

[34] See for example the argument advanced by Muluwa, T.1989. *African Journal of International and Comparative Law* p. 653

[35] Lyster, supra note 33

"Twenty six years after my coronation, I declared that the following animals were not to be killed: parrots, mynas, the aruna, ruddy geese, wild geese, the nandimukha, cranes, bats, queen ants, terrapins, boneless fish, rhinoceroses....and all quadrupeds which are not useful or edible....Forests must not be burned."[36]

In Europe, some areas were designated as hunting reserves for the rich members of the community 1,000 years ago.[37] Such areas were initially set aside for kings and other national leaders but slowly, they became open for the general public and therefore introduced the idea of community involvement and tourism, especially in the last century.[38]

Despite the above early initiatives, it is imperative to point out that the idea of having protected areas as we know them today can be traced back to the 19th century.[39] The English poet William Wordsworth wrote in 1810 of his vision of the lake as "a sort of national property."[40]

In 1832 the American poet, explorer and artist George Catlin pointed to the need for "a nation's park containing man and beast, in all the wild and freshness of their nature's beauty." [41] Catlin was responding to the destruction of aboriginal peoples and cultures in the rapidly developing eastern part of the already expanding country.[42]

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[36] *ibid*
[37] Eagle, P supra note 32
[38] *ibid*
[39] *Ibid* at 2
[40] *Ibid*
[41] George Catlin (1796-1872), is a self-taught American artist who traveled extensively among the native peoples of North America. He was engaged mainly in sketching and painting portraits, landscapes, and

The USA became the first country to set aside a national park by passing legislation creating the Yosemite[43] and the Yellowstone[44] National Parks respectively. The main objective of Yellowstone National Park was declared to be "the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities or wonder within the said park and their retention in the natural order".[45]

The above model of Protected Areas was quick to be copied by both developed and developing countries. Other countries followed suit by creating National Protected Areas: Australia (1879), Mexico (1898), Argentina (1903), and Sweden (1909).[46] Since the 1970s, more Protected Areas have been established worldwide than during all preceding periods. By 1989, about 4,500 sites, totaling about 4.79 million square kilometers, or 1.85 million square miles-32 percent of the earth's surface had been placed under some type of protection.[47]

1.5 Interim Conclusion

In this chapter, the various important roles of Protected Areas have been outlined to show that Protected Areas deserve legislative protection. It has also been indicated that 15% of

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scenes from daily Indian life. On a trip to the Dakotas in 1832, he suggested that such nature beauties be protected 'by some great protecting policy of government'. A detailed historical account is available at http://usparks.about.com/library/weekly/aa012598.htm. Visited on 18th of October 2006

[42] See "The National Parks: Shaping the System" National Parks Service, USA Department of Interior-(1990)10

[43] See the Yosemite Park Act of 1864 (Ch 184, 13 stat. Codified at USC S 48,1994)

[44] See the Yellowstone National Park Act(Ch 24,17 stat 32 codified at 16USC ss21-40, 1994)

[45] *Ibid*, see S.22

[46] Honey, M. 1999.*Ecotourism and Sustainable Development: Who owns Paradise?* Washington DC: Island Press. p.11

[47] Katrina, B, and Michael Wells. 1992. Planning for People and Parks: Design Dilemmas. *World Development* (20)4: 1992:558

the World's terrestrial area is covered by Protected Areas. This figure is a result of concerted efforts that the chapter has traced historically. However, despite their existence for over two millennia now, Protected Areas are accorded different definitions in the different countries in which they are found.

Variations in terms of definitions are a result of; *inter alia,* permissible land uses and an individual country's social-political history. Consequently, the IUCN proposed a comprehensive definition and the system of classifying Protected Areas in order to facilitate uniform National reporting and inter-jurisdictional comparison. These are not the only initiatives at the International level. Other initiatives form the subject matter for discussion in the next chapter.

CHAPTER TWO

2. INTERNATIONAL, REGIONAL AND SUB-REGIONAL INITIATIVES RELATING TO THE ESTABLISHMENT AND MANAGEMENT OF PROTECTED AREAS

> "The conservation of wildlife and wild places calls for specialist knowledge, trained manpower, and money, and we look to other nations to cooperate with us in this important task-the success or failure of which affects [not only the continent of Africa, but] the rest of the world as well." J.K Nyerere, The first President of Tanganyika (Now Tanzania).September 1961[48]

2.1 Introduction

The establishment and management of Protected Areas for the conservation of biological diversity is one of such undertakings in the modern world, in respect of which international cooperation is required if it is to be carried out efficiently. There are various reasons for this. One reason is that the parts of the world that are the most biologically diverse are also incidentally the poorest in terms of their economy.

For example, Africa which is considered to be the poorest continent[49] economically is home to about 25 percent of the global biodiversity some of which comprises unique

[48]Conservation of Nature and Natural Resources in modern African States, Report of a Symposium, Arusha 1961, p 9 in Honey, M. 1999 op cit., note 46 p.225

[49] Poverty in this context is income poverty and it refers to the percentage of the population falling below poverty line. Indicators show that the great majority of countries in which more than half the population live in poverty are in Africa. Out of the 65 countries designated by the World Bank as "low income", 40 are in Africa: out of the 50 countries regarded by many UN bodies as "least Developed", Africa is represented by more that 30. When attention is focused on the 20 poorest countries, most International figures place between 16 and 18 African countries in the list. On its part, the UNDP Human Development Index for 1998

plant and animal species of great economic and ecological value[50]. Since the creation and management of Protected Areas involves monetary costs, international cooperation among economically rich countries and their poor counterparts becomes inevitable[51].

Another reason behind a need for cooperation relates to the principle of common heritage[52]. This principle implies that a certain object or objects are of common legal concern and of intrinsic value to various subjects of international law, usually states.[53]

In relation to Protected Areas, the common heritage principle means that individual states have responsibilities to safeguard their fauna and flora both within and outside of national jurisdictions. This was reaffirmed in the preamble to the Biodiversity Convention of 1992 in the following words: "the conservation of biological diversity is a common concern of human kind."[54]

Further, biological diversity, for which creation of Protected Areas takes place,[55] is not limited by political boundaries. This means that destruction of biological diversity in one

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regards all the 24 lowest ranked countries as being in the African Continent. See Vandana Desai and Robert Potter (eds) 2002: *The Companion to Development Studies*, New York: Oxford University Press p.38

[50] UNEP/UNDP/DUTCH Joint Project On Environmental Law and Institutions in Africa: Handbook On The Implementation of Conventions Related to Biological Diversity in Africa December, 1999,p. 4

[51] The Convention on Biological Diversity (CBD) under Article 21 for example, provides for "a mechanism for the provision of financial resources to developing country parties for purposes of this convention on a grant or concessional basis".

[52] However, according to the UNEP, attempts to characterize biodiversity as "common heritage of mankind" are yet to succeed. Had they to succeed the concept of national sovereignty over natural resources would have been qualified and introduced as some sort of "collective national ownership" of natural resources. See UNEP/UNDP/Dutch Joint Project on Environmental Law and Institutions in Africa: Handbook on the Implementation of Conventions related to Biological Diversity in Africa, p.18

[53] van Heijnbergen, p. supra note 4

[54] Convention on Biological Diversity, 22 EPL 4, 1992, p.251, preamble

[55] The said biological diversity is conserved in the Protected Areas for many reasons. The United States Congress for example, decreed that its first two National Parks would serve as "pleasure grounds" for

country or state can result in devastating effects in another country or state.[56] Therefore there have in recent years been many treaties with regard to Protected Areas. This chapter briefly surveys some of such treaties.

2.2 International Treaties with a bearing on the Establishment of Protected Areas

2.2.1 The Convention on Biological Diversity (CBD)[57]

The Convention on Biological Diversity is one of the outcomes of the United Nations Conference on the Environment and Development (UNCED) held in Rio de Janeiro, Brazil in June, 1992. It is made up of 42 Articles which are accompanied by two Annexes. These are on identification and monitoring; and arbitration.

The Convention comes out of a realization by the International community of the importance of biological diversity for maintaining life sustaining systems of the biosphere and the concern that biological diversity is being significantly reduced by certain human activities.[58]

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visitors, thus linking them to tourism from their inception. Other reasons are scientific research, wilderness protection, preservation of species and genetic diversity, maintenance of environmental services, protection of specific natural and cultural features and maintenance of cultural and traditional attributes.

[56] An example in this regards relate to migratory species; their protection must of course be regulated at the international level. This is also emphasized by the Rio Declaration. Principle 7 for example, provides in part that "States shall cooperate in the spirit of partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." Principle 18 also provides (in part) that "States shall immediately notify other states of any natural disasters or other emergencies that are likely to produce harmful effects on the environment of those States." See Alexandre Kiss and Dinah Shelton; 2005: *International Environmental Law,* 3rd Ed. New York: Transnational Publisher. See also Gastrom Kennedy: 'Environmental Impact Assessment in Tanzania: An Appeal for Action". Nyerere Law Journal 1(2003)p.62-71

[57] The full text of this Convention is reproduced in Volume 31 *International Legal Materials*, 1992, p.818

[58] Stone, C D., "What to do About Biodiversity: Property Rights, Public Good and the Earth's Biological Riches," Volume 68 No.3 *Southern California Law Review*, 1995, p.577

This Convention aims to promote the conservation of biodiversity, sustainable use of its components as well as fair and equitable sharing of benefits, including access to genetic resources and transfer of technology.[59] The agreed text of this Convention was adopted in May 1992 in Nairobi[60]and in June it was signed by 153 states and the European Community at the Rio Conference on Environment and Development.[61]

According to Article 8 of the Convention each contracting party shall establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity and develop guidelines for the selection of those areas.[62] It has been argued that this Article "provides the 'bolts and nuts' expected of parties in order to achieve the first two objectives of the Convention [namely the conservation of biodiversity and the sustainable use of biological diversity].[63]

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[59] Article 1 of the Convention on Biological Diversity, 1992

[60] Conference on the Adoption of the Agreed Text of the Convention on Biological Diversity, text in 22 EPL 4, 1992, p. 251

[61] This conference was convened by the UN General Assembly in Rio De Jeneiro-Brazil in 1992. All but six members of the United Nations were represented by close to 10,000 participants including 116 heads of States and governments. One of the outcomes of this Conference is the Rio Declaration on Environment and development. The Declaration contains 27 principles, the sixth of which states: "The special situation and need of the developing countries, particularly the least developed and those environmentally vulnerable shall be given special priority. International actions in the field of the environment and development should also address the interests and needs of all countries." United Nations Conference on Environment and Development (UNCED), 22 EPL 4, 1992, p. 206. See also Spector, B.I et al (eds) 1994; Negotiating International Regimes: Lessons learned from the UNCED, London: Graham and Trotman, and Johnson, S.P, 1994; The Earth's Summit: The United nations Conference on Environment and Development, London: Graham and Trotman

[62] See Article 8(a) of the Convention on Biodiversity, supra note 57

[63] Michael Kidd. 2002. 'The Implementation of the Convention on Biological Diversity in South Africa.' Paper delivered at International Wildlife Conference, Washington DC, October 2002, p.6

2.2.2 The Convention on Wetlands of International importance especially as Waterfowls Habitat (The Ramsar Convention)[64]

Wetlands are very important both in hydrology and ecology. Their functions include water storage, stream flow regulation, flood attenuation and water purification. Other roles relate to nutrient assimilation and sediment accretion[65]. Another function of wetlands that is of more relevance to this thesis is the provision of a habitat for a wide variety of animal and plant species.

Thus, due to the importance of wetlands, and because wetlands have often been destroyed for being regarded as "wastelands," [66] the international community decided to come up with a Convention for their conservation.

The convention at first focused on the conservation and wise use of wetlands primarily to provide habitat for birds. Over the years however, the focus of the Convention has been widened to encompass "all aspects of wetland conservation and wise use." [67]

The Convention which came into being in 1975 reflects a paradigm shift in international conservation, namely "protecting habitat" rather than species and has been described as "the first modern multilateral treaty aiming to conserve natural resources on a global

[64] The Convention is named after the Iranian town of Ramsar where it was signed in 1971. it entered into force on 21.12.1975
[65] Begg, G. 1990. *Policy Proposal for the Wetlands of KwaZulu-Natal.* London:Butterworths p.8
[66] Ibid p.6
[67] See UNEP/UNDP/DUTCH Joint Project on Environmental Law and Institutions in Africa: Handbook on the Implementation of Conventions related to Biological Diversity in Africa, p.12

scale."[68] According to Mathews, it is "a wide treaty which restrains the countries joining it from the unthinking, selfish exploitation of their sovereign natural patrimony."[69]

The convention is based on the acceptance of the facts that waterfowl due to their trans-national seasonal migrations should be regarded as an international resource and that wetlands constitute a resource of economic, cultural, scientific and recreational value and that their loss would be irreparable.[70]

According to Article 4 of the Convention, parties should establish "nature reserves" in all wetlands, be they of international importance or not. The article further stipulates that governments are responsible for protection of the 'listed' and 'unlisted' wetlands.[71]

The convention supports the principle of state sovereignty over natural resources.[72] Therefore, if a state limits the boundaries of a nature reserve due to national interests, it should compensate as far as possible for any loss of wetland resources and that it should

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[68] G V T Mathews, 'The Ramsar Convention on Wetlands: Its History and development" Ramsar Convention Bureau, 1993, p. 1

[69] *Ibid*

[70] See preamble to the Ramsar Convention, supra note 64

[71] Article 4(1) of the Ramsar Convention. It provides: "Each contracting party shall promote the conservation of wetlands and waterfowl by establishing natural reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening."

[72] Recent developments in the field of the environmental law suggest that this principle is not absolute. Kidd and Cowling for example, emphasize that "States effectively surrendered their sovereignty over their wild animals when they became parties to the CITES [Convention on the International Trade in Endangered Species of Wild Fauna and Flora] and decisions that are in the interest of the global conservation of wild animals should hold sway over regional or domestic interests." See Kidd, M A and Cowling M.G. 2003. CITES and the African Elephant, in *International Environmental Law and Policy in Africa*. Dortdrecht: Kluwer p.57
See also principle 2 of the Rio Declaration on the Environment and Development which provides that: "States have, in accordance with the Chatter of the United Nation and the principles of International Law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibilities to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

create additional nature reserve in the same area or elsewhere.[73] Both Tanzania and the Republic of South Africa are signatories to the convention.[74]

2.2.3 Convention Concerning the Protection of World Cultural and Natural Heritage[75]

This Convention aims at protecting "cultural and natural heritage of outstanding Universal value."[76] It is based on the recognition that cultural and natural heritage of humankind are inextricably interwoven.[77]

A signatory to the Convention must ensure the protection and conservation of its natural heritage through effective and active measures.[78] If required, a state party "may obtain international financial, artistic, scientific and technical assistance and co-operation in order to ensure transmission to the future generations[79] of the cultural and natural heritage of outstanding universal value."[80]

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[73] Article 4(2), supra note 64

[74] UNEP/UNDP/DUTCH Joint Project, supra note 50. p. 13

[75] Convention Concerning the Protection of the World Cultural and Natural Heritage. It was adopted at the General Conference of the United Nations Education, Scientific and Cultural Organization (UNESCO) in 1972.The full text of this Convention is reproduced in Birnie, P.W and Boyle, A (1995) Basic documents in International Law and the Environment. Oxford: Clendon Press

[76] See the 10th paragraph of the preamble to the Convention concerning the Protection of World Cultural and Natural Heritage. Ibid

[77] Artheton, T. 'The Power and the Glory: National Sovereignty and the World Heritage Convention' (1995) *The Australian Law Journal* (69)631 p. 634

[78] Article 4 of the Convention Concerning the Protection of World Cultural and Natural Heritage, supra note 44

[79] This is in line with the principle of 'Inter-generational equity" as elaborated by Edith Brown; 1998, *In Fairness to the Future Generations*. The principle suggests that whereas each generation may benefit from and develop the cultural and natural patrimony inherited from the previous generations, it must also pass it to the future generations in no worse condition than it received.

[80] *Ibid*

The convention does not specify that signatories must delineate Protected Areas but it has certainly spearheaded the formation of Protected Areas in many ways, for example through the incentive of financial assistance as elaborated below.

Once an area is inscribed in the UNESCO world heritage list, a state party may request international assistance and the World heritage committee then decides on such a request.[81]The finance may come from the World heritage Fund.[82] Further, in its operational guidelines of 1995, UNESCO recommended that "the protection of cultural landscapes is helpful in maintaining biological diversity."[83]

Both Tanzania[84] and South Africa[85] are member states to this Convention. According to the laws of the latter, heritage resources are conserved and protected "in order to foster a sense of national pride, unity and identity."[86] Whereas Tanzania ratified the Convention on 2nd of September, 1977, South Africa only ratified it on 10th of July, 1997.[87]

Because this Convention is confined to protecting only the "world's outstanding cultural and natural areas", not every Protected Area can benefit from the associated fund mentioned above. Unless the Protected Area is of "outstanding universal value from the

[81] van Heijnsberg, supra note 4 p. 183
[82] *Ibid*
[83] See paragraph 38 of the Operational Guidelines of the World Heritage Convention, 1995
[84] For the various International Conventions aimed at protecting the environment in respect of which Tanzania is a signatory, see Palamagamba Kabudi; 19998: "The Role of the Judiciary in the Protection of the Environment in Tanzania." Paper presented to the judges' course on Constitutionalism and Human Rights, conducted jointly by the Faculty of Law, University of Dar-Es-Salaam and the School of Law, Trinity College, University of Dublin. In Dar-Es-Salaam 21st September to 2nd October 1998, p.5-11
[85] See Jan Glazewski; 2005 *Environmental law in South Africa.* 2nd edition. Durban: LexisButterworths.
[86] *ibid*
[87] UNEP/UNDP/DUTCH Joint Project, supra note 50. p. 15

point of view of science or natural beauty,"[88] it can not be added to the World Heritage list and hence benefit from the fund.

2.3 Regional (African) and sub-regional conventions with a bearing on the creation of Protected Areas

2.3.1 The Revised African Convention on the Conservation of Nature and natural Resources 2003[89]

This convention was adopted under the auspices of the African Union (AU) as the revision of the 1968 African Convention on the Conservation of Nature and Natural Resources which was adopted under the auspices of the former Organization of African Unity (OAU).[90]

The decision to revise the 1968 convention came out of the need to take on board recent developments in the international treaty law and international environmental law in general.[91] After being revised, it is now according to the IUCN "[the] most comprehensive and modern regional treaty on environment and natural resources conservation and the first to deal with an array of sustainable development matters."[92]

The original Convention was preceded by two Conventions namely the International Convention Concerning the Preservation of Wild animals, Birds and Fish in Africa and

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[88] See Article 2 of the Convention Concerning the Protection of the World Natural and Cultural Heritage, supra note 75

[89] Adopted by the General Assembly of the African Union on the 11th of July, 2006; Maputo-Mozambique. The full text of this convention is available at http://www.iucn.org/themes/law/pdfdocuments/africanconvention. Accessed on 3rd of December 2006).

[90] See Handbook on the Implementation of Conventions related to Biological Diversity in Africa, UNEP/UNDP/DUTCH Joint project on the Environmental law and Institutions in Africa, 1999. p.10

[91] See for example, the 12th paragraph of the preamble to the Revised Convention which states: "Conscious of the need to continue furthering the principles of the Stockholm declaration, to contribute to the implementation of the Rio Declaration and of Agenda 21, and to work closely together towards the global and regional instruments supporting their goals…"

[92] http://www.iucn.org/themes/law/pdfdocuments/africanconvention Accessed on 5th of December 2006

the Convention Relative to the Preservation of Fauna and Flora in their Natural State which entered into force in January 14th, 1936.

The 1936 Convention above provided the basis for the establishment of some of the famous National Parks in Africa such as the Gorongosa Park in Mozambique; the Garamba Park in the Democratic Republic of Congo (DRC); the Tsavo National Park in Kenya; the Serengeti National Park in Tanzania; and the Kagera Park in Rwanda.[93]

According the Revised African Convention, the existing conservation areas must be maintained and extended.[94] Parties shall further asses the necessity of establishing additional conservation areas in order to protect the most representative ecosystems and to ensure the conservation of all species and especially those listed in the annex.[95]

2.3.2 "The Nairobi Protocol"[96]

The 1985 Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, also referred to as "the Nairobi Protocol", belongs to the Nairobi Convention[97] whose article 10 deals with Protected Areas. This article provides that parties should establish Protected Areas "such as parks **and** reserves." The reason for establishing Protected Areas is stated as being "the preservation and protection of rare or

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[93] *ibid*
[94] Article X of the Revised African Convention of 2003, supra note 89
[95] Ibid
[96] Protocol Concerning Protected Areas and Wild Fauna and Flora in the East African Region 1985
[97] The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region, 15 EPL 2, 1985, p.17

fragile ecosystems as well as rare, depleted, threatened or endangered species of wild flora and fauna and their habitats".[98]

As the African Convention, the protocol also advocates for the establishment of Protected Areas in order to safeguard essential ecological and biological processes, representative samples of all types of ecosystems, populations of greatest number of species of fauna and flora depending on these ecosystems and areas of particular scientific, cultural or educational importance."[99]

In establishing such Protected Areas, member States are to examine especially their value as natural habitats for species of fauna and flora, in particular the rare, threatened or endemic ones.[100]In addition, the states must take into account the area's importance as "migration routes or as wintering, staging, feeding or moulting sites for migratory species" as well as the fact that they represent "areas necessary for the maintenance of stocks of economically important marine species, or reserves or genetic resources, rare or fragile ecosystems and areas of interest for scientific research and monitoring.[101]

2.4 Interim Conclusion

The establishment and management of Protected Areas presuppose, *inter alia,* the availability of funds and expertise. For this, international cooperation is an important avenue. A survey has been made in this chapter, of the various International and Regional

[98] Article 10 of the Nairobi Convention
[99] Article 8 of the Protocol, supra note 96
[100] Van Hejnsberg. 1997 supra note 4, p.31
[101] *Ibid*

Conventions that enhance International cooperation. They also oblige state parties to delineate parts of their respective territories as Protected Areas. Yet other Conventions like the Convention Concerning the Protection of the world's Cultural and Natural Heritage spearhead the establishment and management of Protected Areas through the incentive of financial assistance. It is imperative at this juncture to examine how an individual country implements these initiatives. To this end, the next chapter of this thesis focuses on an overview of the Tanzanian legal framework.

CHAPTER THREE

3. AN OVERVIEW OF THE TANZANIAN LEGAL FRAMEWORK FOR THE ESTABLISHMENT AND MANAGEMENT OF PROTECTED AREAS

> "It is a fact in Tanzania that several pieces of legislation have been enacted to confer on the republic ownership of our natural resources. Invariably, it is the executive arm of the republic, which oversees the day to day exploitation of the natural resources.[However], Tanzania's abundant natural resources are in law not owned by the executive but are only under its trusteeship for the benefit of present and future generations." Prof. Ibrahim Juma[102]

3.1 Introductory remarks

Tanzania is endowed with biological diversity that includes fauna and flora as well as their constituent habitats and ecosystems that warrant domestic, regional and international legislative protection.[103] Therefore the country has enacted pieces of legislation for creation and management of Protected Areas that constitute wildlife conservation areas whose purpose include protection of nature, provision of enjoyment, education, research, food and income[104].

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[102] Ibrahim Juma. 2004. The Role of the Judiciary in the Crystallisation of Environmental Principles into enforceable Norms in Tanzania. *Eastern Africa Law Review* 31-34(2004) p.50

[103] Some of the global treaties that have a bearing on Protected areas to which Tanzania is a party include the Convention on Biological Diversity (1992), Convention for the Protection of World Cultural and Natural Heritage (1972) and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971)

[104] See Ibrahim Hamisi Juma; 1999. Protection of Marine Environment from Land Based Sources of Pollution: Matching Tanzanian Domestic law to UNCLOS. PhD Thesis. Faculty of Law: University of Gent. p. 318

These legal instruments however did not come into existence after the attainment of political independence, but during colonial rule. Colonial legislation as well as various international agreements that were entered into by the colonial government were inherited by the independent government and most of them are still in force. [105]

Presently, some of Tanzania's Protected Areas are internationally acclaimed. They include the Serengeti National Park, Ngorongoro Conservation Area, Kilimanjaro National Park and the Selous Game Reserve that have been designated World Heritage sites. The first two as well as Lake Manyara National Park are also Biosphere Reserves. The country's deep commitment towards nature conservation is proven by the fact that 28% of its total land area constitutes Protected Areas. [106]

This chapter examines laws of Tanzania relating to the establishment and management of Protected Areas. For a better understanding of such laws, it is necessary to first provide an overview of the Tanzanian governance system. This will lay a foundation for the understanding of the operation of the laws to be discussed hereunder.

3.2 An overview of governance in Tanzania

Tanzania, also referred to as the United Republic of Tanzania (URT) is a union of two formally independent African states, namely the Republic of Tanganyika and the

[105] Hamudi Majamba. 2004. Environmental law Jurisprudence in Tanzania: A Review of Judicial Precedents. *Lesotho Law Journal* 14(2001-2004): 287-308.p 291

[106] UNEP/UNDP/DUTCH Joint Project on Environmental Law and Institutions in Africa: Report on the Development and Harmonization of Laws relating to Wildlife Management. Vol.6, 1999 p. 75

People's Republic of Zanzibar. The two concluded a treaty of Union on 22nd April, 1964 as the result of which, they became one sovereign republic from 26th April, 1964[107].

Regarding governance, this Union consists of two governments. These are firstly, the Union government which exercises powers over the whole territory in all union matters in and for Tanganyika and secondly an autonomous government known as the Revolutionary Government of Zanzibar whose power is confined to non-union matters in and for Zanzibar.[108] Union matters, according to the Constitution include among others, higher education, research, foreign affairs and statistics.[109]

Environment in Tanzania is not a union matter. To this end, Zanzibar is constitutionally justified to have its own laws relating to the creation and management of Protected Areas. It is against this background that the discussion below focuses only on the laws of the Tanzanian mainland.

3.3 Creation of Protected Areas in Tanzania: the legal aspects

Protected Areas in Tanzania are wide ranging and they have different names depending on the land use pattern in that particular area. National Parks are Protected Areas where no human settlements are allowed. Conservation Areas which so far constitute only Ngorongoro Conservation Area (NCA) is a Protected Area in which Maasai pastoralists are allowed to co-exist with wildlife.

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[107] Sengondo Mvungi. 2003. Legal Problems of the Union between Tanganyika and Zanzibar. *Eastern Africa Law Review.* 28-30(2003):31-50.p 31

[108] *Ibid*

[109] See first schedule to the Constitution of the United republic of Tanzania, 1977 (as amended)

Other types of Protected Areas in Tanzania include Game Reserves where human settlement, besides that pertaining to sport hunting is not allowed and Game Controlled Areas where human settlement is allowed. The four types of protected Areas are created by various laws as discussed hereunder.

3.3.1 Creation of a National Park

The main law relating to creation of National parks in Tanzania is the National Parks Act,[110] of 1959 meaning it was enacted by the British Colonial government. However, it was Colonial Germany; (before Tanganyika was made a trusteeship territory under the League of Nations (now the United Nations Organization) that first contemplated setting aside part of Tanganyika's land as "Protected Areas".[111] This fact is little known and also little documented because most of the records related to Germany's administration are not easily traceable. This may explain the fact that "record keeping [in Tanzania] leaves a lot to be desired."[112]

The independent government inherited the 1959 former British colonial legislation, making from time to time minor amendments such as to substitute the word "Governor"

[110] Cap 282 R.E 2002
[111] The Government of the United Republic of Tanzania, *Report of the Presidential Commission of Inquiry into Land Matters (Vol.1),* Bohuslanisgens Boktryckeri, Uddevella, 1994, pp. 261-280
[112] Mchome, S.E. 2002. *Eviction and the Rights of People in Conservation Areas in Tanzania.* Dar-es-salaam: Faculty of Law, University of Dar-es-salaam p.76

with "President" and "legislative council" with "the National Assembly" or "Parliament".[113]

Other amendments relate to giving relevant game officers the power to "compound offences,"[114] and power of the high court to impose less than minimum penalties.[115] To compound offences means to collect a prescribed fine from an offender upon the latter's admission of a crime and for this reason and due to the fact that many disputes are dealt with administratively, there are very few Court cases pertaining to Protected Areas in Tanzania.

The National Parks Act of 1959 repealed and replaced the previous National Parks Ordinance.[116] Earlier on, the latter had repealed and replaced the Game Ordinance[117] which regulated both National Parks and Game Reserves.[118] This discussion centers on the law that is in force to date, namely the National Parks Act of 1959. Examples will be drawn from the two repealed pieces of legislation cited above for the purpose of clarity.

According to the Act, a National Park is created when the President with the consent of the National Assembly makes a declaration in the Government Gazette to the effect that

[113] According to Section 8(b) of the 1962 Republic of Tanganyika (Consequential transition and Temporary Provisions) Act, Cap 500, all pre-independence laws that contained the words "Governor" and "Legislative Assembly" shall be read as "President" and "the Parliament" respectively.
[114] The National Parks Ordinance (Amendment) Act, 1962, Act No. 37 of 1962
[115] See the Wildlife Conservation Act, [Cap 283, R.E 2002]
[116] Cap. 253 of 1948
[117] Cap. 159 of 1940
[118] The repeal was aimed at, *inter alia,* separating the administration of Game Reserves from National Parks.

any part of land is to be a National Park.[119] With the consent of the other side as the case may be, both the President and the Parliament of the United Republic of Tanzania can vary, amend or even revoke such a proclamation.[120]

Once an area is declared a National Park as indicated above, all rights over that land, except mineral rights become obsolete.[121] Thus even the rights of settlement are extinguished or brought to an end. This is a sharp departure of the Act from its two predecessors.

Regarding the first law, namely the Game Ordinance[122], the colonial government made an exception pertaining to residence and entry for persons who were ordinary residents or whose place of birth was within the Park or a Game Reserve.[123] Therefore, with the ordinance no permit was needed for these people to enter or reside in National Parks and Game Reserves.

However, there was a provision that the Governor could negotiate with landowners the possibility of acquiring their customary land rights to make room for wildlife conservation.[124]

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[119] The National Parks Act, S. 3
[120] See UNEP/UNDP/DUTH Joint Project on Environmental Law and Institutions in Africa: Report on the Development and Harmonization of Laws relating to Wildlife management, Vol. 6, 1999 p. 75
[121] The National Parks Act, Cap. 282 [R.E 2002] S.6 and 7
[122] Cap. 253 of 1940
[123] Mchome, S E. 2002. Supra note 112 p.78
[124] S.5 of the Game Ordinance, Cap. 159 of 1940

The provision also provided that the Governor through the Land acquisition Ordinance[125] could actually confiscate such land and provide compensation to its owners.[126] However, the provisions of the Land Acquisition Ordinance were to be resorted to only in cases where negotiations had failed.

The 1948 National Parks Ordinance[127] continued the spirit of its predecessor in that it continued to recognize rights of individuals living in the National Parks and Game Reserves. It re-enacted the provisions of section 6 of the Game Ordinance[128] and hence recognition of customary land rights continued existing in the National Parks.[129]

Unfortunately, the "luxury" of recognizing customary land rights that we have examined in the two predecessors of the National Parks Act was only short lived. The Maasai pastoralists had to be evicted. The reason and process leading to this are summarized in the quotation below:

"From the outset, conservation organizations in Europe and the United States and scientists and technocrats in Tanganyika weighed in to build an increasingly powerful lobby to expel the Maasai, arguing that the Serengeti's soil was too fragile and its water

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[125] Cap.118. This law has been repealed and replaced by the Land Acquisition Act, 1967; Act No. 47 of 1967

[126] Ibid, See also Mchome, S.E. 2002, supra note 112

[127] Cap.253 of 1948

[128] Cap.159 of 1940, Section 6 provides: " ....It shall not be lawful for any person other than: (a) a public officer on duty within the park; *(b) a person whose place of birth or ordinary residence is within the park (b) any person who has any rights over immovable property within the park*; (c) persons traveling through the park along a public highway; (e) the dependents and servants of the above persons,
To enter or reside in a national except in accordance with a permit to enter or reside issued under the provisions of section 7. (Emphasis added)

[129] See Section 11 of the National Parks Ordinance, Ibid

too scarce to support both humans and wildlife."[130] Ironically however, the scarce water is now "sufficient" to support five star hotels and resorts that have been built on the "fragile" soil.

From Serengeti, the Maasai pastoralists were moved to Ngorongoro highlands. Since the highland constitutes an important wildlife area, it necessitated the promulgation of another law that created a conservation authority. This law is the subject matter for discussion in the sub-section below.

Before we embark on this discussion, it is informative to point out that by the time the Maasai pastoralists were expelled from Serengeti, there was only one National Park namely Serengeti National Park. Today, forty seven (47) years down the road, Tanzania boasts of having twelve (12) National Parks that constitute 4% of its total land area.[131] The twelve National Parks include Serengeti. This is a 14,763 square kilometer Park containing the greatest concentration of wildlife in the world.[132]

Others include Lake Manyara,[133] Tarangire, and Kilimanjaro.[134] The list also includes Mikumi, Ruaha, Saadani and Mahale Mountains.

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[130] Honey, M. 1999.*Ecotourism and Sustainable Development: Who owns Paradise?* Washington DC: Island Press. p.224

[131] See UNEP/UNDP/DUTH Joint Project on Environmental Law and Institutions in Africa: Report on the Development and Harmonization of Laws relating to Wildlife management, Vol. 6, 1999 p. 75

[132] Honey, M. 1999. supra note 130, p.220

[133] This is a compact lakeside park renowned mainly for two things namely its flamingos and trees climbing lions

[134] It contains the snow capped mount Kilimajaro, Africa's highest peak (5,895meters)

The general rule which has endured the test of time is still to the effect that once an area is declared to be a National Park, all rights over that land except mineral rights are extinguished. We can now discuss the creation of a Conservation Area.

3.3.2 Creation of a Conservation Area

As mentioned elsewhere in this thesis, Ngorongoro is so far the only "Conservation Area"[135] in Tanzania at the moment. It was created in 1959 when it was excised from the Serengeti National Park and designated as a "multiple land use area".[136] The philosophy of "multiple land use" simply means the co-existence of the Maasai pastoralists who were moved from Serengeti National Park[137] with the wildlife.

The main law that created the area is called the Ngorongoro Conservation Area Act.[138] It aims at controlling entry into and residence within the Ngorongoro crater highland area as well as making provision for the conservation of natural resources in the area and related matters.[139]

The importance of the Ngorongoro Conservation Area (NCA) can not be underestimated: UNESCO accepted Tanzania's request to have it inscribed in the world heritage list in 1979. Further the area has been recognized as a biosphere reserve under UNESCO'S Man

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[135] The term is used in its restricted meaning as contextually used in Tanzania to mean a wildlife Protected Area with multiple land uses including human habitation. See the discussion in Part 1.2.3 of this thesis

[136] See Juma, I. H. 1999 Supra note 104

[137] It should be pointed out however, that apart from those who where moved from Serengeti National Park, other Maasai pastoralists have been residing in the Area with their herds of cattle and flocks of sheep and goat for some two thousand years. See Chanley, S. 2005. "From Nature Tourism to Ecotourism? The Case of the Ngorongoro Conservation Area-Tanzania." This is available at http://www.findarticles.com. Accessed on the 5th of November 2006.

[138] The Ngorongoro Conservation Act, Cap. 284 R.E 2002

[139] See the preamble to the Act, ibid

and Biosphere Program. It also constitutes the famous archaeological and palaenteological site called Olduvai George which is a depository of fossil evidence of the earliest beginnings of the human race.[140]

Ngorongoro Conservation Area is also significantly unique in that it integrates management for the conservation of soils, vegetation, wildlife and watersheds with the development of pastoralists and the tourism industry. It is therefore among others, a home to resident Maasai tribesmen and women.

Many of the tribesmen and women (or their descendants) were evicted from Serengeti after signing an agreement to that effect in 1959. The agreement however, did not stipulate that the Maasai were entitled to any compensation for the grazing land and permanent water sources they had lost.[141]

3.3.3 Creation of Game Reserves (GRs) and Game Controlled Areas (GCAs)

The main law relating to creation of Game Reserves and Game Controlled Areas in Tanzania is the Wildlife Conservation Act.[142] Under this Act the protection, development, regulation and control of fauna and flora products and other related matters are controlled.[143]

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[140] Kauzeni, A.S. "Experience in Community Conservation in Protected Areas: The case of Ngorongoro Conservation Area". A paper presented during Wildlife Policy Round Table Discussion at Bagamoyo. 25th-26th January 1999

[141] United Republic of Tanzania. 1990. *Report of the ad hoc Ministerial Commission on Ngorongoro.* Dar-es-salaam: Government Printer p.5

[142] The Wildlife Conservation Act Cap. 283, R.E 2002

[143] See the long title to the Act, Ibid

This legislation deals with areas termed Game Reserves, Game Controlled Areas and Partial Game Reserves.[144] As stated above, Game Reserves allow no human settlement besides that for sport hunting; Game Controlled Areas allow human settlement.

The Act repealed and replaced the Fauna Conservation Ordinance.[145] It creates the Game Reserves, Game Controlled Areas and Partial Nature Reserves. Regarding Game Controlled Areas, the Act provides that the President may declare any land of Tanganyika to be a Game Reserve by way of a notice in the Government Gazette.[146]

Like its predecessor namely the Fauna Conservation Ordinance, the Wildlife Conservation Act allows a wider use of land and wildlife resources compared to the National Parks Act.[147] For example, people whose places of ordinary residence are within the Game Reserves as well as those who were born in the Game Reserves are exempted from the general rule relating to the requirements for permits.[148]

The phrases "persons born" and "ordinary resident" within Game Reserves and the requirements for permits to enter and live in Game Reserves are still causing problems in Tanzania, especially between residents and conservationists. Certain cases exemplify this point.

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[144] See Majamba, I.H. 2003. Implementation and Enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Tanzania. *Eastern Africa Law Review.* 28-30(2003)
[145] Cap 302, Repealed.
[146] Wildlife Conservation Act, Cap. 283, R.E 2002, Section 5(1)
[147] The National Parks Act, Cap. 282 R.E 2002
[148] See Section 7(2) (a)-(b) of the Wildlife Conservation Act, supra note 117

In the case of *Republic Versus Logotu Endurin and 8 others*,[149] the accused were charged with contravening the provisions relating to entering into a game reserve without permits, namely sections 7(1)(a) and (2) of the Wildlife Conservation Act[150] respectively. They were also charged with grazing cattle, sheep and goats in the reserve without a permit contrary to section 12(1) and (2) of the Wildlife Conservation Act.[151]

The magistrate wondered why people who were born or ordinarily resident in the reserve would be subjected to the requirements for permits to stay and graze. To this end, he ruled that the requirements for such permits were unnecessary as those people are allowed to stay and graze in the reserve under the Wildlife Conservation Act.[152]

In the case of *Lekengere Faru Parutu Kamunyu and 52 others v Minister for Tourism, Natural Resources and Environment and 3 others*[153], the plaintiffs- former residents of Mkomazi Game Reserve pleaded that the defendants forcefully and in total disregard of the law evicted them from their ancestral land causing them, their families and the community at large damage.[154]

The defendants claimed that the eviction of the plaintiffs was lawful as the rights which the latter were enjoying over Mkomazi Game Reserve were revocable pursuant to

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[149] Criminal Case No. 45 of 1998, Same District Court, at Same.
[150] The Wildlife Conservation Act Cap. 283, R.E 2002
[151] *ibid*
[152] Section 7(1) (a) and (b) Ibid
[153] Civil Case No 33 of 1994, High Court of Tanzania at Moshi, unreported.
[154] See a comprehensive discussion on this case in Mchome, S.E. 2002 supra note 112 p.113-142

sections 7(1) and (2), 9(1) and (2), 11(1) and (2) and 12(1) and (2) of the Wildlife Conservation Act.[155]

The High Court ruled that customary land rights of the plaintiffs were not interfered by the creation of Mkomazi Game Reserve as this was in line with the provisions of the Wildlife Conservation Act.[156]

The Court of Appeal of Tanzania (CAT) however did not find out that there was a customary title in favour of the appellants except "a statutory title carved out of a public land by the Wildlife Conservation Act, 1969" (sic)[157] This ruling only furthered the confusion since the conception of "public title" is a strange creation that does not exist neither in the land laws of Tanzania nor the Wildlife Conservation Act of 1974. Further, Tanzania never had a law called the "Wildlife Conservation Act, 1969" cited by their lordships.

The land laws of Tanzania which were in force by then recognized only one tenure called "a right of occupancy" which has two titles namely "granted right of occupancy" and "deemed right of occupancy" and that all land in Tanzania is public land; this is different from "public title".[158]

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[155] Cap. 281, R.E 2002
[156] *Ibid,* See section 7 (1) and (2) respectively
[157] Mchome, S.E supra note 112, p.124
[158] Section 3 of the land Ordinance, cap 113. This principle has been retained in the new land laws namely the Land Act no. 4 and the Village land no. 5 respectively. However, the land in Tanzania is now divide into three categories namely, general land, village land and reserved land. See Section 4(4) of the Land Act no. 4 of 1999

A Game Controlled Area is created by way of a declaration by the minister concerned with conservation of flora and fauna in the Government Gazette in respect of any area of Tanganyika.[159] The Act excludes from the requirements for permits, peoples born or whose places of ordinary residence are on the game controlled Areas.[160]

3.4 Management of Protected Areas in Tanzania

Tanzanian legislation creates various institutions and bodies and vest in the said institutions, the mandate to manage Protected Areas. This thesis, at this juncture, revisits laws that create such institutions. Since a discussion on creation of Protected Areas precedes this discussion, we find it useful to discuss laws relating to the management of those areas against each Protected Area as discussed above.

3.4.1 Management of National Parks

Tanzania National Parks Authority (TANAPA) is the institution vested with the task of managing the country's twelve terrestrial National Parks.[161] This is a board of trustees created by the National Parks Act[162] as a body corporate capable of suing and being sued as well a vested ability to acquire and alienate movable properties and (with the minister's approval) immovable property for the effective performance of its mandated tasks.[163]

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[159] The Wildlife Conservation Act 1974 Cap. 281, R.E 2002 , S.6
[160] *Ibid*, Section 7 (1) (a)
[161] The use of the word "terrestrial" aims to exclude Marine Parks and Reserves which are created and managed under the Marine Parks and Reserves Act, 1994, Act No.29 of 1994.
[162] Cap 282, R.E 2002
[163] *Ibid,* S.8

The Act provides information regarding board's composition.[164] An analysis of the schedule suggests that the board consists of three kinds of members namely those who assume membership by their portfolios, those who are appointed by the President and honorary members who if appointed on the recommendations of the first two kinds of members, do not have the same powers and privileges as other trustees.[165]

The Chief Conservator of Forests, Game Warden and the Permanent Secretary to the Ministry responsible for National Parks and the Chairman of Tanzania Tourist Board[166] constitute the first kind of members. The second kind of members comprises of between six to ten persons appointed by the President.[167] The President also appoints one of the trustees to be the chairperson.[168] As regards the third kind of members, they are also appointed by the President on recommendation of the trustees and they comprise persons of eminence in scientific or other attainments.[169]

With the exception of honorary members, the Act does not provide information on the requisite qualifications and experience expected of a person to be appointed; neither does it provide for the appointment procedure to be followed by the appointing authority.

The board of trustees is given the overall authority to make regulations but the minister has the final approval mandate.[170] The general powers of the Board are, *inter alia*, to take

[164] See the second schedule to the National parks Act cap 282 R.E 2002
[165] *Ibid*, S.1(3)
[166] *Ibid*, S.1(1)(a) of the second schedule
[167] *Ibid*, S.1(1)(b)
[168] *Ibid*, S.1(2)
[169] *Ibid*, S.1(3)
[170] *Ibid*, S.14

steps that ensure the conservation and security of animals in the parks; and to reserve the portions of National Parks for habitat conservation and nurseries.[171] They also have the authority to make regulations for improving the effective implementation of the National Parks Act.[172]

3.4.2 Management of the Ngorongoro Conservation Area

The responsibility of managing the Ngorongoro Conservation Area is vested in the board of directors of the Ngorongoro Conservation Area Authority (NCAA), a creation of the Ngorongoro Conservation Area Act as amended.[173]

Functions of the Authority as set out in the legislation include conservation and development of natural resources of the Area and the promotion of tourism as well as safeguarding and promoting interests of Maasai citizens[174] of the United Republic engaged in cattle ranching and dairy industry within the area.[175] Other functions are the promotion and regulation of the development of forestry and the construction of infrastructure necessary for the development and protection of the Area.[176]

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[171] *Ibid,*
[172] *Ibid,* S. 18(1)
[173] The Ngorongoro Conservation Act, cap 284 R.E 2002, S.5
[174] Although the principle legislation lists "the promotion of interests of Maasai citizens" as a mandated statutory role of the Ngorongoro Conservation Area management authority, the authority has enacted regulations that tilt heavily in favour of wildlife conservation at the detriment of the people. For example, livestock grazing has been prohibited in the Olmoti crater in Nainokanoka village despite the fact that this crater has been a refuge for resident pastoralists during dry seasons. See Susan Chanley 2005: "From Nature Tourism to Ecotourism? The Case of the Ngorongoro Conservation Area-Tanzania." Available at http://www.findarticles.com. Accessed on 5th November 2006.
[175] *Ibid,*S.6(a)-(c)
[176] *Ibid,*S.6(d)-(f)

The Chief Executive officer of the authority is the conservator of the Area who is appointed by the President.[177] This is also the secretary to the board of directors.[178] The President also appoints the chairperson of the board to preside over board meetings.[179] Other members of the board include between six to eleven members appointed by the minister in charge of the management of natural resources.[180]

The Act does not contain information regarding the procedures to be employed by the minister in making appointments nor does it outline the qualifications and experiences expected of appointees. It only stipulates that the minister must appoint persons who will, in his opinion "perform their functions under the ordinance having regard to the national interest."[181]

3.4.3 Management of Game Controlled Areas and Game reserves

Management of Nature Reserves and Game Controlled Areas are vested on the Director of Game who is appointed by the President.[182] The Director is responsible for the administration of the Wildlife conservation Act.[183] The minister is also empowered to appoint any number of game officers who in his opinion are necessary for the administration of the Act. [184]However, the Act contains no details regarding the procedures for neither appointment nor the qualifications of the potential appointees.

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[177] *Ibid,*S.7(1)
[178] *Ibid,*S.2(1)(b) of the second schedule
[179] *Ibid,* S.2(1)(a)
[180] *Ibid,*S.2(1)(c)
[181] *Ibid,*S.2(2)
[182]The Wildlife Conservation Act, cap 281 (R.E 2002), S. 3(1)
[183] *Ibid,* S.3(2)
[184] *Ibid* ,S.(4)

In an attempt to forge coordination and cooperation in the management of various kinds of Protected Areas, the director of wildlife also sits on the board of Trustees of the Tanzania National Parks (TANAPA) and the Ngorongoro Conservation Area Authority (NCAA) board of director respectively.

3.5 Interim Conclusion

It has been established in this chapter, that Tanzania has enacted different pieces of legislation for the establishment and management of Protected Areas for its abundant natural resources. Many of the country's laws however, are a relic of its colonial past.

To establish Protected Areas, colonial administrators forcefully evicted local communities without compensation or consultation. This state of affairs still characterizes the independent government. Tanzania's relevant legislation, furthermore, lack the procedures to be followed in appointing members of various boards, for example members of the public are not consulted.

As the result, members of the public think that Protected Areas and abundant natural resources therein, are owned by the executives while in fact they are only entrusted to them for the benefit of the present and future generations. In the next chapter, this thesis examines what obtains in the Republic of South Africa in order to lay the foundation for a comparative analysis of legislation of the two countries in chapter five.

CHAPTER FOUR

4. AN OVERVIEW OF SOUTH AFRICA'S LEGAL FRAMEWORK FOR THE ESTABLISHMENT AND MANAGEMENT OF PROTECTED AREAS

> "Environmental conservation in South Africa has also often led to racial inequity. Many rural Africans were the victims of forced removal from areas which were to become protected areas (national parks), and this is a particularly thorny issue which now faces those who have to decide on land restoration claims" Prof. Michael Kidd[185]

4.1 Introductory remarks

The Republic of South Africa is regarded as the third most biologically diverse country in the world[186] and is also home to world renowned Protected Areas.[187] It is among the first countries in the continent of Africa, to enact laws that set aside areas for nature conservation. The first formal Protected Areas were the forest reserves set up under the Cape Forest Act of 1888 and the first Game Reserve to be established was in the Pongola Area in 1894.[188] Over the past two decades, the government has enacted 11 national and provincial laws related to regulation of Protected Areas.[189]

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[185] Michael Kidd. 'Environmental Justice: A South African Perspective.' (1999) *Acta Juridica*, p.151-152
[186] See World Conservation Monitoring Center, "Development of National biodiversity index" 1992
[187] Kruger National Park is the country's most renowned Protected Area. It is located in the Northern and Mpumalanga provinces, along the country's border with Mozambique and Zimbabwe. It covers 19,425 square kilometers.
[188] Hanks and Glavovic "Protected Areas" in Fuggle and Rabbie *Environmental Management in South Africa*. 1992 p. 698
[189] *Ibid*

This chapter examines the country's laws relating to the establishment and management of Protected Areas. As mentioned elsewhere in this thesis,[190] the term "Protected Areas" in South Africa is wide ranging and it covers many aspects. However, this chapter focuses on the Protected Areas for the terrestrial faunal resources. To this end, legislation relating to Forests and Marine resources fall outside the purview of this chapter. Furthermore, the chapter focuses on four kinds of Protected Areas namely National Parks, Special Nature Reserves, Nature Reserves and Protected Environment.

It is imperative, before embarking on the discussion on the creation of the Protected Areas above, to discuss, albeit briefly, South Africa's governance system. This is aimed at providing the framework for understanding a comparative analysis of legislation of the two study countries in the next chapter.

4.2 An overview of governance in South Africa

South Africa is a new democracy, having been under European colonial rule for two centuries followed by fifty years of Apartheid.[191] The democratically elected government that took office in 1994, while enacting laws directed at addressing injustices arising from both colonial and apartheid discriminatory policies, has at the same time been ensuring that environmental concerns are not compromised.[192]

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[190] See Part 1.2.2 of this thesis

[191] Rose Francis "Water Justice in South Africa: Natural Resources Policy at the intersection of Human Rights, Economics and Political Power" *The George Town International Law Review,* XVIIII(2005)

[192] This balance is evident in S.24 of the Constitution of the Republic of South Africa, Act 108 of 1996

These laws, including the Constitution have dramatically changed the administrative landscape in South Africa. There are now nine provinces and the approach to the powers, functions, and structures of provincial and local government has changed.[193]

The Constitution, which is the supreme law of the land, is founded upon the principles of human dignity, equality and recognition of fundamental rights and freedoms.[194] It stipulates that the government of the Republic of South Africa is constituted as national, provincial and local spheres of government.[195] It has been argued that the use of the term "spheres of government" instead of "levels of government" indicates a more "horizontal" status and relationship; avoiding the hierarchy where the "lower" or "smaller" is subject to the "higher" or central level of government.[196] The constitution lists the areas of concurrent National and Provincial legislative competence as well as functional areas of exclusive provincial legislative competence.[197]

According to the Constitution, "environment" and "nature conservation" are matters of both national and provincial jurisdiction.[198] However, nature conservation specifically excludes National Parks, National Botanical Gardens and Marine Resources from this concurrent regime indicating that they are a national matter.[199] This discussion focuses on selected kinds of Wildlife (faunal) Protected Areas that can fall both at the national or provincial level.

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[193] Glazewski, J 2005:"Environmental law in South Africa" supra note 16
[194] See Ss.1 and 2 of the founding provisions and chapter 2 of the Bill of Rights.
[195] See Chapter 3 of the Constitution
[196] Elmene Bray. 1999. Cooperative Governance in the Context of the National Environmental Management Act 107 of 1998. *SAJELP*. Vol.6 No. 1 1999
[197] The Constitution of the Republic of South Africa Act 108 of 1998, See Schedule 4 and 5.
[198] *Ibid,* See Schedule 4
[199] *Ibid*

4.3 ESTABLISHMENT OF PROTECTED AREAS IN SOUTH AFRICA: THE LEGAL ASPECTS

South African legislation relating to the establishment and management of Protected Areas, as indicated elsewhere in this work, aims to address the undesired background that characterizes the country's colonial and apartheid era.[200] However, the new pieces of legislation can not be attributed to the democratic process alone but also to the international paradigm shift about ways in which natural heritage should be conserved and used.[201]

Protected Areas during colonial and apartheid era also served the privileged elite and involved the forced eviction of black communities. Moreover, there was a perception that the apartheid government was concerned about preserving wildlife than about poverty and oppression faced by most of its people. This background is now the "thorny issue"[202] that the new legislative framework aims to address. This thesis now focuses on the relevant legislation.

4.3.1 The National Environmental Management: Protected Areas Act[203]

This is the main law relating to creation of Protected Areas in the Republic of South Africa. It has repealed many laws in an effort to do away with the fragmented nature of legislation that was in force prior to its enactment. The repealing section[204] lists the laws that have been repealed as shown in the table below.

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[200] See part 4.2 of this thesis
[201] These developments relate to Equity, Social justice and power relations in Biodiversity. See Rachel Wynberg, supra note 1 at 234
[202] See Michael Kidd. 1999.'Environmental Law: A South African Perceptive.' supra note 185
[203] Act 57 of 2003 Published in the Government gazette No. 26025 dated 18 February 2004
[204] *Ibid,* S.90

Block 1: A list of laws that have been repealed by the National Environmental Management Act 57 of 2003 and their respective extent of repeal.

Source: Schedule to the Act.

No and year of Act	Short title of Act	Extent of repeal
Act 39 of 1975	Lake Areas Development Act, 1975	The repeal of the whole
Act 57 of 1976	National Parks Act, 1976	The repeal of the whole, except section 2 (1) and Schedule 1
Act 60 of 1979	National Parks Amendment Act, 1979	The repeal of the whole
Act 9 of 1980	Lake Areas Development Amendment Act, 1980	The repeal of the whole
Act 13 of 1982	National Parks Amendment Act, 1982	The repeal of the whole
Act 23 of 1983	National Parks Amendment Act, 1983	The repeal of the whole
Act 43 of 1986	National Parks Amendment Act, 1986	The repeal of the whole
Act 111 of 1986	National Parks Second Amendment Act, 1986	The repeal of the whole
Act 60 of 1987	National Parks Amendment Act, 1987	The repeal of the whole
Act 73 of 1989	Environment Conservation Act, 1989	The repeal of sections 16, 17 and 18

Act 23 of 1990	National Parks Amendment Act, 1990	The repeal of the whole
Act 52 of 1992	National Parks Amendment Act, 1992	The repeal of the whole
Act 91 of 1992	National Parks Second Amendment Act, 1992	The repeal of the whole
Act 38 of 1995	National Parks Amendment Act, 1995	The repeal of the whole
Act 70 of 1997	National Parks Amendment Act, 1997	The repeal of the whole
Act 106 of 1998	National Parks Amendment Act, 1998	The repeal of the whole
Act 54 of 2001	National Parks Amendment Act, 2001	The repeal of the whole

The Act aims firstly, to provide for the conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscape and seascapes. Secondly, to establish a national register for all national, provincial and local Protected Areas. Thirdly, it aims at providing for the continued existence of South Africa National Parks.[205] South African National Parks, (SANPARKS) is a state body entrusted with the day to day management of the country's National Parks.

The Act provides for different kinds of protected areas ranging from Special Nature Reserves, National Parks, Nature Reserves (including wilderness areas) and Protected

[205] *Ibid*, See the long title

Environments.[206] Others are World Heritage Sites, Marine Protected Areas, Special Forest Areas and Mountain Catchment Areas.[207]

The relevant part relating to the creation of the above types of Protected Areas is Part Three entitled "Declaration of Protected Areas." Reasons for such declarations are to "protect the ecologically viable landscapes areas representative of the South Africa's biological diversity and its landscapes and seascapes in a system of Protected Areas as well as to preserve the ecological integrity of those areas."[208]

Other reasons include the protection of areas representative of all ecosystems, habitats and species naturally occurring in South Africa as well as to protect threatened or rare species.[209] The declaration of protected areas also aims at "protecting an area which is vulnerable or ecologically sensitive as well as assisting in ensuring the sustainable use of natural and biological resources."[210]

The additional motivation is to create destinations for nature based tourism and to manage the "interrelationship between natural environmental biodiversity, human settlement and economic development."[211] Other purposes for the creation of Protected Areas are to assist in human social, cultural, spiritual and economic development or to rehabilitate and restore damaged ecosystems and endangered and vulnerable species.[212]

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[206] *Ibid,* S.9 (a)
[207] *Ibid,* S. 9(b)-(e)
[208] *Ibid,* S. 9(h)-(e)
[209] *Ibid,* S. 17 (a)-(b)
[210] *Ibid,* S 17 (f)-(h)
[211] *Ibid* S. 17(i)-(j)
[212] *Ibid,* S.17 (k)-(l)

The Act includes detailed procedures on how each of the kind of Protected Areas is created. The discussion below focuses on the creation of those Protected Areas that are of relevance to this thesis namely National Parks, Special Nature Reserves, Nature Reserves and Protected Environment.

4.3.1.1 Creation of a National Park

The Act empowers the Minister to declare a specific area to be a National Park[213] or to continue being a National Park if it had already been created by other laws.[214] The Minister (a cabinet member in charge of issues related to environmental management),[215] is also empowered to name the National Park that he/she declares.[216]

The Act gives information regarding areas of the Republic that can be declared to be a National Park. For example, an area can only be declared a national park due to the area's international and national biodiversity importance or if it contains a viable, representative sample of South Africa's natural systems, scenic areas or cultural heritage sites as well as the area's ecological integrity.[217] Other factors that can necessitate the area to be declared a national park are the need to prevent exploitation or illegal occupation that threatens the

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[213] This is a Protected Area managed mainly for ecosystem conservation and recreation in that it id designated to:

- Protect the ecological integrity of one or more ecosystems for this and future generations
- Exclude exploitation or occupation inimical to the purposes of designation of the area, and;
- Provide foundation for spiritual, scientific, educational, and recreational and visitor opportunities, all of which must be environmentally compatible. See IUCN Protected Areas Categories. Available at http://www.unep-wcmc.org/protected_areas/categories . Accessed on 7th of November 2006

[214] The National Environmental management: Protected Areas Act 57 of 2003, S. 20 (1) (a)

[215] *Ibid,* See chapter 1 entitled "Interpretation, Objectives and Application of the Act"

[216] *Ibid,* S. 20 (1) (b)

[217] *Ibid* S.20 (2) (a)

ecology of area and if its declaration can contribute to the country's economic development.[218]

Both private as well as public lands may be declared a national park. In case of the former, such a declaration must be accompanied by a written agreement to that effect by the landowner, addressed to the minister or to South African National Parks.[219] This is undoubtedly very different from what pertained during colonialism and apartheid respectively. During those times, parks were created by forcefully evicting tens of thousands of Africans from their homes and lands and therefore such parks are "among the bitterest legacies of apartheid".[220]

If the Minister or South Africa National Parks (SANPARKS) do not get the written consent of the land owner, the minister's declaration of that area must be withdrawn.[221] The national assembly can also decide by a resolution to withdraw a Minister's declaration.[222]

The Act also provides for the promotion of a National Park to become a "wilderness area."[223] By definition, this is an area the designation of which helps to retain an intrinsically wild appearance by keeping it road less, undeveloped and without permanent

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[218] *Ibid,* S.20 (2) (b)-(d)
[219] *Ibid,* S.20(3)
[220] Honey, M supra note 46 p.341
[221] The national Environmental management: Protected Areas Act 57 of 2003, S.20(3) (a)
[222] *Ibid,* S.20(3) (b)
[223] *Ibid,* S. 22(1). Note also that a wilderness Area is equivalent to the IUCN'S Category 1b namely Protected Area-Wilderness area. It is an area managed mainly for wilderness protection. This is a large area of unmodified land and/or sea retaining its natural character and influence, without permanent or significant habitation, which is protected and managed so as to preserve its natural condition. See http://www.unep.org/protected_areas/categories Accessed on 7th November 2006.

improvements or human habitation.[224] However declaring a National Park to be a wilderness area the Minister must consult the management authority of the Park.[225]

4.3.1.2 Establishment of a Special Nature Reserve

Special Nature Reserves[226] are defined by the Act to mean "an area that was declared to be a special nature reserve by the provision of the Environment Conservation Act (ECA)[227]before it was repealed or an area that is declared in terms of S.18 of this act."[228]

According to the Act, to declare a Special Nature Reserve the minister must place a notice in the Government Gazette with regard to a new Special Nature Reserve or as part of an existing Special Nature Reserve.[229] This declaration aims to protect highly sensitive, outstanding ecosystems and special geographic or physical features in the area. It also aims to provide an area for scientific research or environmental monitoring.[230]

Like a National Park, a Special Nature Reserve requires a written consent of the land owner if it is situated on a privately owned land.[231] However, unlike in the case of a National Park, the declaration of a Special Nature Reserve can not be withdrawn only on

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[224]The National Environmental management: Protected Areas Act 57 of 2003. See Chapter entitled "Interpretation, Objectives and Application of the Act"
[225] *Ibid* S.30(3)
[226] This type of Protected Areas is equivalent to the "IUCN'S category 1a Protected Area" namely Strict Nature Reserve: Protected Area managed mainly for science. This area of land/and or sea possesses some outstanding or representative systems, geological or physiological features and/or species, available primarily for scientific research and/or environmental monitoring. See Blackmore, A. 2005. An Overview of the Legal Instruments to Conserve Biodiversity in South Africa with particular reference to the Establishment and Expansion of Protected Areas. LL.M Dissertation, University of KwaZulu Natal, p.86
[227] Act 73 of 1989
[228] The National Environmental Management: Protected Areas Act 57 of 2003
[229] *Ibid,* S. 18
[230] *Ibid,* S.18(2)(a) and (b)
[231] *Ibid,* S.18(3)

the basis that a written consent of the land owner was not obtained prior to the declaration. [232]

4.3.1.3 Declaration of a Nature Reserve

According to the Act, declaration of a nature reserve aims at supplementing the National Parks system of South Africa. The declared area can also be one of scientific, cultural, historic or archeological interest or one that requires "long term protection for the maintenance of its biodiversity or for the provision of environmental goods and services."[233]

In addition, Nature Reserves can be declared to ensure sustainable flow of natural products and services to the local community, allowing the continuation of sustainable traditional consumptive uses. Another reason for declaring a Nature Reserve is to "provide for nature based recreation and tourism opportunities."[234]

A privately owned land can be declared a Nature Reserve, provided that a written agreement has been sent to the minister or M.E.C.[235] However, if an area forms part of a Special Nature Reserve or a national park, it may not be declared as a nature reserve or as part of an existing nature reserve.[236]

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[232] *Ibid*, Section 19 Provides: "The declaration of an area as a nature reserve or as part of an existing special reserve may not be withdrawn and no part of a special nature reserve may be extinguished from the reserve *except by resolution of the national Assembly*" (Emphasis added).
[233] *Ibid*, S.23(2) (b)
[234] *Ibid*, S. 23(2) (c)-(e)
[235] *Ibid*, S.23(3)
[236] *Ibid*, S. 23(4)

Should the land owner withdraw his/her written consent then the minister or M.E.C may withdraw the said declaration.[237] Withdrawal of a declaration can also be done by a resolution of the National assembly or the legislature of a province in cases of the declarations by the Minister and the MEC respectively.[238]

4.3.1.4 Declaration of a Protected Environment

A Protected Environment[239] is declared and named by the minister or MEC by way of a notice in the Government gazette.[240] The aim of declaring a Protected Environment is to allow that area to be monitored as a "buffer zone for the protection of a Special Nature Reserve, National Park, World Heritage Site or Nature Reserve."[241]

Declaring such an area also allows landowners to act (with legal recognition) as a group in conserving biodiversity.[242] Ecosystems that fall outside any special reserve, national park, world heritage site or nature reserve are protected through this declaration. In addition, the regulation of change in an area planned for future declaration as or inclusion in, national park or special nature reserve are other reasons for the declaration of a protected environment.[243]

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[237] *Ibid*, S.24(2)
[238] *Ibid*, S.2491)(a) and (b)
[239] A Protected Environment has been described as "potentially the most useful type of Protected Area to conserve natural and cultural heritage due to their flexibility in restricting those land use activities that may threaten the land, coast or seascape to be conserved and allowing cooperation between the State and the private and community land owners." See Andrew Blackmore, supra note 226
[240] The National Environmental Management Protected Areas Act 57 of 2003, S.28(1)(a)
[241] *Ibid*, S. 28(1)(a)
[242] *Ibid*, S.28(2) (b)
[243] *Ibid*, S.28(2)(d) and (f)

4.4 Management of Protected Areas

The Act provides that the Minister may assign in writing, the management of a National Park to South African National Parks or any other suitable person, organization or organ of the state.[244] With regard to Special Nature Reserve or Nature Reserve, the Minister may assign their management to "a suitable person, organization or organ of the state."[245] The management of a Protected Environment can be assigned by the minister "to a suitable person, organization or organ of a state" provided that the lawful occupier requests or consents to such a declaration.[246]

However, in practice management of South African National Parks has always been a preserve of South African National Parks, known by its acronym as SANPARKS. It was established by section 5 of the National Parks Act 1976,[247] which has been repealed by the National Environmental Management: Protected Areas Act.[248]

According to the new act, the functions of SANPARKS are firstly, to manage the National Parks and other Protected Areas assigned to it. Secondly, to protect, conserve and control those National Parks and other Protected Areas including their biological diversity.

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[244] *Ibid*, S.38(a)A, note that this Section was inserted by S.14(b) of Act 31 of 2004
[245] *Ibid,* S.38 (1)(a)
[246] *Ibid,* S.38(1)(c)
[247] *Ibid*, Act 57 of 1976
[248] *Ibid,* S.90, that is the repealing section of the Act

Thirdly, to advise the Minister on his request, on issues related to conservation and management of biodiversity as well as proposed National Parks and additions to or exclusion from existing national parks. The fourth function relates to acting as a provisional managing authority of Protected Areas under investigation, if requested so to do by the Minister.[249]

SANPARKS is governed by a board of nine to twelve members appointed by the minister.[250] Also included in the board is the director General or an official of the Department designated by the Director General and the chief executive officer.[251]

The Act provides information about the board members' required qualifications and experience as well as their appointment procedure.[252]A person is disqualified from becoming or remaining to be a member of the board if he/she is a member of parliament or provincial legislature and if he/she is removed from office for such reasons as misconduct or conviction of a criminal offence without an option of a fine.[253]

As regards the appointment procedure, the minister must release information to the national and provincial media to invite nominations from among members of the public.[254] A list must then be drawn up reflecting each nominee's particulars.[255]

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[249] *Ibid*, See section 55(1)(a)-(d)
[250] *Ibid*, S.57(a)
[251] *Ibid*, S. 57(b) and (c)
[252] *Ibid*, S.58(1)(a) and (b)
[253] *Ibid*, S.58(2)(a) and (b)
[254] *Ibid*, S.59(1)(a)
[255] *Ibid*, S.59(1)(b)

From this list, the minister must appoint the required number of board members but if the list is not adequate, he may appoint any suitable person.[256] The minister's appointments must reflect a broad range of appropriate expertise taking into account the need for appointing persons disadvantaged by unfair discrimination.[257]

From among members of the board, the minister must appoint the chairperson of the board to preside over meetings. The minister may appoint a member of the board as an acting chairperson for cases when the chairperson is absent. Appointment of an acting chairperson is also done if appointment of the chairperson is pending.[258]

To allow for effective implementation of its tasks, the board may establish one or more committees to assist it.[259] Membership to such committees can include individuals who are not in the board, but the board decides on the members and chairperson of the said committees.[260] The board also decides on the functions of the committees which it can dissolve at any time.[261]

The board with ministerial approval is empowered to appoint the Chief Executive Officer[262] who must be a person with appropriate qualifications and experience. This appointment is valid for five years save for reappointment.[263]

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[256] *Ibid,* S.59(3)
[257] *Ibid,* S.59(4) and (5)
[258] *Ibid,* S.60
[259] *Ibid,* S.70(1)
[260] *Ibid,* S.70(2) and (3)
[261] *Ibid,* S.70(4)
[262] *Ibid,* S.72(1)
[263] *Ibid,* S.72(2)

The Chief Executive Officer is tasked with the following: Firstly, to manage South Africa National Parks. Secondly, to perform such other duties as may be described or delegated to him/her by the board. Thirdly, the Chief Executive Officer has the duty of reporting to the board on aspects related to management, the performance of duties and the exercise of powers at such frequency and in such a manner as the board may determine.[264]

The chief Executive officer is to determine a "staff establishment scheme" which will ensure the ability of SANPARKS to carry out its functions within the financial limits set by the Board.[265] A guiding employment policy is determined by the board with the concurrence of the minister.[266]

Another remarkable feature of the Act relates to the National Parks Land Acquisition Fund as provided for under the provision of section 77. This fund was established by Section 12A of the National Parks Act, 1976.[267] Despite the repeal of the establishing legislation, this fund continues to exist as a separate fund under the administration of South African national Parks.[268] This fund, among other things, is used to purchase privately owned land for the purpose of Conservation by the state or South Africa National Parks.[269]

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[264] *Ibid,* S.72(4((a)-(c)
[265] *Ibid*, S.73(2)(a) and (b)
[266] *Ibid*, S.73(1)
[267] Act 57 of 1976
[268] The National Environmental Management: Protected Areas Act 57 of 2003, S.77(1)
[269] *Ibid*, S77(3)(a)(i)

4.5 Interim Conclusion

This Chapter has surveyed, albeit briefly, South Africa's legislative regime relating to the establishment and management of Protected Areas. The country's Protected Areas are among the bitterest legacies of apartheid, for they were established for the exclusive enjoyment of the privileged white minority while forcefully evicting the local black communities.

The democratically elected government aims to redress these injustices. It also aims to do away with the fragmented nature of laws that used to administer the county's Protected Areas in the apartheid era. To this end, the National Environmental Management: Protected Areas Act 57 of 2003 was enacted.

This act contains important lessons worthy emulating by other jurisdictions. It also contains some weaknesses that become clearer when compared and contrasted with legislation of other countries. In chapter five, this thesis makes a comparative analysis of the Tanzania's legislative framework with its South Africa's Counter parts.

CHAPTER FIVE

5. A COMPARATIVE ANALYSIS OF THE LEGISLATION.

5.1 Introductory remarks

Chapters three and four of this thesis focused on the legislation relating to the establishment and management of Protected Areas in Tanzania and South Africa respectively. It was noted that the two countries are similar in that they are endowed with rich biodiversity, the protection of which calls for effective legislative frameworks. Tanzania has devoted 28% of its total land area for conservation of biodiversity and South Africa has set aside 6% of its territory for the same purpose.[270]

There are also fundamental differences between the two countries in that whereas South Africa's legal system is based on the Roman Dutch Law that of Tanzania is based on the English Common Law. Another difference is that South Africa's Protected Areas such as National Parks are fenced to reduce human-wildlife conflict while Tanzanian National Parks are not fenced.

Despite the above differences, legal comparison is important in the area of environmental statutes since the globe is a series of interlocking ecosystems with many common problems. Legal comparison also leads to development of a country's legal system through studying how other jurisdictions apply internationally acceptable principle such as public participation. This chapter seeks to compare legislation of the two countries on the two aspects namely establishment and management of Protected Areas.

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[270] Hitchcock, R supra note 7 p. 205-206

5.2 Establishment of Protected Areas

5.2.1 Contextual meaning of "Protected Area"

As pointed out elsewhere in this research, the meaning of the term "Protected Areas" is not uniform. It depends on the legislation and common use of an individual country. Both international as well as regional instruments also suggest variance in the use of the term. The IUCN system of classification is resorted to in order to safeguard against confusion.

South Africa's legislation refers to "National Protected Areas" as including a Special Nature Reserve, a National Park or a Protected Environment that is managed by a national organ of state or which falls under the jurisdiction of the Minister.[271] This definition excludes Protected Areas such as Nature Reserves that can also be established and managed by an individual province.

This phenomenon was introduced by the 1996 constitution.[272] Whether a Protected Area falls under the national or provincial management affects the community around such an area in that revenues which would have been used to finance conservation related initiatives in the province go to the national coffers.[273] Therefore, a community would resist the up-grading of a Protected Area such as a Nature Reserve into a National Park to avoid it being managed by a national body fearing that revenues would be undermined.

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[271] See Chapter one of the Act entitled "Interpretation, Objectives and Application of the Act"

[272] Constitution of the Republic of South Africa, 1996. This is by introducing areas of concurrent National and Provincial legislative competence as well as functional areas of exclusive provincial legislative competence as per Schedules 4 and 5 respectively.

[273] Kidd, M.A. 2002. 'The Implementation of the Convention on Biological Diversity in South Africa.' Paper Delivered at *Intentional Wildlife Law Conference,* Washington DC, October 2002 p.17

It is for this reason that Protected Areas in Kwa-Zulu Natal province are not managed by South African National Parks although in accordance to the IUCN category II and the National Environmental Management: Protected Areas Act,[274] they meet the criteria for being declared National Parks. Ithala Game Reserve and iMfolozi Park are pertinent examples.

The above definition differs from what pertains in Tanzania. Tanzania's Protected Areas are all under the management of the central government irrespective of the region in which they fall. This phenomenon, coupled with the fact that some land uses and development of infrastructure are discouraged in and around Protected Areas in order to control populations[275] has lead to the community in and around Protected Areas being poorer than other communities in the same country.[276]

However, it is important to point out that the United Republic of Tanzania's Constitution stipulates that "environment" is not a union matter. The result of this stipulation is that each of the two parts of the union namely Zanzibar and the Tanzania mainland have separate laws relating to establishment and management of Protected Areas.

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[274] The National Biodiversity: Protected Areas Act 57 of 2003, it can be urgued, adopts the IUCN categorization in that one or more ecosystems are to be included within the bounds if the proclamation. See S.21 (2) (a) (ii) of the Act.

[275] See United Republic of Tanzania, A Conservation and Development Strategy for Ngorongoro Conservation Area: Report of the *Ad hoc* Ministerial Commission on Ngorongoro, 10th August 1990

[276] The Maasai pastoralist community exemplifies this point: The principle legislation that establishes the Ngorongoro Conservation Area, namely the Ngorongoro Conservation Area Act, cap 283 prohibits cultivation. Households in the area are forced to sell livestock to purchase grain from the neighbouring Karatu district at a higher price. Livestock diseases resulting from interaction with wildlife also reduces the community's herds. The Ngorongoro Authority controls the land so the community can not lease it to investors. For these reasons, the community in this Protected Area has higher malnutrition and smaller livestock holdings compared to their neighbours. See also Susan Charnley, 'From Nature Tourism to Ecotourism? The Case of the Ngorongoro Conservation Area, Tanzania. Available at http://www.findarticles.com/p/articles

A similarity that is clear in the two study countries pertains to one kind of protected area namely National Parks. Apart from falling in the jurisdiction of the central government in both countries, there are also strict restrictions on entry and residence. This is discussed below.

5.2.2 Prohibition on entry and residence

The law in South Africa states that except with a written permission issued by the management authority, no person may enter or reside in a Nature Reserve, National Park or World Heritage site.[277] Travelers in the Park, holders of vested rights and officials on duty in the parks are exempt from this.[278]

In almost identical wording, Tanzanian legislation prohibits entry into and residence in the National Parks except under and in accordance with a permit issued under the regulations of the Act.[279] Excluded from this rule are trustees, officers and servants of the trustees as well as public officers on duty within the National Park and their servants. The law is silent on travelers through the parks but in practice, many roads linking one region with another cut across National Parks.[280]

The influence of the American system of Protected Areas which involves drawing boundaries around specific areas to preserve them in their natural state and free them of

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[277] The National Environmental Management: Protected Areas Act 31 of 2003, S.46(1)
[278] *Ibid,* S.46(2)(a)-(e)
[279] *Ibid*, S.21(1)
[280] For example, the road from Arusha to Mara cuts across Manyara and Serengeti National Parks respectively.

local people[281] explains why there is a similar prohibition in both countries since these National Parks were modeled after the American system. Looking at this common prohibition analytically, it appears that National Parks of both countries, apart from the conservation of biodiversity, serve the initial "American purpose", namely being a refuge to affluent members of the community who can pay the entry fees. In the long run therefore, the poor and unprivileged will only be able to see wildlife in pictures.

5.2.3 Authorities responsible for establishment of protected areas

In South Africa, all national Protected Areas are established through a declaration by the cabinet Minister dealing with environmental matters.[282] As for provincial Protected Areas such as Nature Reserves, the creating authority is the MEC of the respective provinces.[283]

Different authorities in Tanzania are vested with the power to establish different types of Protected Areas. Game reserves are declared by the President[284]. The President also declares National parks.[285] The Minister responsible for matters relating to management of natural resources is vested with powers to declares a Game Controlled Area[286]

The Tanzanian model above can suggest that National Parks, since they are declared by the highest institution of the country, are more important than other types of Protected Areas. Whereas this can be true in other spheres such as revenues collection and

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[281] Honey, M supra p.130
[282] See for example S. 23 of the National Environmental Management: Protected Areas Act, 31 of 2003
[283] *ibid*
[284] S.3 of the Wildlife Conservation Act, cap 281 (R.E 2002)
[285] See the 2nd schedule to the National Parks Act, cap 282 (R.E 2002)
[286] Wildlife Conservation Act, supra note 245

geographical size, it is not necessarily so from the point of view of science and ecology which considers a wider range of things such as endemic species and the fact that Protected Areas are a series of interlocking ecosystems.

5.2.4 The date of the enactment of the legislation

Apart from the Wildlife Conservation Act of 1974, other pieces of legislation relating to the establishment and management of Protected Areas in Tanzania date as far back as the time of colonial occupation in the country. The National Parks Act, which caters for the twelve National Parks, and the Ngorongoro Conservation Act respectively were both enacted in 1959. However, many things have changed in the conservation plane to necessitate the enactment of new laws.

The coming into power of the democratically elected government in South Africa changed the legal environment in order to address the various injustices of apartheid. As part of this, many outdated laws related to establishment and management of Protected Areas were repealed. The law in force was enacted in 2003 and it has repealed a number of laws as shown in the repealing section.[287]

It can therefore be said that unlike Tanzania's legislation, the South African legislation is up to date and embodies such features as public participation in the establishment of protected areas as discussed below.

[287] The National Environmental Management: Protected Areas Act 57 of 2003, See section 90

5.2.5 Public participation in the establishment of Protected Areas

It has been urged that public participation is "an essential component of the constitutionally entrenched right to procedural fairness."[288] In order to ensure effective participation by the public, five requirements must be met. Firstly, the public must be notified about the proposed decision. Secondly, it must be ensured that the public has access to information regarding the implications of the proposed decision. Thirdly, the public must be given the opportunity to present arguments for or against the proposed decision. Fourthly, clear decision making guidelines should be in place and finally, provision must be made for the public to challenge the decision and the public must have access to remedies in order to challenge the decision.[289]

The historical account relating to the establishment of Protected Areas in Tanzania, discussed in chapter three of this thesis, shows that colonial administrators did not allow for effective public participation (if any) in the establishment and management of Protected Areas. It is reasonable to expect that the independent government would reverse this undesirable state of affairs. Unfortunately, this did not happen.

The same laws have been inherited by a democratic Tanzania and their effects are being borne by communities in and around Protected Areas. As a result, the Maasai pastoralists who were forcefully relocated by the colonial administrators from Serengeti to Ngorongoro were again evicted from Mkomazi Game Reserve in 1988.

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[288] Eastwood, J and E. Pschornstrauss, "The Genetically Modified Organisms Act: Paying lip service to Public Participation sows seeds of dissent" Unpublished paper p.1 (photocopy available with the author)
[289] *Ibid*

To date, the said Maasai pastoralists live under the threat of eviction from Ngorongoro despite the fact that the United Nations has repeatedly declared forced evictions a violation of human rights.[290] The current practice seems to be that the National Parks authorities encroach on pastoral gazing land without any clear guideline.

A recent study, for example, shows that Protected Areas authorities in Tanzania are on the brink of "redefining" their boundaries, resulting in village land[291] being encroached on without compensation, leaving villagers poor and landless.[292]This takes place without public participation.

The Tarangire National Park "redefined" its boundaries to the extent of encroaching on village land which included a school, a dispensary and village offices built by the Park under the "good neighbourhood scheme".[293] This scheme was devised as an incentive for community to support conservation efforts. The main problem is that the old laws in no way consider the need for the community participation in decision making processes.

A similar historical account applies to the Republic of South Africa. The country is now renowned for having at least 77 Conservation and Protected Areas.[294] However, almost

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[290] See UN Commission on Human Rights Resolution on Forced Eviction. It was unanimously adopted on 10th March 1993 in Geneva during the 49th session of the UN commission on Human Rights. The relevant articles are 2, 3, and 4 all of which urge governments to undertake immediate measures at all levels aimed at eliminating forced eviction.

[291] See section 4 of the Village Land Act which distinguishes village land from Reserved Land

[292] Masara, Y. B. 2005. *Report on Wildlife Areas Expansion and Local land Rights: The case of Kimotorok Village, Simanjiro District* PINGOS Forum, Arusha, May, 2005.

[293] *ibid*

[294] Hitchcock, R supra note 8 at 205-206

all Protected Areas were established by evicting tens of thousands of Africans from their homes.[295]

As a result, military patrols and operations were required to protect these areas and they were financed by huge government subsidies to counteract any opposition.[296] An example of such evictions occurred in 1931 when the Khomani people were removed from Gemsbok National Park.[297] This background is now a thorny issue of the new political dispensation, leading it to enact the Restitution of Land Rights Act which will be discussed in this chapter.[298]

However, unlike in Tanzania, the current principle legislation relating to the establishment of Protected Areas in South Africa ensures that there are clear and unambiguous procedures pertaining to public participation. The relevant provision is found in Section 33.[299]

The provision provides that a notice to declare a Protected Area must be preceded by an intention to issue such a notice to be published in the Government Gazette and in at least two national newspapers distributed in the place in which the affected area is situated.[300]

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[295] Honey, m supra at 341
[296] *Ibid*
[297] Hitchcock, R supra at 205-206. This National Park became a Trans- frontier park between South Africa and Botswana in 1999.
[298] The Restitution of Land Rights Act 22 of 1994
[299] The National Environmental Management: Protected Areas Act 31 of 2003, S. 33
[300] *Ibid*, S.33(1)(a)

In addition when private land owners are to be affected by such a declaration, they must be notified of the proposed notice by registered postal mail.[301]

Via the notice, the public (besides those whose rights may materially and adversely be affected) must be invited to present written representations to the authority for or against the proposed notice within 60 days from the date of its publication.[302] In addition, enough detail must be included in the notice to allow the public to submit meaningful responses.[303]

Under special circumstances, for example when the proposed notice may affect the rights or interests of the local community, the minister or MEC as the case may be, may allow oral representation or objections.[304] All representations received or presented must be considered by the minister before publishing the relevant notice.[305]

5.3 Management of Protected Areas

5.3.1 Management authorities

The laws of Tanzania entrust the management of Protected Areas to different authorities. According to the Wildlife Conservation Act[306], the Department of Wildlife which is within the Ministry of Tourism and Natural Resources (MTNR) is vested with authority

[301] The National Environmental Management: Protected Areas Act 57 of 2003
[302] *Ibid*,S.33(2)(a)
[303] *Ibid*, S.33(2)(b)
[304] *Ibid*, S.33(3)
[305] *Ibid*
[306] The Wildlife Conservation Act ,Cap 283, R.E 2002

to manage wildlife in the whole country.[307] In practice however, jurisdiction of this department has been confined to Protected Areas other than National Parks and Ngorongoro Conservation Area[308]. This department is headed by the Director of Wildlife who is appointed by the President.[309]

Presidential appointment in this portfolio is a problem to the management of Protected Areas in that whereas the Director is under the Ministry of Tourism and Natural Resources (MTNR), the responsible Minister can not even transfer him/her to another department in the same Ministry at a time when the Minister is of the opinion that the Director's performance is minimal or tainted with corrupt dealings. This is a problem in Tanzania as indicated below.

In September 2006, Mr. Anthony Diallo the then Minister for Tourism and Natural Resources asked his Permanent Secretary to transfer Mr. Emanuel Severe who is the director of Wildlife to the Forestry Institute in Arusha. Upon receiving the letter of transfer, Mr. Severe refused, saying he is not under the Minister. This sparked confusion among lay people as to who is superior among the two.

Later on, the Chief Secretary Mr. Philemon Luhanjo told the public that Mr. Severe was right in refusing the transfer order given by his Permanent Secretary and that the Permanent Secretary had violated Public Service Regulations by demoting the

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[307] Laura H. and Vincent s.: Report on the Policy and Legislation Pertaining to National Parks Management. FAO, Rome, September, 1996 p.17
[308] *Ibid*
[309] See the UNEP/UNDP/DUTCH Report, supra note 50 p.91

Presidential appointee. To the further confusion of lay people among the citizenry who associate the whole trend with corruption in the wildlife department,[310] the Minister was transferred to another Ministry leaving the Director of Wildlife undisturbed.[311]

National Parks are managed by a board of trustees of the Tanzania National Parks Authority (TANAPA). This board was created by the National Parks Act.[312] The Ngorongoro Conservation Area which permits multiple land uses including grazing and inhabitation is managed by the Board of Directors of the Ngorongoro Conservation Area Authority whose Secretary, the Conservator, and the Chairperson are appointed by the President.[313]

The fact that Protected Areas are being managed by different authorities is positive as it ensures cooperation and divergence of a broad range and diversity of appropriate expertise. However, this situation has resulted in a proliferation of legislation and lack of legally binding coordination as well as unnecessary management costs and overlapping mandates[314].

An example of the problematic nature of the situation is that one authority granted a lease of over 4000 square kilometers in Loliondo Game controlled Area to Brigadier Muhamed Abdulrahman Al-ally, a national of United Arab Emirates for hunting without taking into

[310] According to the Tanzanian media, a Committee of Enquiry will start looking into corruption allegations in the hunting administration and that public pressure is mounting with a number of critical articles having appeared. See for example "The Government's silence threatens Donors" in http://www.habaritanzania.com/articles Accessed on 8th of December 2006.
[311] See the story in http://www.biggamehunt.net Accessed on 8th of December 2006.
[312] UNEP/UNDP/DUTCH Report, supra p.91
[313] See the Fourth Schedule to the Wildlife Conservation Act, Cap 283
[314] UNDP Report, supra p.95

account the fact that this area is a migratory route for animals to and from Serengeti and Ngorongoro.[315] If there were a legally binding requirement for consultations on the likely undesired eventualities of the decision, no doubt due to the area's ecological importance the lease would have not been issued.

Similarly, the laws of South Africa give various authorities the task to manage Protected Areas. In addition, because the Minister responsible for environmental affairs is given considerable powers, the system is open to abuse.

The Act provides that the Minister, in writing, must assign the management of a Special Nature Reserve or a Nature Reserve to a suitable person, organization or organ of the state and must entrust the management of a National Park to South Africa National Parks or another suitable person, organization or organ of the state.[316]

This provision could damage the effectiveness of the management of Protected Areas in South Africa.[317] For example, when a new minister is appointed, the law allows him/her to decide whether or not to change the management authority by placing it in the hand of another "person, organization or organ of the state". The end result of this is that there might be no institutional development and experience to solve problems as they arise.

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[315] Peter, C.M. 1999. "Human Rights in Tanzania: Selected Cases and Materials" Berlin: Rudiger Koppe Verlag Koln, p. 746

[316] S.38(1)(a) and (aA) of the National Environmental Management: Protected Areas Act 30 of 2003

[317] In respect of World heritage sites, a safeguard against this likely state of affairs is provided for under the World Heritage Act. The relevant provision is section 7 which provides that "The Minister of Environmental Affairs must consult with the Minister of Arts, Culture, Science and Technology and with interested parties before acting in terms of S.8[appointing an existing organ of State] or S.9 [appointing a new authority], in which consultation, in the case of interested parties, may be in the form of public hearing and must include consultation with the relevant affected (a)provinces (b)local government (c)cultural authorities (d)nature conservation authorities (e) heritage authorities and (f) other organs of state

In practice however, National Parks of South Africa have always been managed by the board of South African National Parks (SANPARKS), the appointment of whose members is the subject of discussion below.

5.3.2 Appointment of Board members

It was shown elsewhere in this thesis that both countries use Boards to manage various protected areas. In this part, we seek to compare the procedures involved in appointing members to such boards. It should be borne in mind that such boards are integral parts of management and determine the effectiveness of the conservation of biodiversity[318]. To this end, appointment of board members requires clear guidelines.

The law in South Africa empowers the Minister in charge of matters related to the environment to appoint between nine and twelve board members of South African National Parks.[319]

Anyone holding office in the National Parliament or Provincial Legislature is barred from becoming or remaining a board member to ensure the separation of powers.[320] This is an innovative provision because members of parliament are expected to put into task, functions of various bodies of the government in the same spirit of separation of powers.

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[318] The importance of these boards is seen in the general trend towards distancing them from political discretions. See Brian Child (Ed).2004. Parks in Transition: Biodiversity, Rural Development and the Bottom Line.UK: Earthscan, p.124

[319] The National Environmental Management: Biodiversity Act 57 of 2003, S.57(1)(a)

[320] *Ibid*, S 58(2)(a)

The law also provides that the minister must invite nominations from members of the public by placing advertisements in the media that circulate both nationally and in all provinces.[321] In addition the law provides that nominations from members of the public must be supported by personal details and qualifications of the individual nominee and other information that may be prescribed.[322]

This is a mark of remarkable transparency and public participation worthy emulating, especially since the Minister is also compelled to have regard for the need to appoint persons who have been disadvantaged by unfair discrimination,[323] on top of the requirements of qualifications and experience. The main goal is to ensure that the appointees to the board have wide-ranging and appropriate expertise.[324]

On the contrary, the laws of Tanzania do not have the requisite legally binding procedures guiding the appointment of members to various boards vested with authority to establish and manage Protected Areas. The Ngorongoro Conservation Area Authority Act[325] for example, provides that the board shall consist of a chairperson appointed by the President, the conservator who shall also be the secretary to the board (also appointed by the president) and not less than six and not more than eleven other members appointed by the minister.[326]

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[321] *Ibid,* S.59(1)(a) and (b)
[322] *Ibid*
[323] *Ibid*, S.59(4)
[324] *Ibid*, S.59(5)
[325] The Ngorongoro Conservation Area Authority Act, Cap 283, R.E 2002
[326] *Ibid,* See S.2 (1) (a)-(c) of the second schedule.

Unlike its South Africa's counterpart, it does not disqualify parliamentary office bearers from appointment. In fact, many boards of Tanzania consist of members of parliament and retired army officers. The undesirable result of this is that the board might not reflect persons with a broad range of appropriate expertise, and that it might be ethically compromised by outside pressures.

Further, Tanzanian legislation, the National Parks Act and the Ngorongoro Conservation Act respectively, lack public participation and transparency safeguards characteristic of South Africa's law discussed above. The appointing authority is not bound to invite nominations from members of the public by way of advertisements in the media. The media is used only to introduce to the public the already appointed members.

5.3.3 Co-management of Protected Areas

From the point of view of a comparative analysis of the pieces of legislation in the two countries, the concept of co-management of Protected Areas is the biggest difference since it is not provided for, even in passing, by the Tanzanian legislative framework. In South Africa, the concept developed following the enactment of the Restitution of Land Rights Act.[327] Initially therefore, the whole concept evolved due to material conditions that are peculiar to South Africa.

The Right to Land Restitution is provided for under the supreme law of the land, namely the Constitution. This is in line with the post apartheid transformation policies in which

[327] The Restitution Of Land Rights Act 22 of 1994

the democratically elected government recognizes the right to land restoration to the previously disenfranchised as an issue of "supreme importance." [328]

The Constitution entitles persons to claim restitution of rights in land lost as a result of racial discriminatory policies by the previous government to the extent provided for by the Restitution of Land Rights Act.[329] It is estimated that more than 3.5 million people and their descendants have been victims of racially based dispossessions and forced removals during the years of segregation.[330]

To succeed in a claim for restitution, five elements must be proved. Firstly, that the claimant is a community or part of a community. Secondly, that the claimant had a "right to land" prior to dispossession. Thirdly, that dispossession was a result of past racially discriminatory laws. Fourthly, that the dispossession took place after June 19, 1913 and lastly, that the claim has been lodged no later than December 31, 1998.[331]

Restitution of land rights has not spared Protected Areas. In December 1995, the Makuleko community lodged a claim of about 250km in the northern section of the Kruger National Park. The claim was settled in that a contractual agreenment was made

[328] See *Alexkor V. Richtersveld Community*, 2003 (12) BCLR 10301 (CC) PARA 38
[329] The Relevant provision is S.25 (7) (a). It provides that: "[A] person or community dispossessed of property after 19th June 1913 as a result of past racially discriminatory laws is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
[330] Robert K. Hitchcock and Dianna Vinding. 2004. Indigenous Land Rights in Southern Africa. Copenhagen: International Work Group on Indigenous Affairs.
[331] S. 2(1) of the Restitution of Land Rights Act, supra note 327

was made an order of court to the effect that the community agreed for their land to continue being a Protected Area under co-management schemes.[332]

It can therefore be said that the provision relating to co-management of Protected Areas in the National Environmental Management: Protected Areas Act, follows a recognition that there are land restitution claims in respect of Protected Areas as well. To establish National Parks, both the colonial and the independent government in Tanzania forcefully evicted people, condemning them to landlessness and poverty. The restitution of land rights as practiced in South Africa can be used to address the injustices in a win-win basis. This thesis now concludes the discussion and makes additional recommendations.

[332] See Hector Magome. Sharing South African National Parks: Community Land and Conservation in A Democratic South Africa. Available at http://www.cbnrm.uwc.co.za

CHAPTER SIX

6. CONCLUSION AND RECOMENDATIONS

This work has been an attempt to study pieces of legislation pertaining to the establishment and management of Protected Areas of different jurisdictions in a comparative perspective; taking South Africa and Tanzania as case studies. This comparison was preceded by the historical account of initiatives relating to the establishment and management of Protected Areas. Regional and international Conventions with a bearing on this subject matter have also been surveyed.

It has been established that the two countries are both endowed with rich biodiversity and are signatories to a number of international instruments related to biological diversity. However, their respective legal systems are different in that whereas South Africa's legal system is based on the Roman Dutch law, its Tanzania's counterpart is based on the English common law.

The difference in the legal systems notwithstanding, it became clear in the discussion that the new South African constitutional dispensation has acted as a catalyst towards the coming into being of progressive and exemplary provisions relating to the establishment and management of Protected Areas.

However, the legislation as a whole is not free from pitfalls as it has been made evident in the discussion. Whereas it can be viewed as progressive using Tanzania as a yard stick, it

can not necessarily be so when compared to all other jurisdictions. To this end, there still exists room for improvement.

On its part, many of the Tanzania's laws relating to the establishment and management of Protected Areas are a relic of the country's colonial past. The same objectives and spirit have been inherited by the independent government. In many respects therefore, the old legislation impede on the participatory establishment and sustainable management of Protected Areas.

For example, despite the fact that environmental law in the international plane has advanced tremendously in the last few decades, the new principles, standards, and values have not found their ways in the Tanzanian legislative frame work. Since chapter five of this thesis is also reflective of available options for Tanzania, it is imperative that the following general recommendations be made here in addition, as part of the concluding remarks

Firstly, that there is a need for Tanzania to enact or amend the existing laws in order to clearly and unambiguously protect the local communities against unfair evictions. The same law should devise means for co-managing Protected Areas in a win-win basis instead of maintaining the current position in which all rights except mineral rights become obsolete upon for example, declaration of a National Park.

Mineral rights are seldom a concern of the said communities, many of whom are indigenous peoples. They are concerned primarily with access to grazing land, medicinal plants, and water sources for livestock all of which are crucial for their survival. A balance between conservation objectives and these rights has been heralded internationally and termed 'sustainable development'.

Secondly, there is a need for the existing laws to be amended or repealed and replaced with a new law that embodies the principles of public participation in the establishment and management of Protected Areas. More importantly, there should be procedures to be followed in appointing members to the various boards entrusted with the management of the country's Protected Areas. For the sake of bringing to task state conservation agencies, parliamentary office bearers should be disqualified for appointment.

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