

**THE CHALLENGES TO THE ENFORCEMENT OF  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE  
UNITED REPUBLIC OF TANZANIA: A CRITICAL ANALYSIS**

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE  
UNITED REPUBLIC OF TANZANIA: A CRITICAL ANALYSIS**

**By**

**Martha Thobias**

**A Dissertation submitted in Partial Fulfilment of Requirements for Award of  
the Degree of Master of Laws of the Mzumbe University.**

**2013**

**CERTIFICATION**

We, the undersigned certify that we have read and hereby recommend for acceptance by the Mzumbe University a Dissertation titled **CHALLENGES TO THE ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE UNITED REPUBLIC OF TANZANIA: A CRITICAL ANALYSIS** in fulfilment of the requirements for the degree of Master of Laws of Mzumbe University.

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## ACKNOWLEDGEMENT

The accomplishment of this work would hardly have been possible without the help, support and contribution of several individuals and institutions. In recognition of this fact, therefore, I wish to take this opportunity to acknowledge the support, assistance and guidance of my supervisor **Isabella Warioba** who supervised the whole work right from the beginning to the end. Her contributions were critical to the accomplishment of this work.

I am also grateful to my father and my mother for providing me with financial and other kind of support without which it could not be possible to complete this work.

A note of thanks should go to all those who in one way or the other helped me during my library and field study, particularly the staff of The Commission for Human Rights and Good Governance (CHRGG), Legal and Human Rights Centre (LHRC) Dar es salaam for their mutual support and cooperation and all those who were ready to take, read and respond to the questionnaires distributed to them.

Furthermore, sincere gratitude should go to all authors whose works are listed in the bibliography of this study. Without them it could be difficult to come up with this work.

Above all, Thanks to God, is the cause of all my success.

## **DEDICATION**

To my father, my mother, my sister Suzan T. Mitimangi,

And with honour the memory of my younger sister Stella Thobias (1990-2013)

## ABBREVIATIONS

|                   |   |
|-------------------|---|
| <b>CEDAW:</b>     | Convention on the Elimination of All Forms of Discrimination<br>Against Women             |
| <b>CERD:</b>      | United Nations Committee on the Elimination of All Forms of<br>Racial Discrimination      |
| <b>CESCR:</b>     | Committee on Economic, Social and Cultural Rights   |
| <b>ECOSOC:</b>    | Economic and Social council   |
| <b>ESCR:</b>      | Economic, Social and Cultural Rights  |
| <b>GA:</b>        | General Assembly  |
| <b>GC:</b>        | General Comment   |
| <b>HC:</b>        | High Court  |
| <b>ICCPR:</b>     | International Covenant on Civil and Political Rights                                      |
| <b>ICERD:</b>     | International Convention on the Elimination of All Forms of<br>Racial Discrimination      |
| <b>ICESCR:</b>    | International Covenant on Economic, Social and Cultural Rights                            |
| <b>ILO:</b>       | International Labour Organisation   |
| <b>OP-ICESCR:</b> | Optional Protocol to the International Covenant on Economic<br>Social and Cultural Rights |
| <b>UN:</b>        | United Nations  |
| <b>UNHRC:</b>     | United Nations Human Rights Committee   |
| <b>UNCES CR:</b>  | United Nations Committee on Economic, Social and Cultural<br>Rights                       |
| <b>URT:</b>       | United Republic of Tanzania   |

## **ABSTRACT**

Challenges to the enforcement of social economic rights exist where individuals cannot enjoy their social economic rights which they acquire by virtue of being human .These rights include the right to health services, to education, to work, to fair remuneration, to decent housing and adequate food. These rights are integral in international human rights documents, forming an integral part of the Universal Declaration of Human Rights, 1948, the International Covenant of Economic, Social and Cultural Rights (ICESCR), 1966 and Optional Protocol to ICESCR, 2008. However problem comes where this indivisible bundle of rights cannot be put into practice in the Tanzanian context, its factors being the non realization of these rights in the National Constitution. Thus, the foregoing incited the researcher to undertake this study to look into the challenges which put hindrance to the justiciability of social economic rights in Tanzania; in critical perspective. The general objective of this research is to examine challenges facing the enforcement and justiciability of the Economic Social and Cultural rights in Tanzania.

In conducting the research, the researcher examined the relevant documents and materials and through interview and questionnaires to seek answers to the research questions on the challenges on the enforcement of social economic right, and the possibility of making social economic rights justiciable in the United Republic of Tanzania.

The study reveals findings which range from the adequate provisions of social economic rights in the constitution of United Republic of Tanzania 1977, lack of effectiveness in the side of judiciary in the enforcement of social economic rights which caused by adequate provisions of social economic rights and insensitiveness of social economic rights by the decision makers, lack of effectiveness in the Commission of Human Right and Good Governance, which associated with the lack of legal binding decision of the Commission.

It is therefore recommended that, Tanzania should incorporate the full content of social economic rights in its bill of right to give guarantee of protection and enjoyment of social economic rights to the individuals.

## TABLE OF CONTENTS

|   |          |
|---|----------|
| CERTIFICATION .....                             | i        |
| DECLARATION AND COPYRIGHT .....                 | ii       |
| ACKNOWLEDGEMENT .....                           | iii      |
| DEDICATION .....                                | iv       |
| ABBREVIATIONS .....                             | v        |
| ABSTRACT .....                                  | vi       |
| TABLE OF CONTENTS .....                         | vii      |
| TABLE OF SELECTED CASES .....                   | xii      |
| DOMESTIC CASES .....                            | xii      |
| INTERNATIONAL CASES .....                       | xiii     |
| LIST OF TABLES .....                            | xiv      |
| <br>  |          |
| <b>CHAPTER ONE .....</b>                        | <b>1</b> |
| <b>GENERAL INTRODUCTION .....</b>               | <b>1</b> |
| 1.1 Introduction .....                          | 1        |
| 1.2 Background to the Problem.....              | 1        |
| 1.3 Statement of the Problem .....              | 10       |
| 1.4 Objectives of the Study .....               | 11       |
| 1.4.1 General Objectives .....                  | 11       |
| 1.4.2 Specific Objective .....                  | 11       |
| 1.5 Research Questions .....                    | 11       |
| 1.7 Significances of the Study.....             | 12       |
| 1.8 Literature Review .....                     | 12       |
| 1.9 Research Methodology.....                   | 20       |
| 1.9.1 Area of Study .....                       | 20       |
| 1.9.2 Data Collection Methods .....             | 21       |
| 1.9.3 Field Research.....                       | 21       |
| 1.9.4 Collection of Secondary Data .....        | 22       |
| 1.9.5 Sample size and sampling techniques ..... | 22       |
| 1.9.6 Sampling Technique.....                   | 23       |

|   |           |
|---|-----------|
| 1.10 Chapterization .....   | 23        |
| 1.11 Conclusion .....   | 24        |
| <b>CHAPTER TWO .....</b>  | <b>25</b> |
| <b>CONCEPTUAL AND LEGAL FRAMEWORK ON ECONOMIC, SOCIAL<br/>AND CULTURAL RIGHTS .....</b>                                   | <b>25</b> |
| 2.1 Introduction .....  | 25        |
| 2.2 Definition of Terms .....   | 25        |
| 2.2.1 The Concept and Meaning of Social Economic Rights .....   | 25        |
| 2.2.2 Meaning of Justiciability .....   | 26        |
| 2.2.3 Definition of the term Enforcement .....  | 27        |
| 2.2.4 Meaning of Human Rights .....   | 28        |
| 2.3 Conceptual framework of economic social and cultural rights.....  | 29        |
| 2.3.1 The concept of the Constitution and enforcement of social, economic and<br>cultural rights .....                    | 29        |
| 2.3.2 Domestic Application of International Human Rights Law .....  | 30        |
| 2.4 The Legal Framework on Economic, Social and Cultural Rights .....   | 32        |
| 2.4.1 International Level .....   | 32        |
| 2.4.1.1 The Universal Declaration of Human Rights (UDHR) 1948.....  | 32        |
| 2.4.1.2 The International Covenant on Economic Social and Cultural Rights<br>(ICESCR) 1966 .....                          | 33        |
| 2.4.1.3 Optional Protocol to the International Covenant on Economic, Social and<br>Cultural Rights (OP ICESCR) 2008 ..... | 44        |
| 2.4.1.4 Committee on Economic Social and Cultural Rights (CESCR) .....  | 45        |
| 2.4.1.5 Other Universal Instruments which protect social economic rights .....  | 47        |
| 2.4.2 The Regional level .....  | 47        |
| 2.4.2.1 The African Charter on Human and Peoples' Rights (The Charter).....   | 47        |
| 2.4.3 The Domestic Level .....  | 49        |
| 2.4.3.1 The Constitution of United Republic of Tanzania, 1977 .....   | 49        |
| 2.4.3.2 Place of the ESCR in the Constitution .....   | 49        |
| 2.4.3.3 Basic Rights and Duties Enforcement Act (BRDEA), 1994 .....   | 50        |
| 2.4.3.4 Commission for Human Rights and Good Governance Act (CHRGG) .....   | 50        |

|  |           |
|--|-----------|
| 2.4.3.5 Protection of ESC Rights under Tanzania National Legislations .....  | 51        |
| 2.4.3.6 The status of Tanzania in realization of social economic Rights.....   | 52        |
| 2.4.3.7 Ratification of Human Rights Treaties .....  | 52        |
| 2.5 Conclusion .....   | 53        |
| <br>   |           |
| <b>CHAPTER THREE .....</b>   | <b>54</b> |
| <b>CONTEMPORARY ISSUES ON ESC RIGHTS .....</b>   | <b>54</b> |
| 3.1 Introduction.....  | 54        |
| 3.2 An Analysis to the Inclusion of Social Economic rights in Tanzania Constitution .....                              | 54        |
| 3.3 The importance of Constitutional entrenchment of social economic rights .....                                      | 55        |
| 3.4 Indirect ways of enforcing Social Economic Rights.....   | 56        |
| 3.4.1 The Use of Directive Principles of State Policy to Enforce Social Economic Rights .....                          | 56        |
| 3.4.2 Protection of social economic rights through interpretation of civil and political rights.....                   | 57        |
| 3.5 The Legal Justiciability of Social Economic Rights .....   | 58        |
| 3.6 Conclusion .....   | 61        |
| <br>   |           |
| <b>CHAPTER FOUR.....</b>   | <b>62</b> |
| <b>CHALLENGES TO THE JUSTICIABILITY OF SOCIAL ECONOMIC RIGHTS IN TANZANIA .....</b>                                    | <b>62</b> |
| 4.1 Introduction.....  | 62        |
| 4.1.1 The Inadequate provision of social economic rights in the Constitution of United Republic of Tanzania 1977 ..... | 63        |
| 4.1.2 Social economic rights provided in the Constitution .....  | 63        |
| Right to Own Property .....  | 64        |
| 4.1.2 Consequences of Inadequate Provisions of ESCR in the constitution of Tanzania .....                              | 64        |
| 4.1.3 Right to Health Services.....  | 65        |
| 4.1.4 Right to Education .....   | 65        |
| 4.1.5 Right to Food, Clothing and Housing .....  | 65        |

|   |           |
|---|-----------|
| 4.2 Challenges to Judicial enforcement .....  | 66        |
| 4.2.1 The Jurisdiction of the Court.....  | 66        |
| 4.2.2 Judges’ capability to give effect to social economic rights claims .....  | 67        |
| 4.2.3 Locus Standi and Access to Court .....  | 70        |
| 4.2.3 Separation of Power Doctrine as a challenge to the enforcement of ESCR ...  | 71        |
| 4.2.4 Challenges in the enforcement of ESC rights in the CHRGG .....  | 71        |
| 4.2.4.1 Introduction to the CHRGG .....   | 71        |
| 4.2.4.2 Jurisdiction of the Commission.....   | 72        |
| 4.2.4.3 Locus Stand and the Access to the Commission.....   | 73        |
| 4.2.4.4 Status of the Decision of the Commission .....  | 73        |
| 4.2.4.5 Remedies and their Enforcement .....  | 75        |
| 4.3 Conclusion .....  | 77        |
| <br>  |           |
| <b>CHAPTER FIVE.....</b>  | <b>78</b> |
| <b>FINDINGS OF THE RESEARCH.....</b>  | <b>78</b> |
| 5.1 Introduction .....  | 78        |
| 5.2 Does economic, social and cultural rights sufficiently protected in the<br>Constitution of United Republic of Tanzania 1977 .....                       | 78        |
| 5.3 Can social, economic rights be justiciable in Tanzania .....  | 79        |
| 5.4 Are there any challenges in the Judiciary and the Commission for Human Rights<br>and Good Governance in the enforcement of social economic rights?..... | 79        |
| 5.4 Effectiveness of the CHRGG in the enforcement of ESC rights .....   | 80        |
| 5.5 Conclusion .....  | 80        |
| <br>  |           |
| <b>CHAPTER SIX .....</b>  | <b>82</b> |
| <b>CONCLUSION AND RECOMMENDATIONS.....</b>  | <b>82</b> |
| 6.1 Conclusion .....  | 82        |
| 6.2 Recommendations .....   | 82        |
| 6.2.1 The Courts should play a role of domesticating the contents of ICESCR<br>provisions. ....   | 82        |
| 6.2.2 The Parliament should allow the domestication of the provisions of the<br>ICESCR.....   | 83        |

|   |    |
|---|----|
| 6.2.3 Academicians are obliged to write about ESC rights; Lawyers, judges, and other decision makers must be reflectively with the issue of ESC rights. ....                                  | 83 |
| 6.2.4 Tanzania should adopt to ratify The Optional Protocol to the International Covenant on Economic Social and Cultural Rights as it will enhances states' compliance with the ICESCR. .... | 83 |
| 6.2.5 Tanzania should follow an example of Kenya and South Africa holistic inclusive Bill of Rights, which includes a comprehensive set of ESC rights. ....                                   | 84 |
| 6.2.6 The CHRGG should be given power to give decision with the status of legal binding nature.....   | 85 |
| BIBLIOGRAPHY .....  | 86 |
| APPENDIX I.....   | 90 |
| APPENDIXII .....  | 93 |

## TABLE OF SELECTED CASES

### DOMESTIC CASES

Ako Gembul and 100 Others vs. Gidagamowd and Waret Farms Ltd and National Agricultural and Food Corporation (NAFCO), Civil case No. 12 of 1989 High Court Arusha

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(ACHPR 2001)

The Government of the Republic of South Africa and others V Irene Grootboom and  
others, 2001 (1) SA 46 (CC), October 4, 2000.

## LIST OF TABLES

|  |    |
|--|----|
| Table: 5.1 Adequacy of provision and protection of socio- economic rights in Constitution of Tanzania 1977 ..... | 79 |
| Table: 5.2 Possibility in the enforceability of social economic rights in Tanzania.....                          | 81 |
| Table: 5.3 The effectiveness of the Judiciary in the determination and protection of social economic rights..... | 80 |
| Table: 5.4 Effectiveness of the CHRGG in the enforcement of ESC rights .....                                     | 80 |

## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Introduction

*“In a democracy we vote maybe every four or five years, but we have to eat every day”.*<sup>1</sup>

The need to realize economic social and cultural rights in domestic level is very important for ensuring every one’s dignity. To create the defined legal rights will empower citizen to claim their social rights directly in their countries. The challenge is for national higher law to recognize these rights and give a direct way for claiming.<sup>2</sup>

The Constitution of United Republic of Tanzania of 1977 does not recognise social economic rights in full, only a few social economic rights are included in the Constitution. These are the right to work,<sup>3</sup> the right to just remuneration,<sup>4</sup> and the right to own property.<sup>5</sup> And worse; there are other few social economic rights for example, the right to work, to education and other pursuits,<sup>6</sup> which are included in an unjusticiable part of the Constitution which is the fundamental objectives and directive principles of state policy.<sup>7</sup>

Non inclusion of these rights in the Constitution has led to a number of challenges for example challenges in the legal enforcement of the rights in a court of law, absence of state’s obligation for their enforcement, enforcement mechanisms, and the lack of effective remedies.

#### 1.2 Background to the Problem

The requirement of human dignity protection, creased the approval of the broad international standard scheme which is now in subsistence. This scheme is economic, social and cultural rights which traces its origin in the German enlightenment 19th

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<sup>1</sup> Pierre de Vos, The Protectors (Human Rights Commissions and Accountability in East Africa) (2008), Fountain Publishers Kampala, <http://www.fountainpublishers.co.ug>, Accessed on 15<sup>th</sup> February 2012

<sup>2</sup> [www.ohchr.org/Documents/Publications/PovertyStrategiesen](http://www.ohchr.org/Documents/Publications/PovertyStrategiesen). Accessed on 20<sup>th</sup> Dec, 2011

<sup>3</sup> Article 22

<sup>4</sup> Article 23

<sup>5</sup> Article 24

<sup>6</sup> Article 11 of the Constitution of United Republic of Tanzania 1977

<sup>7</sup> Part II, Article 11 of the Constitution of United Republic of Tanzania 1977

Century reign,<sup>8</sup> the Russian Revolution in the 20th Century and the French revolution of 1789. The French revolution, in addition to the tyrannical nature of the French aristocracy, was precipitated by socioeconomic exclusions and inequalities.<sup>9</sup> One of the factors leading to the outbreak of this revolution was the shortage of bread in addition to socioeconomic injustices such as limited access to land.

The *French Declaration of the Rights of Man and Citizens* adopted on 26 August 1789 dealt strongly with the issue of social inequality.<sup>10</sup> The Declaration guaranteed equality of all men and women in all circumstances, including social equality. It also, in effect, abolished feudalism, thereby opening up access to resources. The French revolution was followed by the Russian Revolution of 1917. One of the burning issues leading to the Russian revolution was the distribution of land. Access to land had previously been enjoyed by only a privileged few; thereby depriving the majority of livelihood.<sup>11</sup>

Another issue was the need to guarantee the rights of the workers who had previously been exploited. Issues such as low wages, poor conditions of work and exploitation of labour called for immediate attention.<sup>12</sup>

The Russian Revolution coincided with the creation of the International Labour Organization (the ILO) in 1919. The ILO was created to abolish the injustices, hardships and privation of labourers and to guarantee fair and humane conditions of labour.<sup>13</sup> By this time, the momentum for the recognition of socio-economic deprivation as a human rights problem was gaining force.

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<sup>8</sup> [www.wsu.edu/brians/hum\\_303/socialism.html](http://www.wsu.edu/brians/hum_303/socialism.html)

<sup>9</sup> Mbazira C, PhD Thesis, *Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies*, P 41  
<http://www.etd.uwc.ac.za/usrfiles>. Accessed on 30th May, 2012

<sup>10</sup> Ibid P.Mbazira, C.41

<sup>11</sup> Ibid P.Mbazira, C.41

<sup>12</sup> Loc cit Mbazira, C. P 42

<sup>13</sup> Mbazira C, PhD Thesis, *Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies*, P 42  
<http://www.etd.uwc.ac.za/usrfiles>. Accessed on 30th May, 2012

In his 1944 State of the Union address, President Roosevelt of the United States of America while advocating the adoption of an “Economic Bill of Rights”, said the following:

*We have come to the realisation of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not free men”. People who are hungry and out of job are the stuff of which dictatorships are made.*<sup>14</sup>

Later, in 1945, the United Nations (UN) was created with one of its proclaimed purposes being “... solving international problems of an economic, social and cultural nature (among others), promoting and encouraging the respect for human rights”.<sup>15</sup>This commitment within the UN set the stage for the proclamation of human rights, including socioeconomic rights.

In 1948, the Universal Declaration of Human Rights of 1948 (UDHR)<sup>16</sup> was adopted. The UDHR does not make a distinction between civil and political rights and socio-economic rights. The socio-economic rights that the UDHR proclaims include: the right to work and its related rights,<sup>17</sup> the right to a standard of living adequate for health and well being,<sup>18</sup> the right to education,<sup>19</sup> the right to participate in one’s culture, and protection of interests resulting from scientific, literary or artistic production.<sup>20</sup> However, the UDHR is not a treaty; it is a mere resolution of the General Assembly (GA) not subject to ratification.<sup>21</sup> In spite of this, the UDHR has formed the basis for the adoption of other more binding human rights treaties such as the ICESCR 1966 and ICCPR 1966.<sup>22</sup>

Immediately after the adoption of the UDHR, the General Assembly deemed it necessary to include the rights it had proclaimed in a binding treaty.

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<sup>14</sup> Ibid, Mbazira, C. P 42

<sup>15</sup> Article 1 (3) of the UN Charter.

<sup>16</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

<sup>17</sup> Art 23.

<sup>18</sup> Art 25.

<sup>19</sup> Art 26.

<sup>20</sup> Art 27.

<sup>21</sup> Loc cit Mbazira, C., P.42

<sup>22</sup> International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights 1966

The GA in 1948 requested the United Nations Commission (the Commission) to prepare, as a matter of priority, a draft covenant on human rights. In 1950, the GA specifically asked the Commission to include in the draft Covenant a clear expression of economic, social and cultural rights.<sup>23</sup> This marked the beginning of controversies on the nature of socio-economic rights. Many scholars have associated these disagreements with the ideological split of the cold war.<sup>24</sup> The Eastern states championed the cause of socio-economic rights because they associated these rights with socialistic ideals emphasising the fulfilment of the basic needs of all. In contrast, the Western states championed civil and political rights as the foundation of liberty in the free world.<sup>25</sup> It is because of these differences that the International Covenant on Civil and Political rights (ICCPR) was adopted differently from the International Covenant on Economic Social and Cultural Rights (ICESCR). This was done as a compromise, so that countries opposed to socio-economic rights would ratify the ICCPR and those opposed to civil and political rights would ratify the ICESCR.<sup>26</sup> The above notwithstanding, opposition to socio economic rights have continued even after the end of the cold war.

In addition, states believed to have been socialist later joined in this opposition and the ratification record indicates that Eastern states have been as reluctant to ratify the ICESCR as are capitalist states. The record also indicates that most Western states were not in a rush to ratify the ICCPR.

Indeed, the UN Committee on Economic, Social and Cultural Rights (the Committee) has stressed that the ICESCR is neutral in terms of economic and political systems. It neither prefers socialist, as opposed to capitalistic economies, nor centrally planned as opposed to laissez-faire economies. It appears, therefore, that these disagreements did not result from the ideological differences, though there is no denying that the ideological differences influenced the debate.<sup>27</sup> The main reason for the split relates to differences in conception of the obligations engendered

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<sup>23</sup> The International Bill of Human Rights, Fact Sheet No.2 (Rev.1), [www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf), Accessed on 20<sup>th</sup> June, 2012

<sup>24</sup> [www.ebooks.cambridge.org/ebook.jsf/bid](http://www.ebooks.cambridge.org/ebook.jsf/bid)

<sup>25</sup> Ibid Mbazira C., P. 45

<sup>26</sup> [www.nzinitiative.org.nz/nzbr/publications/publications-1997/nzbr-rights](http://www.nzinitiative.org.nz/nzbr/publications/publications-1997/nzbr-rights), Accessed on 18 May, 2012

<sup>27</sup> <http://www1.umn.edu/humanrts/gencomm/econ.htm>

by the rights. The split was not influenced by the view that socio-economic rights are somehow inferior to civil and political rights. Rather, social rights were not viewed as justiciable because courts, or court-like bodies, were not thought to be competent bodies to deal with them.<sup>28</sup> A reporting mechanism, As opposed to a complaints procedure, was considered most suitable for enforcement of the rights.<sup>29</sup>

In Africa, and in most third world countries, the loyalties of human rights scholars and policymakers depended on which side of the divide a particular state allied to. Indeed, for most African policymakers and scholars, socio-economic rights were regarded as of more significant in the building of states just emerging from colonial oppression and subjugation.<sup>30</sup>

The African Charter on Human and Peoples' Rights (the Charter)<sup>31</sup> is the principal instrument protecting social economic rights in Africa.

The Charter recognises the indivisibility and interrelatedness of economic, social and cultural rights from other rights regarding the conception that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>32</sup>

In Tanzania the problem of enforcement of Economic, Social and Culture rights started from the first time when the Bill of Rights was rejected to be included in the new independent state constitution of 1961 by the Nationalist led by the Tanganyika African National Union (TANU).The reason for the rejection of the Bill of Rights was that such a Bill of Rights would hamper the new Government in its endeavours to develop the country. In addition, it would be used by the judiciary which at that

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<sup>28</sup>Macklem, P.(1992) *Constitutional Ropes of sand or justiciable guarantees? Social Rights in a New South African Constitution*, [www.escri-net.org/docs/i/401074](http://www.escri-net.org/docs/i/401074),Accessed on 21th May,2012

<sup>29</sup>Mbazira C, PhD Thesis, Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies, P 41  
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<sup>30</sup>Law Reform Journal,Vol 2of 2009 P.87 [www.lrc.go.tz](http://www.lrc.go.tz),Accessed on 12,November,2011;  
Also SHIVJI, I. G.,(1989) *The Concept of Human Rights in Africa*, London: CODESRIA,

<sup>31</sup> African Charter on Human and Peoples' Rights, adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU), Nairobi July 1989 *Documents of the Organisation of African Unity*, p. 109 (entered into force 21 October 1986).

<sup>32</sup> Preamble Para 8 African Charter.

time it was mainly white to frustrate the government through declaring most of its actions unconstitutional.<sup>33</sup>

On the struggle for inclusion of Bill of Rights, Tanganyika Law Society forwarded the suggestion to the Presidential Commission for the Establishment of a Democratic One Party-State, the inclusion of the Bill of Rights in the Constitution as one of the ways of providing guarantees to the fundamental rights and freedom of the individual. This idea was however rejected. Instead, the Commission came up with two proposals on how to deal with guarantee of fundamental rights and freedom; one that of Provisions of the Fundamental Rights and freedom in the lose form in the preamble to the Constitution, and another is the establishment of a form of Ombudsman to protect the people against the over-zealous politicians and bureaucrats, and the idea was accepted by the Government. As a result the Preamble in the interim constitution of 1965 contained constitutional guarantees which are usually found in a normal Bill of Rights. In addition the Government established the Permanent Commission of Enquiry (PCE) through a separate legislation.

However it is clear that the two methods adopted by the Government could not effectively replace a Bill of Rights due to the various limitations associated with their legal basis and mandate. Firstly, putting the fundamental rights and freedom in the preamble to the interim constitution was useless. This is because under the common law system which is followed in Tanzania and under former British colonies, the Preamble is not part of the Constitution;<sup>34</sup> and therefore one cannot base his or her case for violation of rights or freedom on this part of the constitution; as it was declared in the words of Hon. Mr Justice (retd.)Kisanga in the case of **Attorney General V. Lesinoi Ndeinai and Joseph Selayo Laizer and two others.**<sup>35</sup>

*A preamble is a declaration of our belief in these rights. It is no more than just that. The rights themselves do not become enacted thereby such that they could be enforced under the Constitution. In other words one cannot bring a*

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<sup>33</sup> NOLA,(2008) The Justice Review, Twenty Years of the Justiciability of the Bill of Rights in Tanzania “ Blocking Fundamental Rights and Freedom in Tanzania”: The History of Bill of Rights, P. 3

<sup>34</sup>Ibid, NOLA, p 7

<sup>35</sup> [1980]TLR 214

*complaint under the constitution under respect of the violation of any of these rights as enumerated in the preamble.*

The same view was also expressed by the late Biron, J., in **Hatimali Adamji V. East Africa Posts and telecommunication Corporation**.<sup>36</sup>

The Permanent Commission for Inquiry had its own limitations too. First; it was not independent. All its investigations following the complaint ended up in the office of the president. It was the president who was to decide whether or not to pursue the matter reported to him. Secondly the president had powers to stop any investigation which the commission had initiated at any point in time; thirdly the President could also bar the Commission from accessing certain information or investigating certain categories of persons.

The performance of the commission over the years indicated serious shortcomings arising out of these inhibitions.

Therefore like the period before the fundamental rights and freedom of the individual were left at the mercy of the executive arm of the state.<sup>37</sup>

On 1965 Interim Constitution, it so happened that the constitution of the then ruling party TANU was appended to it as schedule. The TANU Constitution being the main document of liberation movement contained beliefs and guarantees similar to those found in the preamble and in most Bills of Rights.

Unlike the preamble, schedules in the Constitution form part of the law.<sup>38</sup> The schedule therefore could be used to deal with issues relating to assertion and enforcement of fundamental rights and freedoms during this period. This actually happened in the case of **Thabit Ngaka V. Regional Fisheries Officer**<sup>39</sup>, In this case

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<sup>36</sup> 1973 LRT No. 6

<sup>37</sup> NOLA,(2008) The Justice Review, Twenty Years of the Justiciability of the Bill of Rights in Tanzania, Blocking Fundamental Rights and Freedom in Tanzania: The History of Bill of Rights, P. 7

<sup>38</sup> Mwaikusa,J.T., Genesis of Bill of Rights in Tanzania,in Peter, C.M. and Juma, H.I (1998) (Eds),Fundamental Rights and Freedom in Tanzania,Dar es salaam:Mkuki na Nyota

<sup>39</sup> 1973 LRT No. 24

Mfalila J,(as he then was) invoked the schedule to the constitution to declare a worker's right to his wages.

In 1977, the Permanent Constitution of United Republic of Tanzania was adopted. This Constitution was a retrogressive step as far as fundamental rights and freedoms are concerned. Unfortunately at first the new constitution, like its predecessor- the Interim Constitution did not contain a Bill of Rights. As if that was not enough, the Constitution of the new ruling party Chama Cha Mapinduzi (CCM)<sup>40</sup> was not appended as a schedule to the new Constitution. This sealed the fate of any form of enforcement of fundamental rights and freedoms by the people through the Constitution. This hopeless situation existed until 1984 when the Bill of Rights was eventually introduced in the Constitution vide Fifth Amendment to the Constitution.<sup>41</sup>

Following the pressure from various sources, both internal and external,<sup>42</sup> and the adoption of African Charter on Human and People's rights by the OAU in 1981 in Nairobi,<sup>43</sup> a Bill of Rights was eventually incorporated in the Constitution of Tanzania through the fifth Constitution amendment of 1984.<sup>44</sup>

However, although the Bill of Rights was lastly adopted in the Tanzania Constitution, there were still several problems which led to hindrance of full enjoyment of the rights, and especially the social economic rights to individuals.

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<sup>40</sup> Chama Cha Mapinduzi(CCM) was established through the merger of the two hitherto existing political parties i.e Tanganyika African Union(TANU) on the Mainland, and Afro Shiraz Party(ASP) on the Isles on the fifth February 1977. The new Union Constitution was adopted a few months there after having been drafted by the same team that prepared the CCM Constitution. See Msekwa P., *Towards Party Supremacy*, Arusha:Eastern Africa Publications Ltd, 1977

<sup>41</sup>Constitution of United Republic of Tanzania Fifth (Amendment) Act No. 15 of 1984.

<sup>42</sup> These pressures come from three forces that are: first the people who were airing their views through the radio, newspaper and other forms of communication wanted the basic rights incorporated in the constitution. Secondly, there was pressure from Zanzibar the other part of United Republic. Zanzibar had different history on bill of Rights. It's independence constitution of 1963 contains Bill of Rights in its chapter II, which titled as Protection of fundamental rights and Freedom of the Individual<sup>42</sup>(Article 14- 31). Thirdly there was pressure from developments that were taking place on the African continent in the area of Human Rights at that time.

<sup>43</sup> This historical document was at this point on time, open for signature and Tanzania had taken a very active part on its formulation for it ratified the charter on 31<sup>st</sup> May, 1982.

<sup>44</sup> Shivji I, Majamba, H.I.,Makaramba,R.V.,and Peter, C.M.,(2004) Constitutional and Legal System of Tanzania, Mkuki na Nyota Publishers:Dar es salaam, P.56

Economic Social and Cultural Rights (ESCR) were not included in the Constitution, except only three rights of which are the right to work,<sup>45</sup> the right to just remuneration<sup>46</sup> and the right to own property<sup>47</sup> and other few were included in the part of Directive Principles of State policy which cannot be enforceable by any court.<sup>48</sup> Also the Bill of Rights did not impose an obligation to the State on the fulfilment of social economic rights.

Empirical reasons are given as to why most of the social economic rights were excluded from the Tanzanian Constitution Bill of Rights when the 14<sup>th</sup> Constitution amendment was effected on 1984.

This seems to be a deliberate omission since history had shown that the government was against the idea of having justifiable Bill of Rights<sup>49</sup> at all. For example it was once paradoxically argued that if the entire provisions of the UDHR, particularly on social economic rights, were included in the Bill of rights and were made part of justiciable rights, the country would be thrown into frequent conflicts that could undermine national stability.<sup>50</sup>

Another view that was also stated is that; as the implementation of social economic rights depends on economic capacity of the respective country, it was apt for the Bill of Rights to exclude them as justiciable rights.

Article 11 (1) of the Tanzanian constitution makes it clear in the most explicit terms that so far as the social policies referred to in part II are concerned; they are too dependent on the economic capacity of the state to provide them. It must follow therefore that as a matter of common sense that rights set out in part II of Chapter one of the Tanzania Constitution cannot be justifiable in a court of law.

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<sup>45</sup> Article 23, Constitution of united Republic of Tanzania 1977

<sup>46</sup> Ibid Article 24

<sup>47</sup> Ibid Article 25

<sup>48</sup> Ibid Article 7(2)

<sup>49</sup> Ruhangisa John E., (1998) *Human Rights in Tanzania: The Role of Judiciary*, PhD. Thesis: University of London P. 136

<sup>50</sup> Nyalali, F.L., *The Bill of Rights in Tanzania*, Vol.8 University of Dar es Salaam Law Journal, 1991, p.2

### **1.3 Statement of the Problem**

The objective of Tanzania's Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, and that the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that human dignity and other human rights are respected and cherished.<sup>51</sup>

Furthermore, human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.

Tanzania is a state party to ICESCR and recognizes that; its citizens are therefore entitled to realization of the social economic rights indispensable for their dignity and the free development of their personality.<sup>52</sup>

Since its independence, Tanzania has had four Constitutions; the constitution of 1961, 1962, 1964 and 1977 which is the current Constitution where by the Bill of Rights was entrenched.

However despite all these enactments of the Constitution, and despite the ratification of the International Covenant on Economic, Social and Cultural Rights for well over thirty years, it is well known that Economic Social and Cultural rights have neither been given sufficient constitutional recognition nor are they a reality.

Their insufficient recognition in the Bill of Rights presents a number of serious challenges which include: their legal justiciability in courts of law, human rights mechanisms and the enforcement of effective remedies to the victims.

Consequently, Tanzania is among the nations, of which majorities of its individuals suffer due to insufficient protection of ESC rights. They face problems such as forced eviction, lack of education, poor health services, discrimination on access to and ownership of the property, unemployment and poor working conditions. That is

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<sup>51</sup> Article 9(a) of the Constitution of United republic of Tanzania 1977

<sup>52</sup> Article 22 of the UDHR, G.A.res.217A (III), U.N. Doc.A/10AT 71(1948)

to say, there is no connection between the Constitutional protection of human dignity and the reality on the ground.

Therefore, it was the aim of this research to explore the status of socio-economic rights in Tanzania as well as the challenges that are faced to make them justiciable in Tanzania.

#### **1.4 Objectives of the Study**

This research had the following objectives:

##### **1.4.1 General Objectives**

This study aimed at examining the challenges facing the enforcement and justiciability of the Economic Social and Cultural rights in Tanzania.

##### **1.4.2 Specific Objective**

This study had the following specific objectives:

- i. To contribute to the understanding on the need of constitutional realization of social economic rights.
- ii. To analyze challenges on the legal enforcement of the social economic rights in Tanzania.
- iii. To make recommendations on the full inclusion and realization of the social economic rights in the Constitution and other indirect ways to enforce social economic rights.

#### **1.5 Research Questions**

This research was guided by the following questions:

- (i) Does economic, social and cultural rights sufficiently protected under the Constitution of United Republic of Tanzania 1977?
- (ii) Can social, economic rights be justiciable in Tanzania?
- (iii) Are there any challenges to the judiciary and the Commission for Human Rights and Good Governance in the enforcement of social economic rights?

### **1.7 Significances of the Study**

- (i) The importance of this study is to provide useful information to the State on the need of promotion of social economic rights in Tanzania for the protection of human dignity.
- (ii) To promote the full enjoyment of social economic rights as human rights to the citizens by making them justiciable

### **1.8 Literature Review**

In contemporary human rights circles, judicial enforceability of social economic rights is the most debatable subject in the discussions pertaining to the implementation of these rights.

Due to this debate there are two sides on the literature regarding the enforceability of social economic rights that is for and against judicial enforceability of social economic rights.

The following are literatures that argue against the enforceability of social economic rights in the constitution.

**Yigen, K.**<sup>53</sup> discusses the arguments against the enforceability of social economic rights that, the inclusion of social economic rights in the domestic constitution will bring the document into disrepute. The reason for this is that socio-economic rights are unenforceable, and the inclusion of rights which are not enforceable into the most authoritative document in the legal system undermines the principle that rights should be enforced just because they are rights. The effect is to weaken the law's commitment to enforcing rights and consequently to subvert all other rights in the Constitution and discredit the Bill of Rights.

He also mentions some reasons for non realisation of social economic rights in the country constitution that there is a perception that the realisation of socio-economic rights is determined by political priorities and that, socio-economic rights are not rights of individuals, or fundamental rights, but broadly formulated programmes for governmental policies in the economic, social and cultural fields. She went on

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<sup>53</sup>Yigen, K. Enforcing Social Justice: Economic and social Rights in South Africa, Vol.4. o. 2 International Journal of human Rights 2000,P 16

showing the distinction between fundamental rights and directive principles that, the fundamental rights are typically considered justiciable that is, the question concerning their fulfilment or violation is capable of being decided by a court of law, whereas directive principles, a term often used in connection with socio-economic rights, include that the responsibility for the fulfilment and enforcement of socio-economic rights lays with the legislators, parliaments or other political fora for policy and programmatic formulation.<sup>54</sup>

However Yigen K, suggest that failure of courts to enforce and rule on socio-economic rights does not mean that socio-economic rights are not judicially enforceable. They are indeed capable of being decided by courts, and one example where the court could judge is by applying the following principle: Although the full realization of the rights recognized in the ICESCR is to be attained progressively, the application of some rights can be made justiciable immediately while others can become justiciable over time.<sup>55</sup>

**E.W Vierdag**,<sup>56</sup> against the implementation of social economic rights states that the implementation of these provisions of ICESCR is a political matter, not a matter of law, and hence not a matter of rights.<sup>57</sup>

**Mureinik, E.**,<sup>58</sup> also argues against the enforceability of social economic rights on the view that it costs a great deal of money, he then suggests that, judges do not have the budget and they are in any event not qualified to evaluate how much it is necessary to spend, nor how much society can afford, nor what its priorities are, or ought to be. He further suggests that to determine questions like these; it is essential for decision maker to have expertise and political accountability.

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<sup>54</sup> Yigen, K. Enforcing Social Justice, *Economic and social Rights in South Africa*, Vol.4.N o. 2, International Journal of human Rights 2000,P 17

<sup>55</sup> Yigen, K. Enforcing Social Justice, *Economic and social Rights in South Africa*, Vol.4.N o. 2, International Journal of human Rights 2000,P 17

<sup>56</sup> Vierdag, E.W., (1978), *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, Netherlands Yearbook Of International Law. [www.unhcr.ch/tbs/doc.nsf/0/.../FILE/G0044730.doc](http://www.unhcr.ch/tbs/doc.nsf/0/.../FILE/G0044730.doc), Accessed on 25<sup>th</sup> May,2012

<sup>57</sup> Ibid, Vierdag, E.W.,

<sup>58</sup> Mureinik, E., (1992) Beyond a charter of luxuries: Economic rights in the Constitution South African Journal on Human Rights, [www.books.google.co.tz](http://www.books.google.co.tz), Accesed on 20 February,2012

On the other side of the debate are the literatures which support the enforceability of social economic rights in the country constitution.

**Liebenberg, S.,**<sup>59</sup> stresses that the conception of social justice should inform our interpretation of rights claims. She perceives the litigation process as a platform from which the poor and marginalized are given an opportunity to voice their hardships.<sup>60</sup> She also argues against the view that enforcing of social economic rights cost a great deal of money. She analyses that in several occasion all over the world the legal fraternity witnessed judges passing decrees and orders that entail massive expenditure without any regard to the budgetary consequences particularly by the way of enforcing civil and political rights .

For example the right to fair trial requires the state to pay the salaries of judges, the prosecutors, and administrative staff, to build houses etc. Many other civil and political rights including the right to vote, equality, freedom of speech and the right to fair trial also involve questions of social economic policy and have budgetary implications.<sup>61</sup>

**Agbakwa, S.**<sup>62</sup> argues that economic, social, and cultural rights are the key to effectively realizing human rights in Africa .His article contends that human rights discourse on the indivisible bundle of rights must be put into practice in the African context, where these rights are people's primary means of self-defence. It contrasts many scholars and commentators who have pointed to the under-development and acute economic crises of African states as the reasons behind the non-enforcement of ESCR.<sup>63</sup>He then examines the inextricable link between these rights and development, arguing that there is no justification for discriminatory enforcement of human rights.

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<sup>59</sup> Liebenberg, S., Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Common Wealthy(2001)www.communitylawcentre.uwc.ac.za, Accessed on 23, February,2012

<sup>60</sup> Liebenberg, S., Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Common Wealthy(2001)www.communitylawcentre.uwc.ac.za, Accessed on 23, February,2012

<sup>61</sup>Loc cit, Liebenberg, S.,

<sup>62</sup> Agbakwa , C.S, *Yale Human Rights & Development Law Journal*, Vol. 5 P.179

<sup>63</sup>Ibid, Agbakwa , C.S, P. 179

Furthermore, he argues that recognition and enforcement of these rights catalyze development and are inextricable from it. Any quest for meaningful development ought to be predicated on the effective protection, enforcement, and realization of ESCR.<sup>64</sup>

**Pierre deVos**<sup>65</sup> discusses on the indivisibility and interdependence of social economic rights from other human rights. He referred to Vienna Declaration and other important international human rights gatherings that confirm that social and economic rights just like civil and political rights are worthy of protection by governments and international organisations and that, in appropriate cases, they can even be enforced by courts and other relevant bodies.

He then analyses the challenges facing the implementation of social and economic rights in Africa today especially then on inclusion of social economic rights in the country constitution. He mentions the example of South Africa whose Constitution explicitly includes a set of judicially enforceable social and economic rights in its Bill of Rights; because these rights are actually enforced by their Constitutional Court; and because the Constitution places a special duty on the constitutionally created Human Rights Commissions to oversee the enforcement of these rights.

As for literature on the status of socio-economic rights in Tanzania:

**Luoga, F**<sup>66</sup>, examining the nature of Tanzania Bill of Rights discusses on the right to education which is provided under **Article 11**, that this right is crucial and reproductive in every society in order to sustain its development, and that the right to education extends to the parental right to decide on the type of education to be offered to their children. However Article 11 of the constitution of Tanzania mentions this right, but it is not enforceable because the article is under the non justiciable part.<sup>67</sup> He ends up his discussion on assessing the effectiveness of Tanzania Bill of Rights and concludes that it is state-centric, vague in its formulation and incomplete.

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<sup>64</sup> Ibid, Agbakwa, C.S, P. 183

<sup>65</sup> Pierre de Vos, (2008), *Human Rights Commissions & Accountability in East Africa*, Kituo cha Katiba na Sheria: Kampala P. 1 <http://www.fountainpublishers.co.ug>, Accessed on 12<sup>th</sup> February, 2012

<sup>66</sup> Luoga F., "The Tanzanian Bill of Rights", in Maina, C.P and Juma, I.H (Eds) (1998) *Fundamental Rights and Freedom in Tanzania*, Mkuki na Nyota, Dar es salaam P.43

<sup>67</sup> Ibid, Maina, C.P and Juma, I.H P.43

**Mashamba, C<sup>68</sup>**, discussing on the using of Directive Principles of State Policy to provide for Economic, social and cultural rights in the Tanzanian Bill of Rights. He continues by evaluating the place of the fundamental objectives and directive principles of state policy in enforcing socio economic rights under the Constitution of Tanzania. His Article is set against a background that the Bill of Rights under the Constitution protects, as justiciable, only three socio-economic rights which is the right to work,<sup>69</sup> which goes together with the right to a fair remuneration,<sup>70</sup> and the right to property,<sup>71</sup> and the few socio-economic rights are contained in an unenforceable part of the Constitution.<sup>72</sup>

**Legal and human Rights Centre of Tanzania;**<sup>73</sup> also evaluates the importance of realisation of social economic rights as paramount for the attainment of other rights including the right to life and right to development. The chapter in their report measures the level of implementation of some of the stated rights in the view of suggesting for a better change.<sup>74</sup> The International Covenant on Economic Social and Culture Rights of 1966 which was ratified by Tanzania in 1977, details the categories of these rights. The Report discusses the right to work. According to their views; the right to work is comprised of availability of decent work, fair remuneration the right to organize trade union, security of tenure and the like. The Constitution of United Republic of Tanzania of 1977 has provisions which guarantee some of the important labour rights which have enshrined in various international Instruments. However they end up suggesting that there is failure to the implementation of these rights.<sup>75</sup>

**The Legal and Human Rights Centre (LHRC),**<sup>76</sup> also examines the non realisation of right to health services as one of social economic right, despite its importance as part and parcel of right to life. It points out the realization of these rights to health by the International Human Rights Instruments and the need of direct state parties to

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<sup>68</sup> Law Reform Commission of Tanzania Journal, Volume 2 of 2009, P. 81 , [www.lrc.tz](http://www.lrc.tz), Accessed on 23<sup>rd</sup> July 2011

<sup>69</sup> Article 22, the Constitution of the United Republic of Tanzania, 1977

<sup>70</sup> Article 23, the Constitution of the United Republic of Tanzania, 1977

<sup>71</sup> Article 24, the Constitution of the United Republic of Tanzania, 1977

<sup>72</sup> Article 11 of the Constitution of United republic of Tanzania, 1977

<sup>73</sup> Legal and Human Rights Centre, report on Human Rights in Tanzania 2009, P. 64

<sup>74</sup> Legal and Human Rights Centre, report on Human Rights in Tanzania 2009, P. 64

<sup>75</sup> Legal and Human Rights Centre, report on Human Rights in Tanzania 2009, P. 64

<sup>76</sup> Legal and Human Rights Centre, report on Human Rights in Tanzania 2009, P. 64

ensure availability of physical and mental health to their people, adequate health and medical care for all as provided under article 12 of International Covenant on Economic, Social and Culture rights of 1966, Article 25 of Universal Declaration of Human Rights of 1948, Article 16 of the African Charter on People and Human Rights of 1981.

The report then went on discussing the lack of powers to the Commission for Human Rights and Good Governance (CHRGG) on the enforcement of Economic Social and Cultural Rights, for it had no power on giving binding decision which led to the delay on determination of rights to the victims.

It mentioned the example of the case of Nyamuma Serengeti villagers<sup>77</sup> that at 2009, it was about more than five years since the Commission ruled in favour of the 135 families of the village that the eviction by District authority was unlawful and that the villagers should be compensated and reinstated<sup>78</sup>.

**Shivji I.**<sup>79</sup> discusses the very limited economic and social rights which are included in the Bill of Rights of Tanzania among other rights which are guaranteed in the Constitution. He analyses that all traditional rights as Universal Declaration of Human Rights of 1948 guides; that are first generation of human rights which are basically civil and political rights, economic, social and cultural rights are contained in the Bill of Rights of both the Union and Zanzibar constitution but the economic, social and cultural rights are very limited and only some of them are included in the Bill of Rights of Tanzania.<sup>80</sup>

He also considers the challenges of the Commission for Human Rights and Good Governance as one of the mechanism to facilitate the enforcement of economic and social rights and the Bill of Rights at large. That there are mixed feelings among Tanzanians on the performance of the Commission on human rights and good governance.

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<sup>77</sup>Ibrahimu Korosso and 134 others and legal and Human Rights Centre V the District Commissioner and Officer Commanding District (OCD) for Serengeti District, case No. HBB/S/1032/MARA.

<sup>78</sup>Ibrahimu Korosso and 134 others and legal and Human Rights Centre V the District Commissioner and Officer Commanding District (OCD) for Serengeti District, case No. HBB/S/1032/MARA.

<sup>79</sup> Shivji, G. I, Majamba, I., Makaramba, R. And Peter, C. M.(2004), Constitutional and Legal System of Tanzania, Mkuki na Nyota Publishers: Dar es salaam P. 95

<sup>80</sup> Shivji, G. I, Majamba, I., Makaramba, R. And Peter, C. M.(2004), Constitutional and Legal System of Tanzania, Mkuki na Nyota Publishers: Dar es salaam P.95

On the one hand there are those who have been impressed by its decision to institute public hearings on major human rights abuses. In particular the case of Serengeti residents whose houses had been burnt down on the orders of the district commissioner attracted a lot of attention. Two points have been raised in relation to the Serengeti hearing. The first is that the exercise itself is too expensive particularly to ferry witnesses all the way from Serengeti to Musoma, where the hearing was taking place. Besides the process it demands retaining advocates for long session. Not many victims for human rights violations can afford this.

Two there are complaints that the commission instead of being facilitative and non technical has tended to fall into adopting complicated technicalities. In effect it is argued, the lawyers and commissioners have turned the process of public hearing into a form of a court proceedings thus undermining the whole essence and rationale of establishing the Commission.<sup>81</sup>

**NOLA on the Justice Review**<sup>82</sup> discusses the judicial enforceability of social economic rights in Tanzania that the Bill of Rights utterly excluded most of the substantive social economic rights. Only the right to work and get commensurate remuneration; and the right to own property were included on the Bill of Rights, while the rest of social economic rights as provided for in the ICESCR were relegated to the unjusticiable part of the constitution. ie in part II of chapter one of the Constitution which include the right to education, the right to social welfare/security at times of old age, sickness and in other cases of incapacity; the right to healthy and the right to livelihood. The right to adequate food and housing were surprisingly left out of the constitution. This is seemingly a deliberate move by the government of the day because, for the most part the right to work and own property are amongst the social economic rights that requires less positive obligation on the part of the state as compared to the rights to healthy, the rights to food and the right to adequate standard of living, to social security or food and adequate housing.

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<sup>81</sup> Shivji, G. I, Majamba, I., Makaramba, R. And Peter, C. M. (2004), Constitutional and Legal System of Tanzania, Mkuki na Nyota Publishers: Dar es salaam P. 99

<sup>82</sup> NOLA, Loc cit

Furthermore, **NOLA on The Justice Review**, adds, that the government of the day avoided to include those social-economic rights that require direct positive obligation of the state such as the right to health, the right to food, and the right to housing in the justiciable part of the Constitution, in order to play a negative role as far as human rights promotion and protection is concerned.<sup>83</sup>

**NOLA** also elaborated that constitution entrenchment of social economic rights at municipal level offers the best protection of these rights particularly in countries that have per se constitutional supremacy- like South Africa- or constitutional semi supremacy combined with an entrenched judicial review of human rights violations like Tanzania.<sup>84</sup>

Such constitutional entrenchment normally guarantees judicial remedies to social economic rights, than the other ‘appropriate means’ referred to in article 2(1) of the ICESCR which could be rendered ineffective if they are not reinforced or complemented by judicial remedies.<sup>85</sup> So by failing to entrench some of the fundamental social economic rights in the enforceable part of the Constitution, the Government of Tanzania has limited the chances of litigants to directly access judicial remedy in case of violation of any of these rights.

**Wambali, M.KB.**, on the discussion on the place of economic social and social rights in the Bill of Rights shows one of the main characteristic of the Bill of Rights in Tanzania from its enactment that is the omission of what the in the United Nations circles are referred to as the Second Generation rights. He is of the opinion that this is a visible weakness considering the fact that the Bill of rights was entrenched in the constitution long after Tanzania had already acceded to the International covenant on economic Social and Culture rights 1966.<sup>86</sup>

Authors in this study argued on two sides, those who support the notion of inclusion of social economic rights and those who against the notion of the inclusion of social

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<sup>83</sup> Mashamba, C. J., (2008). *Litigating Social Economic Rights beyond the Bill of Rights in Tanzania*. In National Organisation for Legal Assistance(NOLA)(Eds) Twenty years of the justiciability of the Bill of Rights in Tanzania, 1988-2008. Dar es salaam: MkukinaNyota publishers P. 80

<sup>84</sup> Ibid, Mashamba, C.J P.

<sup>85</sup> General comment No. 9, Nineteenth session 1998: “The Domestic application of the Covenant”, UN Doc E/1999/22/22 117-121 Para 3.

<sup>86</sup> Adopted by the United Nations General Assembly (UNGA) on 16 December 1966 and entered into force on 3 January 1976( in 999 UN Treaty Series)UNTS:3

economic rights in Domestic Constitution, for the reason that social economic rights cannot be justiciable. However, all the authors in the above literatures could not highlight the challenges which cause obstacles to legal justiciability of social economic rights in the United Republic of Tanzania; therefore this research intends to fill that gap.

Moreover, this research complements the above discussed literature by giving a Tanzanian perspective on the subject matter.

It will first point out the status of ESC rights and then assess whether its practicable to make them justiciable in Tanzania. It will further point out the challenges towards making ESC rights justiciable in Tanzania.

## **1.9 Research Methodology**

A research methodology is a systematic way of collecting data and processing them within the framework of the research process.<sup>87</sup>

### **1.9.1 Area of Study**

The research was conducted in Dar es Salaam region, particularly in the machinery for the enforcement of Human Rights which is the High Court of Tanzania which has the original jurisdiction in entertaining human rights matters, the Commission for Human rights and Good Governance where the duties and functions of protection and promotion of human rights are vested to by the Constitution. The research also involved the Civil Society/NGO's located in Dar es Salaam which deal with providing legal Aid and dealing with the protection and promotion of human rights, which are Commission for Human Rights and good Governance and The Legal and human Rights Centre.

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<sup>87</sup>Kothari,C.R, (2<sup>nd</sup> RE)(2004)*Research Methodology*, New Age International(P)Ltd: India P. 1

## **1.9.2 Data Collection Methods**

### **1.9.3 Collection of Primary data**

#### **1.9.3 Field Research**

The practical part of the study involved visiting the Commission for Human rights and Good Governance where the duties and functions of protection and promotion of human rights are vested to by the Constitution and also visiting a civil society, Legal and Human Rights Centre offices to collect data relating to the Challenges to the Enforcement of Economic Social and Cultural Rights in the Constitution of United Republic of Tanzania 1977, Moreover the sample from members of the public were involved.

A combination of methods and instruments for data collection were used. Data from the field were collected through direct interview and questionnaires from the respondents during the field study.

The choice of these methods was based on the intensiveness of the information required and the number of the people involved in this study being a bit large and that it would not be possible for interview alone to be conducted effectively to this group.

**Questionnaire method** was used to collect information from the some Human Rights Activist respondents and Members of the Public respondents especially on the perception and practicability of enforcement of social economic rights in the United Republic of Tanzania.

This is due to the fact that, the members of public selected were many; therefore it could not be easy for the interview method to work under such circumstance. A number of printed questions relating to the enforcement of social economic rights in The United Republic of Tanzania were distributed to selected number of respondents for them to read, understand and respond.

The questionnaires were distributed or mailed personally by the researcher to potential respondents and were collected or received by the researcher himself.

Due to the fact that some members of the public involved were of different educational background, the questionnaires were of two languages, that is English and Swahili.

**An interview method** was used to collect information from some of the Staff of the Commission for Human Rights and Good Governance (CHRGG), the Legal and Human Rights Centre (LHRC). The aim was to collect information personally from the sources on issues relating to the Challenges in the enforcement of economic, social and cultural rights in Tanzania. Both structured interviews<sup>88</sup> on issues planned and unstructured<sup>89</sup> on those issues requiring further clarification were used.

#### **1.9.4 Collection of Secondary Data**

The collection of secondary data was through documentary review of some relevant materials such as Textbooks, statutes, research reports, Article in journals, workshop/conference papers and some materials from the web-sites.

These materials were found from the libraries of the Mzumbe University, the University of Dar es salaam.

#### **1.9.5 Sample size and sampling techniques**

A sample is some part of a larger body specially selected to represent the whole. Sampling is the process by which this part is chosen. Sampling then is taking any portion of a population or universe as representative of that population or universe.<sup>90</sup> Sampling may be useful if the population size is large and if both the cost and time associated with obtaining information from the population is high. As this study had to cover the whole of Tanzania and due to the fact that it was not easy to include each place and everybody in the study, considering limitation of time and budgetary constraints, a sample had to be taken representing the whole of Tanzania.

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<sup>88</sup> An Interview involving the use of a set of predetermined questions and standardized technique of recording , Kothari,C.R, (2<sup>nd</sup> RE)(2004)*Research Methodology*, New Age International(P)Ltd: India P.98

<sup>89</sup>An Interview not following a system of predetermined questions and standardized technique of recording, Kothari,C.R, (2<sup>nd</sup> RE)(2004)*Research Methodology*, New Age International(P)Ltd: India P. 98

<sup>90</sup> UIC, Sampling: [www.uic.edu](http://www.uic.edu) accessed on 31/12/2011

A total of 100 respondents were selected for the purpose of providing information necessary for this study, which include: 20 Advocates, 40 Human Rights Activists and 40 Members of the Public. This sample size was considered optimal for the purpose of this study and following the fact that the budget was not enough to cover a large sample size.

#### **1.9.6 Sampling Technique**

In carrying out this research a purposive sampling method which is a deliberate selection of particular unit of the universe for constituting a sample which represents the universe, was used. This is a deliberate selection of particular unit of the universe for constituting a sample which represents the universe.

#### **1.10 Chapterization**

The Dissertation is organized in Six Chapters. Chapter one gives the general introduction of the study and the background to the research problem. Other important aspects which are covered in this chapter include: statement of the problem, literature review, objectives and significance of the study, research questions and the research methodology which was applied in conducting the study.

Chapter two gives the conceptual framework and legal framework of the study in relation to the enforcement of economic social and cultural rights; in conceptual framework the concept of the constitution and enforcement of social economic rights were covered. In legal framework the Domestic application of social economic rights were covered; an overview of the protection of social economic rights at the International, regional and domestic level were also discussed. The Content of social ICSCR which is rights and obligations to state parties which include core content, duty to respect, protect and fulfil were also covered.

Chapter three discusses on the Contemporary issues on Social Economic Rights which include the importance of constitutional entrenchment of social economic rights in the Domestic Constitution, Indirect ways of enforcing social economic rights which are the use of Directive Principles of State Policy and the use of civil and political rights were also covered.

Chapter Four discusses the Challenges to the justiciability of social economic rights in the Constitution of URT, the Judiciary and the Commission for Human Rights and Good Governance.

Chapter Five discusses the major findings of the study basing on the discussion on the challenges for the enforcement of social economic rights in the United Republic of Tanzania.

Chapter Six gives the conclusion and recommendations of the study, observations of the researcher and suggestions that are considered important for the improvements of the enforcement of social economic rights in Tanzania.

### **1.11 Conclusion**

This chapter discussed the general introduction of the research, It give the concept and meaning of words and aspects which used in the discussion of social economic rights.

It then discusses background to the problem where the challenges of enforcement of social economic rights were traced from far back the German enlighten on 19<sup>th</sup> Century and in Tanzania from before entrenchment of Bill of Rights in the Constitution. Then the statement of problem was stated in this chapter to show the researcher exploration of the problem.

The objectives of the research was also discussed and further the literature review was surveyed to see what other authors already discussed on the enforcement of social economic rights.

Moreover research methodology was discussed in this chapter and the data collection methods were explored.

## **CHAPTER TWO**

### **CONCEPTUAL AND LEGAL FRAMEWORK ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

#### **2.1 Introduction**

One of the most contemporary subjects throughout the world on human rights discourse is the enforceability of the social economic rights. The concern for the enforcement of social economic rights is now wide in the globe and in African countries as well; Though it was believed since adoption on the ICESCR that socio-economic rights were programmatic, to be realised gradually and were therefore not justiciable and could not be enforced by the courts. Those socio-economic rights required spending by the state as compared to the civil and political rights. But later it was discovered that the above arguments had been overstated. All the rights are now believed to be interrelated and interdependent<sup>91</sup>. The understanding that civil and political rights did not involve cost implications was misplaced; rights such as fair trial and right to vote have cost implications, as do other rights. It is clear that development cannot be achieved unless a holistic approach to the realisation of human rights is taken. In this context new approaches have emerged, stressing equitable, people centred development, combined with a respect for human beings and a demand for social and economic equity.<sup>92</sup>

#### **2.2 Definition of Terms**

##### **2.2.1 The Concept and Meaning of Social Economic Rights**

The Concept of challenges to the social economic rights enforcement

‘Challenges’ in the context of this study refers to the setbacks and hurdles that Tanzania faces (or has been facing) in its quest for an effective enforcement of social economic rights.

Socio-economic rights relate to an individual’s social economic and cultural entitlements. Economic social and cultural rights aim to ensure the satisfaction of basic human needs such as health, food, employment and education.

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<sup>91</sup>United Nations Human Rights (Office of the High Commissioner of Human Rights), [www.ohchr.org](http://www.ohchr.org), Accessed on December 11<sup>th</sup> 2012.

<sup>92</sup> Nola, *The Justice Review, Twenty Years of the Justiciability of the Bill of rights in Tanzania*, Volume 7, No. 1, 2008, Mkuki na Nyota: Dar es Salaam P 43

Economic, social, and cultural rights are the key to effectively realizing human rights and are people's primary means of self defence as they are indispensable for an individual's dignity and the free development of their personality.<sup>93</sup>

### **2.2.2 Meaning of Justiciability**

The term justiciability refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights.<sup>94</sup> Justiciable rights grant right holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties. The existence of a legal remedy understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim are a defining features of a fully fledged right.<sup>95</sup> Such legal remedies are particularly important when the matter at stake is the violation of human rights, which are, by definition, rights inherent to the human being's condition and identity.

It is for this reason that a number of human rights instruments expressly provide for a right to a remedy in case of violations of human rights.<sup>96</sup>

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<sup>93</sup> [www.ohchr.org/Documents/Publications/PovertyStrategiesen](http://www.ohchr.org/Documents/Publications/PovertyStrategiesen), Accessed on 20<sup>th</sup> Dec, 2011

<sup>94</sup> International Commission for Jurists(ICJ)(2008)Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Switzerland, <http://www.icj.org> P. 6, Accessed on 8 April, 2012

<sup>95</sup> Ibid, International Commission for Jurists(ICJ)

<sup>96</sup> See, for example, International Covenant on Civil and Political Rights, Article 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13; International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance, Articles 12, 20 and 24; Universal Declaration of Human Rights, Article 8; United Nations Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, Principles 4 and 16; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4-7; Vienna Declaration and Programme of Action, Article 27; Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Articles 13, 160-162 and 165; Declaration on Human Rights Defenders, Article 9; European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 13; Charter of Fundamental Rights of the European Union, Article 47; American Convention on Human Rights, Article 25; American Declaration of the Rights and Duties of Man, Article XVIII; Inter American Convention on Forced Disappearance of Persons, Article III(1); Inter-American Convention to Prevent and Punish Torture, Article 8(1); African Charter on Human and Peoples' Rights, Article 7(1)(a); and Arab Charter on Human Rights, Article 9.

The right to a remedy has often been considered one of the most fundamental and essential rights for the effective protection of all other human rights.

Similar provisions regarding the protection of constitutional or fundamental rights can be found in many constitutions around the world. The UN Committee on Economic, Social and Cultural Rights (CESCR) reflects this notion in its General Comment (GC) N° 9:

*But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.<sup>97</sup>*

### **2.2.3 Definition of the term Enforcement**

Enforcement is the phrase comes from the word “enforce” which means compel, the compliance of the law, rule or obligation.<sup>98</sup>

In order to enforce any right, it must be articulated with sufficient specificity to permit a tailored remedy. In the case of social economic rights, which there is no unanimous definition, the lack of clarity regarding meaning and content leads to difficulties of enforcement.<sup>99</sup>

Once social economic rights are well-defined, the strongest tool for their enforcement which is the judicial system can be used, given that the courts alone have the power not only to render judgments but also to execute those judgments done by other human rights enforcement mechanisms.

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<sup>97</sup> CESCR, General Comment N° 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), Para. 2.

<sup>98</sup> Concise Oxford English Dictionary(2008)(11 Edn), Oxford University Press: Great Britain

<sup>99</sup> Wiles, E., *Aspiration Principles or Enforceable Rights?, The Future for Socio-Economic Rights in National Law*, works at: <http://www.digitalcommons.wcl.american.edu/auilr>-Accessed on 13,July,2012

#### 2.2.4 Meaning of Human Rights

Human Rights are fundamental Rights, which a person has by virtue of being a human being.<sup>100</sup> Human rights are not acquired, nor can they transferred, disposed of, extinguished by any act or event; according to classical theory now reflected to international standards they ‘**inhere**’<sup>101</sup> universally in all human beings throughout their lives by virtue of their humanity alone. They are inalienable, universal, interrelated, and interdependent.<sup>102</sup>

Human Rights also are primary correlative duties that fall on states and on their public authorities, not on other individuals. The emphasis on the meaning of Human Rights was also given by Lugakingira J. (as he then was) in the case of *Rev. Mtikila V. Attorney General*<sup>103</sup> that fundamental rights are not gifts from the state. They are inherent in person by reason of his birth and are therefore prior to the state and the law.

Modern constitutions like the Constitution of United Republic of Tanzania have enacted fundamental rights in their provisions.

This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.<sup>104</sup>

Moreover; Human rights mean the rights relating to life, liberty, equality, and dignity of the individual guaranteed in the constitution and or embodied in the international covenants and enforceable by the court in the particular country.<sup>105</sup>

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<sup>100</sup> Shivji I, Majamba, H.I., Makaramba, R.V., and Peter, C.M., (2004) Constitutional and Legal System of Tanzania, Mkuki na Nyota Publishers: Dar es salaam 77

<sup>101</sup> Lugakingira J. (as he then was), in the case of *Rev Mtikila V. Attorney General* ([1995] T.L.R. 31)

<sup>102</sup> United Nations Human Rights (Office of the High Commissioner of Human Rights) Meaning of Human Rights, [www.ohchr.org](http://www.ohchr.org)-Accessed on December 11<sup>th</sup> 2012

<sup>103</sup> (1995) TLR 31

<sup>104</sup> *ibid*

<sup>105</sup> Hulsbury's Law, Human Rights: *Protection and Purpose*, [www.hulsburys.com/human-rights-protection.html](http://www.hulsburys.com/human-rights-protection.html). Accessed on November 25<sup>th</sup> 2012

## **2.3 Conceptual framework of economic social and cultural rights**

### **2.3.1 The concept of the Constitution and enforcement of social, economic and cultural rights**

Traditionally, the constitution of a country is generally regarded as the supreme law of the state. This means that the modern approach of entrenching Bill of Rights in domestic constitution is particularly significant for the protection and enforcement of social economic rights. In most contemporary country constitutions, such as the constitution of the United Republic of Tanzania of 1977, the Bill of Rights has largely entrenched civil and political rights in more lucid terms than the case for socio-economic rights.<sup>106</sup>

One of the importance of the inclusion of social economic rights is reception of extensive protection as justiciable rights in the constitution of country. Individuals can generally be able to invoke these constitutional provisions to obtain relief from courts when their rights are infringed or threatened by the state.<sup>107</sup> This is in line with the provisions of the General Comment No. 9<sup>108</sup> that emphasizes on the importance of the judicial remedies for the protection of the rights recognized in the ICESCR.

Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing the results which are consistent with the full discharge of its obligations by the State party.<sup>109</sup> The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.<sup>110</sup>

Therefore the Constitution of the Country as the higher law should contain the set of economic, social and cultural rights with the obligation attached to them to make the

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<sup>106</sup> NOLA, Loc cit P.49

<sup>107</sup> Circle of Rights, Economic, Social and Cultural Rights: A Training Resource, section 7, module 22, Strategies for enforcing ESCR through Domestic Legal System, <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>. Accessed on 20th February, 2012

<sup>108</sup> UN CESCR, General Comment No. 9 of 1998 on the domestication application of the ICECR, UN Doc. E/1999/22, paragraph 4;

<sup>109</sup> Ibid, Circle of Rights

<sup>110</sup> CESCR in General Comment 9

rights enforceable and enjoyable by the citizens as the case of civil and political rights.

In addition, the entrenchment of a set of justiciable human rights in a country's constitution basically represents the highest ranking norm within the domestic legal order. In such a system of constitutional supremacy, the courts are vested with the extensive power to enforce human rights.<sup>111</sup> Thus the incorporation of socio-economic rights as justifiable rights in a country's constitution provides a great deal of scope for developing effective remedies for these rights. Some example of this kind of constitutional orders can be found in the Constitutions of Botswana, Ghana, South Africa, India and Canada.<sup>112</sup>

### **2.3.2 Domestic Application of International Human Rights Law**

Traditionally, the notion was that the nature of a state's legal order determined the domestic application of an international human rights treaty. When a state ratifies a human rights treaty, the provisions of the treaty do not necessarily automatically become part of its domestic law.<sup>113</sup> Whether they do or not depends on the nature of the legal system. Tanzania follows dualist system. A dualist system sees International law and domestic law as two separate systems. International law thus, has to be incorporated through legislation before it is applied in the domestic arena.<sup>114</sup>

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<sup>111</sup>Circle of Rights, Economic, Social and Cultural Rights: A Training Resource, section 6, module 19, Monitoring and Assessing the enjoyment of ESC rights  
<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>. Accessed on 20th February,2012

<sup>112</sup> NOLA, (2008) The Justice Review, Twenty Years of the Justiciability of the Bill of Rights in Tanzania "Blocking Fundamental Rights and Freedom in Tanzania.Mkuki na Nyota: Dar es salaam. P. 50

<sup>113</sup> Ibid, Circle of Rights, Section 7,Module 22; In what is known as a monist system, when a state ratifies an international treaty, the provisions of the treaty automatically becomes part of domestic law; while in dualist system, Dualists see international law and domestic law as two separate systems. International law thus has to be incorporated through legislation before it is applied in the domestic arena.

<sup>114</sup> Circle of Rights, Economic, Social And Cultural Rights: A Training Resource,Section6,Module19,Monitoring and Assessing the Enjoyment of ESCR,  
<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm> Accessed on 20th February,2012

It is therefore important when developing strategies for domestic application and justiciability of ESC rights to take into account the nature of the domestic legal system.<sup>115</sup>

However, it is important to note that international human rights treaties have established some principles for domestic application irrespective of the nature of the legal system.<sup>116</sup>

The basic principle governing domestic application of international human rights treaties is that the States (when becoming party to an international treaty) are deemed to submit themselves to a legal order in which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.<sup>117</sup>

The Committee on Economic Social and Cultural Rights (CESCR), in its General Comment 9, has established categorically that the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so by all appropriate means, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place. To reinforcing this idea, the CESCR also said in General Comment 9.

This approach has proved successful in the work of the Social and Economic Rights Action Centre (SERAC) in Nigeria. SERAC is championing demands for the full

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<sup>115</sup> ICESCR, Article 2(1).

<sup>116</sup> Ibid,ICESCR

<sup>117</sup> Ibid,ICESCR

resettlement of the 300,000 people forcibly evicted from their homes when Maroko, formerly Nigeria's largest slum community, was demolished by the military government in 1990 without compensating or resettling over 97% of evicted families.

SERAC's litigation activities seek to further legitimize and consolidate the community's demands.<sup>118</sup> For example, in **Farouk Atanda V the Government of Lagos State & Four Others**,<sup>119</sup> SERAC is asking the court to determine whether the housing provided as resettlement to less than 3% of families evicted from Maroko is adequate and habitable as required by applicable human rights standards. This and other cases have come to represent a crucial part of the community's resolve to carry on their struggle. Their determination is expressed in part by their regular attendance in huge numbers at the proceedings-and this in turn sends clear signals to the judicial authorities.

## **2.4 The Legal Framework on Economic, Social and Cultural Rights**

### **2.4.1 International Level**

#### **2.4.1.1 The Universal Declaration of Human Rights (UDHR) 1948**

The first most important instrument to proclaim the protection of socio-economic rights was the UDHR. Provisions which give guarantee of social-economic rights in UDHR are; right to own property,<sup>120</sup> right to work under favourable conditions,<sup>121</sup> right to food, clothing and housing ,<sup>122</sup> right to health care and social services,<sup>123</sup> right to special protections for children,<sup>124</sup> right to education,<sup>125</sup> right to participation in cultural life,<sup>126</sup> .

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<sup>118</sup>Circle of Rights, Strategies for Enforcing ESC rights through domestic legal systems, Section7, Module22, <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>, Accessed on 20<sup>th</sup> February 2012.

<sup>119</sup> Ibid,Circle of Rights

<sup>120</sup> UDHR Article 17

<sup>121</sup> UDHR Article 23

<sup>122</sup> UDHR Article 25

<sup>123</sup> Ibid,UDHR

<sup>124</sup> Ibid,UDHR

<sup>125</sup> UDHR Article26

<sup>126</sup> UDHR Article 27

However this declaration is not a treaty and was understood not to be imposing binding legal obligations as it is apparently believed to have acquired the status of customary international law thereby establishing principles that are binding on all subjects of international law<sup>127</sup>. This called for the promulgation of binding treaties which in 1966 led to the adoption of the ICCPR incorporating civil and political rights, and the ICESCR incorporating economic, social and cultural rights.

#### **2.4.1.2 The International Covenant on Economic Social and Cultural Rights (ICESCR) 1966**

The ICESCR provides for the protection of a wide range of economic, social and cultural rights. These include: the right of self-determination,<sup>128</sup> right to work,<sup>129</sup> right to social security,<sup>130</sup> family rights and protection of the family,<sup>131</sup> the right of everyone to an adequate standard of living;<sup>132</sup> which incorporates the right to food, clothing and housing, right to health,<sup>133</sup> right to education,<sup>134</sup> and the right to take part in one's culture.<sup>135</sup>

In order, to make clarity in the normative interpretation and development of these rights especially in the complaint mechanisms, the practice of giving authoritative interpretation to the provisions of ICESCR, the monitoring mechanisms has been adopted. This includes the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles),<sup>136</sup> as elaborated by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Principles).<sup>137</sup>

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<sup>127</sup> Mbazira, C.(2003)The enforcement of Economic Social and culture Rights in the African human Rights System, LLM Dissertation in University of Pretoria.

<sup>128</sup> ICESCR Article 1

<sup>129</sup> ICESCR Article 6

<sup>130</sup> ICESCR Article 9

<sup>131</sup> ICESCR Article 10

<sup>132</sup> ICESCR Article 11

<sup>133</sup> ICESCR Article 12

<sup>134</sup> ICESCR Article 13

<sup>135</sup> ICESCR Article 15

<sup>136</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc E/CN.4/1987/17; annex to 1987 (9) *Human Rights Quarterly* 122 – 235.

<sup>137</sup> Mbazira, C.(2003)The enforcement of Economic Social and culture Rights in the African human Rights System, LLM Dissertation in University of Pretoria

## ***The Rights and Obligations in the ICESCR***

### ***Core content or minimum core duties***

The first conceptual element that assists in determining the responsibilities of a state in relation to ESC rights is the idea of core content (also called minimum core content, minimum core obligations, <sup>138</sup>minimum threshold). This concept entails a definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless. The idea of core content has also been employed in analyzing civil and political rights, and especially in the constitutional law tradition. Different constitutional constructions have justified this core requirement as a corollary of the concept of human dignity, or have conceived it as a vital minimum or ‘survival kit’. The definition of a vital minimum, by its nature, is evolving. The accepted mandatory minimum level may change over time, for example as science and technology advance. This is particularly true with some rights, such as the right to medical treatment and the right to food security, which are, respectively, components of the right to health and the right to food. In relation to some rights, such as the right to education, there is considerable consensus on the minimum core content of the service to be provided by the State that is, universal, free and compulsory primary education.

### ***Obligations of state party to the ICESCR***

The obligations of state parties are provided under article 2 of the ICESCR Which outlines the nature of State Parties’ obligations under the Covenant and determines how they must approach the implementation of the substantive rights contained in the Covenant.

For the purposes of this analysis, four components of Article 2 need to be highlighted.

The first is that although article 2(1) particularly obliges States to adopt legislative measures to ensure the enjoyment by everyone of the rights in the Covenant, the Covenant generally requires States to adopt “all appropriate measures.”

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<sup>138</sup> Maastricht Guidelines, Guideline 9.

This takes into cognizance the fact that laws alone may not be a sufficient response at the national level for the implementation of economic, social and cultural rights.

Administrative, judicial, policy, economic, social and educational measures and many other steps will be required by governments in order to ensure these rights to all.

The second component is that State Parties are obliged to (achieve) progressively the full realization of the rights recognized in the ICESCR.<sup>139</sup> This does not imply that States must defer indefinitely efforts to ensure the enjoyment of the rights laid down in the ICESCR. Rather, the duty in question obliges States, notwithstanding their level of national wealth, to move immediately and as quickly as possible towards the realization of economic, social and cultural rights.<sup>140</sup> Further, whereas certain rights, by their nature, may be more apt to be implemented in terms of the progressive obligation rule, many obligations under the ICESCR are clearly required to be implemented immediately. For example non-discrimination provisions and the obligation of State Parties to refrain from actively violating economic, social and cultural rights or withdrawing legal or other protection relating to those rights.<sup>141</sup>

The third component is the duty of each State Party to ensure the enjoyment of the rights in the ICESCR to the maximum of its available resources.<sup>142</sup> While recognizing the reality that the extent of realisation of these rights depends on the financial muscle of the State Party, the latter shoulders the onus of showing that it has done its utmost within the constraints of its available resources. Where resources are demonstrably inadequate to attain the desired standard, the State Party is enjoined

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<sup>139</sup> Article 2(1) of ICESCR

<sup>140</sup> General Comment No 3 Para 9; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17 Annex (1987), reprinted in (1987) 9 *Human Rights Quarterly* 122 (Limburg Principles).

<sup>141</sup> Fact Sheet No.16 (Rev.1) - Office of the High Commissioner for Human Rights [www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf](http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf), Accessed on 20 July 2012

<sup>142</sup> Article 2(1) ICESCR, [www.ohchr.org](http://www.ohchr.org) › OHCHR › English › Professional Interest, Accessed on 20 July 2012

to monitor the extent of non realisation and to devise appropriate remedial measure.<sup>143</sup>

Additionally, a State Party is obliged to fulfil a minimum core obligation so as to satisfy at least the essential levels of the rights such as basic nutrition, primary health care, shelter and basic education. Failure to satisfy these basic needs constitutes a prima facie violation of the ICESCR.<sup>144</sup>

Furthermore the burden lies on the State Party to demonstrate that every effort has been made to gather all resources available to satisfy these minimum obligations as a matter of priority<sup>145</sup>. The term “available resources” includes both domestic resources and any international economic or technical assistance or cooperation available to a State Party.<sup>146</sup>

The last is the obligation to ensure the enjoyment of these rights without discrimination.

This obliges State Parties to desist from discriminatory behaviour and to alter laws and practices which allow discrimination. It also obliges State Parties to prohibit private persons and bodies from practicing discrimination in any field in public life.<sup>147</sup> However, special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals in order to ensure their equal enjoyment of economic, social and cultural rights with others are not considered discrimination, provided that such measures do not lead to the maintenance of separate rights for different groups and are not continued after their objectives have been achieved.<sup>148</sup>

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<sup>143</sup> General Comment No 3 Para 11 as read with General Comment No 1 (Third session, 1989) Reporting by State Parties UN Doc E/1989/22 Para 4 and 6.

<sup>144</sup> Chirwa, D.M., The Impact of the International Covenant on Economic, Social and Cultural Rights [www.communitylawcentre.org.za/.../Socio-economic\\_rights\\_in\\_Africa.P](http://www.communitylawcentre.org.za/.../Socio-economic_rights_in_Africa.P) 3, Accessed on

<sup>145</sup> General Comment No 3 Para 10.

<sup>146</sup> General Comment No 3, paras 13 and 14; General Comment No 2 (Fourth session, 1990) International technical assistance measures (article 22 of the Covenant) UN Doc E/1990/23.

<sup>147</sup> The Limburg Principles, para 38.

<sup>148</sup> Ibid, para 39

### ***Duties to respect, protect, and fulfil***

For the purpose of absolute implementation of social economic rights, the CESCR has classified the different levels of State obligations by stating that every ESC right, as with every human right, includes duties to respect, duties to protect and duties to fulfil. This interpretation of State obligations has been reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>149</sup> This tripartite classification is based on different assumptions about the relationship between the right holder, his or her access to the protection afforded by a right, potential threat to that access, and the role of the State. The CESCR has explored the application of this classification in several General Comments regarding different rights protected by the ICESCR. In these General Comments the Committee has identified both duties arising from those rights and the types of violations of those duties. Exploring how this classification applies helps to illustrate the problems created by rejecting the justiciability of ESC rights per se.

### ***Duty to respect***

According to Maastricht guidelines, duties to respect focus on preventing the State from unduly intervening in the enjoyment a particular freedom or entitlement. The State is required to abstain from interfering. Nevertheless, to prevent the interference, the State may still have to take proactive measures, for example, to prevent State agents from acting in certain ways, or to provide reparation if a duty has been breached. Judicial intervention to ensure compliance with duties to respect ESC rights both preventive and restorative or compensatory is not substantially different from traditional notions of civil and political rights litigation, i.e. protecting against State action that threatens the *status quo*. This is particularly the case when potential victims already have access to essential provisions, such as food, housing, work, income and health care. The Duty to respect was also analysed in the Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria.

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<sup>149</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 6.

In this case, the African Commission on Human and Peoples' Rights endorsed the notion of duties to respect the enjoyment of ESC rights.<sup>150</sup>

The Commission stated:

*The obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.*<sup>151</sup>

*The Commission found that the Government of Nigeria breached its duties to respect the rights to health and to a healthy environment, by directly attacking, burning and destroying several Ogoni villages and homes.*<sup>152</sup> *The Commission also considered that there had been violations of the right to housing: "At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. [...] The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter." Similarly, the Commission found that the State had also breached its duties to respect the right to food.*

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<sup>150</sup>African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication N° 155/96, October 13-27, 2001.

<sup>151</sup>See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication N° 155/96, October 13-27, 2001. *Ibid.*, para. 45

<sup>152</sup>*Ibid* Para 54

The duty to respect is has been held to be justiciable, for example in the following circumstances:

*Protection against State-organized or sanctioned forced evictions,*

As it was decided in the South African Constitutional Court in the case of *Jaftha v. Schoeman* and *Van Rooyen v. Stoltz*,<sup>153</sup> the Constitutional Court decided that provisions of the *Magistrates' Courts Act* that allowed, without adequate judicial oversight, the sale of a person's home to make good a judgment debt, breached the duty to respect the right of everyone to have access to adequate housing. Similarly, an Argentine State Supreme Court decided that provisions of the local Administrative Code that granted the State the authority to automatically evict tenants of State owned housing were unconstitutional, breaching the right to due process and the right to housing.<sup>154</sup> The court explicitly linked the right to due process, the right to legally challenge eviction orders and the right to adequate housing. The judgment referred specifically to CESCR's General Comment 4 (on the right to adequate housing) and General Comment 7 (on forced evictions);

*Protection from direct threats to health by State actors;*

This entails the protection from the interruption of existing levels of medical treatment provided by the State.

Other examples include the protection against arbitrary termination of employment in the public sphere; protection from retrogressive and retroactive downgrading measures in social security schemes; and protection from State interference in the use of a minority language or anything deemed to have an important symbolic value for a particular culture or religion.

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<sup>153</sup>Constitutional Court of South Africa, *Jaftha v. Schoeman; Van Rooyen v. Stoltz*, (2005) 1 BCLR 78 (CC) October 8, 2004. The summary of the case is due to Danie Brand.

<sup>154</sup>Buenos Aires Supreme Court (*Tribunal Superior de Justicia de la Ciudad Autónoma de Buenos Aires*), *Comisión Municipal de la Vivienda c. Saavedra, Felisa Alicia y Otros s/Desalojo s/Recurso de Inconstitucionalidad Concedido*, October 7, 2002, and *Comisión Municipal de la Vivienda c. Tambo Ricardo s/desalojo*, October 16, 2002.

### ***Duty to protect***

Under the duty to protect, the State is required to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement.<sup>155</sup> Emphasis is therefore placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third party interference.<sup>156</sup> This is normally achieved through one or all of the following; State regulation of private party conduct; inspection and monitoring of compliance; and administrative and judicial sanctions enforced against non-compliant third parties, such as employers, landlords, providers of health care or educational services, potentially pollutant industries or private food and water suppliers.<sup>157</sup> Judicial intervention to ensure compliance with duties to protect ESC rights gain, preventive, restorative or compensatory is similar to litigation that seeks to require the State to protect against the acts or failure to act of private (third) parties in the sphere of civil and political rights.

Some examples from domestic and international courts and quasi judicial bodies illustrate the potential for determining non-compliance with a State's duty to protect the enjoyment of an ESC rights from the conduct of third parties are: Inter-American Court of Human Rights in *Mapiripán Massacre v. Colombia*<sup>158</sup> (violation of the right to freedom of movement and residence); *Ituango Massacres v. Colombia*<sup>159</sup> (violation of the right to property and the right to privacy, family life and home) In these cases, the Inter American Court of Human Rights considered massacres perpetrated by paramilitary groups in Colombia as a violation of the duty to protect ESC rights. The massacres caused the forced eviction and displacement of the civilian population, and the loss of their homes and means of livelihood. In both cases, the State was found responsible, amongst other things, for its failure to protect the civilian population against attacks from paramilitary groups, which the Court held was the responsibility of the Colombian army, which was in overall control of the area.

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<sup>155</sup> See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication N°155/96, October 13-27, 2001. Para 66

<sup>156</sup> SERAC and CESR V. Nigeria ibid

<sup>157</sup> See Maastricht Guidelines, Guideline 15(d).

<sup>158</sup> *Mapiripán Massacre v. Colombia*, September 15, 2005, paras.167-189

<sup>159</sup> July 1, 2006, paras.172-200 (violation of the right to property and the right to privacy, family life and home) and 204-235 (violation of the right to freedom of movement and residence).

In the *SERAC and CESR v. Nigeria*<sup>160</sup> case, the African Commission on Human and Peoples' Rights also found violations of the State's failure to regulate and prevent the conduct of a private oil company which polluted natural resources and destroyed the traditional means of livelihood of the Ogoni people.

The Commission held that the State had failed in its duties to protect the rights to health, to a clean environment, and to protect against the degradation of the people's wealth and natural resources.

Moreover, when private individuals and parties threaten the provision of what would be considered essentials for a decent life; judicial intervention is one means to protect the rights involved. This approach should work alongside and compliment other State activity, such as regulation and law enforcement.

Access to some basic ESC rights such as the rights to work, health or education services, housing or food is often left to a great extent to market forces or provision by third parties. This creates its own tensions for the State, in how it carries out its duties to protect.

However, this duty to regulate conduct between private parties becomes greater where there is a power imbalance between those parties. Judicial intervention as a means of controlling the actions, or failure to act of private parties in the context of duties to protect ESC rights have arisen in the following examples: protection against privately conducted forced evictions; protection of labour conditions in the private labour market; protection from failure to comply with health or education requirements in the private sphere; protection from discrimination in contracts directed at providing basic services such as health, water, housing or education; and protection from abusive termination or modification of these contracts.

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<sup>160</sup>African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication N° 155/96, October 13-27, 2001. On the duties to protect, see paras. 46, 61 and 65. On the findings of violations to these duties, see paras. 55, 57-58 and 66. For a comment, see F. Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, Vol. 52 (2003), p. 749-760.

### ***Duty to fulfil***

Duty to fulfil imposes on State obligations to facilitate, provide and promote access to rights. This is particularly the case when such access is limited or nonexistent. In these circumstances, the State is expected to be a proactive agent, capable of bringing about an increase in access to a range of ESC rights. Therefore, emphasis is placed on State action directed at: identifying problematic situations; providing relief; and creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights.

The duty to fulfil ESC rights includes an obligation to remove obstacles to the full enjoyment of ESC rights. It also requires the implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.<sup>161</sup>

Cases concerning the obligations to fulfil the provisions of ESC rights have involved access to the provision of services and assessing whether legislation and regulations that are necessary to provide services exist. Even if they do exist, they must satisfy standards of reasonableness, adequacy, equality and non-discrimination. Cases may involve: total or partial omissions; failure to meet substantive standards regarding the quality of services; failure to meet procedural standards for planning, implementing or monitoring services; insufficient allocation of resources; failure to implement statutory obligations; failure to regulate and<sup>162</sup> monitor private parties when public services are outsourced; or failure to provide services to eligible individuals.

Since duties to fulfil require positive action by the State, it is not surprising that most of the cases involving alleged breaches of these duties to fulfil concern State omissions. If an omission is identified, this tends to translate into a requirement to act (for example, requirements to legislate, to provide treatment or to put into place a policy).

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<sup>161</sup> International Commission of Jurists(ICJ)(2008), Courts and Legal Enforcement of Economic, Social and Cultural Rights: Switzerland, P.49

<sup>162</sup>International Commission of Jurists(ICJ)(2008) Ibid, P 49

The case of *The Government of the Republic of South Africa and others v. Irene Grootboom and others*<sup>163</sup> provides a good example of judicial scrutiny of compliance with duties to fulfil. In this case the South African Constitutional Court considered that the housing policy adopted by the government failed to take into account the situation of some of the most vulnerable groups of society, such as the group of squatters who were evicted in this case.

In the case of *Autism-Europe v. France*,<sup>164</sup> decided by the European Committee of Social Rights, the Committee found that measures undertaken by the Government of France to provide guidance, education and vocational training for persons, and especially children, with autism, were insufficient and failed to meet its duties under the Revised European Social Charter.

In *People's Union for Civil Liberties v. Union of India and others*<sup>165</sup>, the Supreme Court of India also identified duties on the State to fulfil ESC rights. During a famine in the State of Rajasthan many people died of starvation, even though the government kept grain reserves for emergencies. Through a number of interim measures, the Supreme Court found that the government had failed to implement schemes to prevent and combat famines, and ordered detailed urgent measures to resolve the situation,<sup>166</sup> where among them it required the Government to: implement the Famine Code for three months; double the grain allocation for the food for work scheme and to increase financial support for other food schemes; ensure that food ration providers stay open and provide the grain to families below the poverty line at the set price; to give publicity to the rights of poor families to grain; and grant all individuals without means of support a ration card for free grain; to progressively implement meal schemes in schools.<sup>167</sup>

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<sup>163</sup> The Government of the Republic of South Africa and others v. Irene Grootboom and others, 2001 (1) SA 46 (CC), October 4, 2000.

<sup>164</sup> European Committee of Social Rights, International Association Autism-Europe v. France, Complaint N° 1/2002, November 7, 2003.

<sup>165</sup> Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001

<sup>166</sup> People's Union for Civil Liberties v. Union of India and others, (Civil) No.196 of 2001

<sup>167</sup> Ibid Para 5 <http://www.escr-net.org/docs/i/401033>, Accessed on 13, June, 2012

### **2.4.1.3 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP ICESCR) 2008**

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is an international treaty establishing complaint and inquiry mechanisms for the International Covenant on Economic, Social and Cultural Rights. It was adopted by the UN General Assembly on 10 December 2008, and opened for signature on 24 September 2009. As at February 2013, the Protocol has 10 parties and 32 more signatories.

It entered into force on 5 May 2013. The OP-ICESCR provides victims of ESC rights violations who are not able to get an effective remedy in their domestic legal systems with an avenue to get redress. As such, OP corrects the longstanding imbalance in the protection of different human rights, which marginalised ESC rights. It is a legal text, which establishes stronger mechanism for accountability, generally including both individual complaints communication and an inquiry procedure, thus enabling the committee to investigate of its own volition.<sup>168</sup>

Under individual complaints mechanism, parties agree to recognise the competence of the Committee on Economic, Social and Cultural Rights (CESCR) to consider complaints from individuals or groups who claim their rights under the Covenant have been violated against their States to the CESCR.

It also allows them to seek redress for violations of ESC rights that generally go unnoticed at the national level.<sup>169</sup>

However, in order to exercising the rights of standing before the committee, these individuals must be coming from a state party to the OP-ICESCR

Furthermore, Complainants must have exhausted all domestic remedies before seeking redress from the Committee. Besides, anonymous complaints and complaints referring to events which occurred before the country concerned joined the Optional Protocol are not permitted.

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<sup>168</sup>OP-ICESCR, Article 1

<sup>169</sup> OP-ICESCR, Article 3

The Committee can request information from and make recommendations to a party. Parties may also opt to permit the Committee to hear complaints from other parties, rather than just individuals.

The Protocol also includes an inquiry procedure mechanism. Parties may opt out of this obligation on signature or ratification. This mechanism allows the Committee on ESCR to investigate, on the basis of reliable information received or on its own initiative, situations that appear to constitute a consistent pattern of gross/grave or systematic violations of economic, social and cultural rights within a State party.

Grave violations constitute severe abuses of one or more rights under the ICESCR.

In this regard, the Committee, considering the facts in a particular situation, is able to determine that an investigation into a grave violation should be undertaken ;Whereas the systematic violations refers to the scale or prevalence of violations, or to the existence of scheme or policy directing violations. Systematic violations of the ICESCR would refer to patterns of violations that may result from actions or inactions by the State.

The inquiry procedure mechanism, in addition allows the Committee to respond in a timely mode to serious violations taking place within a State party to the ICESCR instead of waiting until the next State report is due to be submitted. In addition, the inquiry procedure offers a means to adequately address systematic or widespread violations of economic, social and cultural rights in cases where individual complaints are not adequate to reflect the extent of the situation.

It also addresses situations where individuals or groups are unable to submit communications due to practical constraints of fear or reprisals.<sup>170</sup>

#### **2.4.1.4 Committee on Economic Social and Cultural Rights (CESCR)**

The Committee on Economic, Social and Cultural Rights is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.<sup>171</sup>

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<sup>170</sup> OP-ICESCR, Article 11

<sup>171</sup> <http://www2.ohchr.org/english/law/cescr/.htm>

The Committee was established under Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council in Part IV of the Covenant.<sup>172</sup>

All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of acceding the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations.

The Committee also serves the function of interpreting the rights contained in ICESCR. They give the interpretation in what are known as General Comments. The Comments adopted include: Article 2 – the nature of the obligations of the States parties,<sup>173</sup> article 11(1) - the right to adequate housing,<sup>174</sup> Article 11 - right to adequate food,<sup>175</sup> Article 13 - the right to education<sup>176</sup> and Article 12 -right to health.<sup>177</sup>

The Committee meets in Geneva and normally holds two sessions per year, consisting of a three-week plenary and a one week pre-sessional working group. The Committee also publishes its interpretation of the provisions of the Covenant, known as general comments.<sup>178</sup>

Moreover, as of 2013 after the Optional Protocol discussed above came into force, the Committee now also has the power to receive individual complaints from individuals and organisations from countries who are parties to the Optional Protocol.<sup>179</sup>

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<sup>172</sup> <http://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1985-17.doc>

<sup>173</sup> General Comment No. 3 (Fifth session, 1990) UN doc.E/1991/23.

<sup>174</sup> General Comment No. 4 (Sixth session, 1991) UN doc E/1992/23.

<sup>175</sup> General Comment No. 12 (Twentieth session, 1999) UN doc. E/2000/22

<sup>176</sup> General Comment No. 13 (Twenty-first session, 1999) UN doc. E/2000/22

<sup>177</sup> General Comment No. 14 (Twenty-second session, 2000) UN doc. E/C.12/2000/4.

<sup>178</sup> <http://www2.ohchr.org/english/bodies/cescr/sessions.htm>

<sup>179</sup> OP-ICESCR, Article 1(2)

#### **2.4.1.5 Other Universal Instruments which protect social economic rights**

Despite the ICESCR, social economic rights are protected by other International Instruments which include: the Convention on the Rights of the Child (CRC),<sup>180</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>181</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>182</sup> and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPMWF).<sup>183</sup>

#### **2.4.2 The Regional level**

##### **2.4.2.1 The African Charter on Human and Peoples' Rights (The Charter)**

At the regional level the most important instrument protecting human rights, including economic, social and cultural rights, is the Charter. The Charter does not draw a distinction between civil and political rights, and economic, social and cultural rights, and treats them as interrelated, interdependent and indivisible.<sup>184</sup>

The Charter incorporates a wide range of economic, social and cultural rights. These include: the right to property;<sup>185</sup> right to work under favourable conditions and equal pay for equal work;<sup>186</sup> right to health;<sup>187</sup> right to education;<sup>188</sup> family rights;<sup>189</sup> and the right to self determination<sup>190</sup>.

As a monitoring body the Charter establishes the Commission on Human and Peoples' Rights.<sup>191</sup> The Commission's broad mandate is to promote human and peoples' rights under the Charter. In the exercise of this mandate the Commission has powers to receive and adjudicate over state and individual communications.<sup>192</sup>

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<sup>180</sup> Articles 4,17,23,24,25,27,28,29(1)(c),31,32,39 of Convention of the Right of the Child (CRC)

<sup>181</sup>Rights to education Article 10,employment Article 11,health Article 12,economic and social benefits Article 13

<sup>182</sup> Article 5(e)(i-f) of CERD

<sup>183</sup> Articles 12(4),22(9), 25,26,27,28,29, 30,31,32,33,35,36,37,40,43,45,46,47,49,50,51,52,53,54and 56 of CPMWF

<sup>184</sup> Preamble Para 8 African Charter

<sup>185</sup> Article 14.

<sup>186</sup> Article 15.

<sup>187</sup> Article 16

<sup>188</sup> Article 17

<sup>189</sup> Article 18

<sup>190</sup> Article 20

<sup>191</sup> Article 30

<sup>192</sup> Article 47

However, the African Commission on Human and Peoples' Rights (the Commission), the body charged with monitoring the implementation of the African Charter, has been described as 'the missing link' in the enforcement of economic, social and cultural rights. This has been because of the Commission's lack of sufficient resources, absence of an effective enforcement mechanism, confidentiality of its proceedings and the lack of political will to strengthen it.

However its decision in **Social and Economic Rights Action Centre & another v Nigeria (SERAC case)**<sup>193</sup> establishes strong precedent for the enforcement of socio-economic rights within the international community.<sup>194</sup>

The decision demonstrates how international instruments can be more creatively interpreted in order to further break down the barriers between the different categories of rights and obstacles of holding the state responsible for the violations of human rights by actors other than the state.<sup>195</sup>

Moreover, the decision of the African Commission on Human and Peoples Rights on **Purohit and Moore V. Gambia**<sup>196</sup> added weight on the realization of social economic rights under the principal of progressive realization; when the Commission give further realization of social economic rights after considering the article 16 of the Charter which provides that:

(1)Every individual shall have the right to enjoy the best attainable state of physical and mental health.

(2)State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

It was stated under paragraph 84 of this case that:

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<sup>193</sup> (2001) AHRLR 60 (ACHPR 2001)

<sup>194</sup> Chirwa, M(2002)3(2) *ESR Review* 19 5..

<sup>195</sup> Oloka-Onyango J 'Reinforcing marginalized rights in the age of globalization: International mechanisms, non state actors and the struggle for peoples' rights in Africa' (2003) *American University International Law Review*, 852.

<sup>196</sup> Purohit and Moore v. The Gambia, Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII

The African Commission is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

Therefore, the relevance of the Purohita decision is that it introduces the concept of progressive realisation at the African level. The Charter was silent on the aspect and hence it was presumed that social, economic and cultural rights are also immediately realisable like civil and political rights at the African level.

### **2.4.3 The Domestic Level**

#### **2.4.3.1 The Constitution of United Republic of Tanzania, 1977**

##### **2.4.3.2 Place of the ESCR in the Constitution**

In the Constitution of United Republic of Tanzania; very few social economic rights are incorporated; it include a right to work,<sup>197</sup> a right to just remuneration,<sup>198</sup> and a right to own property.<sup>199</sup> There are also other few social economic rights which are included in part II of the Constitution which is of fundamental objectives and directive principles of state policy; these are right to work, to education and other pursuit.<sup>200</sup> However, the part of the Constitution which provides for the Fundamental Objectives and Directive Principles of State Policy is unenforceable and therefore the socio economic rights which are located in this part cannot automatically be forced by any court.<sup>201</sup>

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<sup>197</sup> Article 22

<sup>198</sup> Article 23

<sup>199</sup> Article 24

<sup>200</sup> Article 11

<sup>201</sup> Article 7 Constitution of United Republic of Tanzania of 1977

#### **2.4.3.3 Basic Rights and Duties Enforcement Act (BRDEA), 1994**

This is the Act of Parliament enacted for the purpose of giving procedures in the human rights. Therefore this legislation covers all suits and causes of action which concerning the provisions of Bill of Rights i.e. Articles 12 to 29 of the Constitution of United Republic of Tanzania.<sup>202</sup> The original jurisdiction in cases relating to fundamental rights and duties is provided to the High Court.

According to section 4 of this Act, if any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

Furthermore this Act provides procedure in the Court, which is argued to be controversial in the enforcement of human rights in Tanzania; this procedure is under section 10<sup>203</sup> which requires that for the purpose of hearing any petition made the Act, The High Court should be composed by THREE JUDGES, with exception of determination of whether an application is frivolous, vexatious or otherwise fit for hearing which will be done by a single judge.

Moreover, every question in a petition before the Court should be determined according to the opinion of the majority of the judges hearing the petition.<sup>204</sup>

#### **2.4.3.4 Commission for Human Rights and Good Governance Act (CHRGG)**

The CHRGG Act,<sup>205</sup> enacted on 2001 following Article 130 of the Constitution<sup>206</sup> to establish the Commission for Human Rights and Good Governance.

The CHRGG plays the dual role of an ombudsman and a human rights commission for the protection and promotion of human rights as well as good governance.

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<sup>202</sup> Section 1(2) BRDEA 1994

<sup>203</sup> BRDEA, 1994

<sup>204</sup> Section 10(2) BRDEA

<sup>205</sup> Act No. 7 of 2001

<sup>206</sup> Constitution of United Republic of Tanzania 1977

The functions of the Commission are provided for under Article 6(1) (a-o)<sup>207</sup> which includes: Promoting within the country, protection and the preservation of human rights and of duties to the society in accordance to the Constitution and the laws of the land. To receive allegations, and complaints related to the violation of human rights generally; to conduct research into human rights, when necessary, to institute proceedings in Court designed to terminate activities involving the violation of human rights or redress the right or rights so violated.

However, the decisions of the Commission have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.

#### **2.4.3.5 Protection of ESC Rights under Tanzania National Legislations**

In Tanzania, there are several Acts of parliament making elaborative provisions in relation to ESC rights, articulated as individual rights and supported by availability of remedies. However, there are very few legislations of such kind as ESC rights are concerned and if they are available, can be in the weakness of relaying in class restrictions for instance workers, or lacking publicity even when intended for unrestricted benefit. For example, Workers' and Farmers' Housing Development Fund<sup>208</sup> and The Customary Laws Declaration Orders of 1963.<sup>209</sup>

Generally, the elements of ESC rights can be garnered from several statutes, including; Land Act, 1999<sup>210</sup> and Land (Amendments) Act, 2004. The Act provides for the basic law in relation to land, the management of land, settlement of disputes and related matters. The Employment and Labour Relation Act 2004,<sup>211</sup> an act to make provisions for core labour rights, to establish basic employment standards, to provide a frame work for collective bargaining, prevention and settlement disputes.

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<sup>207</sup> Act No. 7 of 2001

<sup>208</sup> Act No.20 of 1974.

<sup>209</sup> Supra no. 52 above. This law desciminate women from right to own property.

<sup>210</sup> Act No.4 of 1999

<sup>211</sup> Act No.6 of 2004

The Courts (Land Disputes Settlement) Act, 2002;<sup>212</sup> An Act to provide for the establishment of land dispute settlement machinery and for matters incidental thereto. The Occupation Health and Safety Act, 2003;<sup>213</sup> The Labour Institute Act, 2004;<sup>214</sup> and The Worker Compensations Act, 2008.<sup>215</sup> Education Act, 1978<sup>216</sup> and The Public Health Act, 2009.<sup>217</sup>

#### **2.4.3.6 The status of Tanzania in realization of social economic Rights**

#### **2.4.3.7 Ratification of Human Rights Treaties**

Tanzania became a member of the United Nations in 1961, thus becoming part of the human rights system established by the Universal Declaration of Human Rights (UDHR). Since then Tanzania has signed and ratified a number of international UN treaties, including those which protect and promote social economic rights.

However, with respect to domestication of international human rights instruments, Tanzania has adopted a dualist legal system, which requires the incorporation of international obligations into domestic legal system through the adoption of national legislations. Therefore, international rules are not directly applicable in the courts of law and require a further commitment from the State Authorities by the adoption of municipal laws.<sup>218</sup>

The following are International Instruments which support social economic rights which ratified by Tanzania

International Covenant on Economic Social and Cultural Rights (ICESCR) - (ratified on 1976), African Charter on Human and Peoples' Rights (The Charter) - (ratified on 1984), Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) - (ratified on 1985), the Convention on Rights of the Child (CRC) (ratified on 1991), the Convention on the Rights of Persons with Disabilities (CRPD) (ratified on 2009).

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<sup>212</sup> Act No.2 of 2002

<sup>213</sup> Act No.5 of 2003

<sup>214</sup> Act No 7 of 2004

<sup>215</sup> Act No.20 of 2008

<sup>216</sup> Act No.25 of 1978

<sup>217</sup> Act No.1 of 2009

<sup>218</sup> Prof.VijayGhormade: General Principles of Constitutional Law, class notes, 2011

## **2.5 Conclusion**

This chapter explored the Conceptual and Legal Framework of ESCR. In the conceptual frame work, the concept of constitution and enforcement of social economic rights was discussed to show its applicability as the main law in the domestic legal system which can guarantee enjoyment of social economic rights.

In the part of Legal framework, an aspect of Domestic application of International Human Rights law was discussed.

An overview to the protection of social economic right in the International level to include the universal declaration of human Rights, International Covenant on Economic Social and cultural Rights, The African Charter on Human and Peoples' Rights and the constitution of united Republic of Tanzania, Regional level and domestic level was also emphasized. The Content of social economic rights in the ICESCR, and its monitoring mechanisms, the OP-ICESCR and Committee on ICESCR were emphasized as well

## CHAPTER THREE

### CONTEMPORARY ISSUES ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

#### 3.1 Introduction

One of the very authentic difficulties associated with the implementation of any right, but especially with the implementation of the economic, social and cultural rights, in any domestic constitution relates to the exactness with which such rights can be defined.<sup>219</sup> One cannot implement rights if there is uncertainty about the scope and content of such rights. Indeed if, such a right is unclear it would entail no realization; and therefore there would be no obligations engendered by these rights, and hence there will be no acts or omissions by the state or other role players would constitute infringements of these rights.<sup>220</sup>

#### 3.2 An Analysis to the Inclusion of Social Economic rights in Tanzania Constitution

Since independence 1961, Tanzania did not include social economic rights in its Constitution, except for the only three rights<sup>221</sup> which were included in the fifth constitutional amendment of 1984<sup>222</sup> when the Bill of Rights was entrenched in the Constitution of Tanzania.

Different scholars since then suggested an aspect of non inclusion of social economic rights in the Constitution of Tanzania for different reasons; one being that lack of resources.<sup>223</sup> It was suggested that it is important to make a broad distinction between the subject matter of a part on Directive principles of state policy on the one hand and, and a part on individual human rights on the other.<sup>224</sup>

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<sup>219</sup> [www.en.wikipedia.org/wiki/Human\\_rights](http://www.en.wikipedia.org/wiki/Human_rights), Accessed on 12 march 2011

<sup>220</sup> Parra, J. C, *The human Rights Based Approach, A Field of Action for Human Rights Education:* Geneva, [www.ciel.org/Publications/HR\\_Approach\\_Climate\\_2012](http://www.ciel.org/Publications/HR_Approach_Climate_2012) Accessed on May, 2012

<sup>221</sup> Right to work-Article 22, Right to just remuneration-Article 23, and Right to own property-Article 24

<sup>222</sup> The Tanzania Constitution (Fifth Amendment) Act, No.15 of 1984

<sup>223</sup>Chenge, A. J., "The Government and Fundamental rights and Freedoms in Tanzania" in Peter C, M., and I. H Juma (eds) *Fundamental Rights and Freedom in Tanzania*, Dar es salaam:Mkuki na Nyota Publishers

<sup>224</sup> Ibid,Chenge, A,J

The practice of state in modern constitution has been to include in the former those provisions of the universal declaration of human rights which subsequently were elaborated in the international covenant of economic social and Cultural rights whose implementation depends on state's economic capacity to provide them.<sup>225</sup> The Constitution of Tanzania makes it clear in the most explicit terms that, so far as the social policies referred in part II are concerned, they too are dependent on the economic capacity of the state to provide them.<sup>226</sup> It must follow therefore as a matter of common sense that rights set out in part II of chapter one of the Tanzania Constitution cannot be justiciable in a court of law.

Non inclusion of social economic rights in the constitution is the main challenge for the legal enforcement of the same, since individuals cannot go to court to claim for them, as they are not recognized by law.<sup>227</sup>

However in 1976 Tanzania ratified the ICESCR which gives obligations to state parties reflecting duties to respect, protect, promote and to fulfil each right contained in the Covenant.<sup>228</sup>

### **3.3 The importance of Constitutional entrenchment of social economic rights**

Although human rights have become internationalized, accessible and effective municipal remedies remain the primary means of protecting social and economic rights.<sup>229</sup> At the municipal level, constitutional entrenchment offers the best protection of human rights especially in countries that have constitutional supremacy combined with judicial review. As the UN Committee on Economic, Social and Cultural rights has stated, judicial remedies are important because other "appropriate means" referred to in article 2(1) of the ICESCR could be rendered ineffective if they are not reinforced or complimented by judicial remedies.<sup>230</sup>

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<sup>225</sup> Nola, *The Justice Review, Twenty Years of the Justiciability of the Bill of Rights in Tanzania*, Vol 7, No. 1, P50

<sup>226</sup> Article 11(1)

<sup>227</sup> Nola, *Loc cit* P 83

<sup>228</sup> Article 2(1) ICESCR

<sup>229</sup> Liebenberg, S "The domestic protection of economic and social rights in domestic legal systems" in A Aide *et al* (Eds) *Economic, Social and Cultural Rights*, 2nd Ed, (2001) 55, 57.

<sup>230</sup> General Comment No 9 (Nineteenth session, 1998) "The domestic application of the Covenant" UN Doc E/1999/22 117-121 Para 3.

Direct entrenchment takes the form of the inclusion of economic, social and cultural rights as justiciable rights in a bill of rights. This provides the best forum of protection because it enables individuals or groups to seek redress from courts for violations of their rights easily without having to rely on judicial activism, as is the case with indirect protection.<sup>231</sup> Thus, direct protection challenges the traditional liberal conception that a bill of rights is a shield from arbitrary interference in individual liberties by the state and underscores the fact that economic, social and cultural rights also impose negative duties and that the meeting of social needs through the imposition of positive obligations on the state is an equally fundamental value in a constitution.<sup>232</sup>

### **3.4 Indirect ways of enforcing Social Economic Rights**

#### **3.4.1 The Use of Directive Principles of State Policy to Enforce Social Economic Rights**

The use of directive principles of state policy provides one example of indirect protection.<sup>233</sup> Expressly declared as non-enforceable, these principles constitute a set of social and economic objectives to guide the government in applying laws. Nevertheless, the Supreme Court of India has held that these principles are essential in interpreting the content of fundamental rights. Thus, the right to life, the Indian Courts have concluded, includes the right to a livelihood, the basic necessities of life such as adequate nutrition, clothing, reading facilities and the rights to shelter, health and education.<sup>234</sup>

Tanzania is one of such African countries, where the few included of socio-economic rights are contained in the unenforceable part of the Constitution.

However, this approach of constitutionalising and enforcing socio-economic rights only defeats the purpose and spirit of protection and promotion of human rights at

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<sup>231</sup>DM Chirwa - 1976 The Impact of the International Covenant on Economic, Social and Cultural rights [www.communitylawcentre.org.za/.../Socioeconomic\\_rights\\_in\\_Africa.p](http://www.communitylawcentre.org.za/.../Socioeconomic_rights_in_Africa.p) 7

<sup>232</sup> Liebenberg, S., Loc cit P. 57-58

<sup>233</sup> Chirwa, D. M., Loc cit P 8

<sup>234</sup> Tellis & Another v Bombay Municipal Corporation and others (1987) LRC (Const) 351; Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 516; Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others (1997) AIR SC 152; Paschim Banga Khet Mazdoor Samity v State of West Bengal (1996) AIR SC 2426; Jain v State of Karnataka (1992) 3 SCC 666; Krishnan v State of Andhra Pradesh & Another (1993) 4 LRC 234.

domestic level. The starting point for any meaningful evaluation of the protection and realisation of human rights should be gauged in the well established principle that, human rights are birthrights. They inhere in a human being by virtue of being a human being. As Article 20(1) of the Ugandan Constitution provides, ‘fundamental rights and freedoms of the individual are inherent and not granted by the state.’ Thus, the inclusion of basic rights and fundamental freedoms in a Constitution is a mere appreciation of the same.<sup>235</sup> As the late Justice Lugakingira observed in the case of *Rev. Christopher Mtikila v. A.G.*,<sup>236</sup>

### **3.4.2 Protection of social economic rights through interpretation of civil and political rights<sup>237</sup>**

The use of Civil and political rights is another way of enforcing social economic rights, in a Constitution which does not expressly protect a set of social economic rights

In Tanzania litigants to the violation of social economic rights can use a right to equality or the Equality Clause, which is one of the civil and political rights to have judicial effect. Under Tanzania Bill of Rights, the Equality Clause is contained in Article 12 which is buttressed by the non discrimination provisions<sup>238</sup> in Article13; therefore the litigants in Tanzania can still litigates in courts of law issues pertaining to social economic rights through the equality clause, notwithstanding the provisions of Article 7(2) of the Constitution which try to oust the jurisdiction of courts to determine anything in part II of chapter one of the Constitution. For example in *A.G v Lohay Akonaay and Another*,<sup>239</sup> the Court of Appeal discuss the importance of Article 13 of the constitution, and held that: that since our constitution is democratic; any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional.

In that case, the respondents, father and son had acquired land rights under customary law recognised as deemed rights of occupancy under section 2 of the Land

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<sup>235</sup> MASHAMBA, C.J. The Law Reform Commission Journal, (2009) “The use of Fundamental objectives and directive principles of state policy to protect social Economic rights P. 82

<sup>236</sup> [1995] TLR 31.

<sup>237</sup> Ibid, P. 71-74

<sup>238</sup> The non discrimination clauses was discussed in *Julius I.F Ndyanabo v. A.G*

<sup>239</sup> [1995]TLR 80(CA)

Ordinance,<sup>240</sup> over 20 acres in Mbulu District, Arusha region which they had cleared in 1943. They occupied and used the land until they were dispossessed during “*Operesheni Vijiji*” under the Villages and Ujamaa villages Act, 1975. They successfully sued for recovery of that land and regained possession of it in 1990 under a Court decree. An appeal against that judgment was still pending in the High Court when the Regulation of Land Tenure (established Village) Act, 1992 was passed. The effect of this Act was to extinguish customary rights in land acquired before “*Operesheni Vijiji*” in an established village to prohibit the right to compensation for such extinction, to oust the jurisdiction of the Courts, to terminate relevant court proceedings and to prohibit the enforcement of any relevant court decision. Proceedings under the 1992 Act were to be instituted only in local land Tribunals.

The respondents then petitioned the High Court alleging breaches of their fundamental rights and obtained a declaration from the High Court that the 1992 Act was invalid for inconsistency with the Constitution in that its provisions violated the petitioners right of equality before the law, of freedom from deprivation of property without fair compensation, and of access to the Court to protect their rights, the HC ordered the offending Act to be struck out of the Statute books.

The A.G appealed to the Court of Appeal on the ground these holdings were erroneous, that customary land rights were not forms of property protected by the Constitution and that although certain sections of the 1992 Act violated the constitution the whole Act should not be invalidated on that ground alone. However the Court of Appeal found the 1992 Act, *inter alia*, unconstitutional for violating the equality clause as enshrined in Articles 12 and 13(1) to (5) of the Tanzania Constitution.

### **3.5 The Legal Justiciability of Social Economic Rights**

While it is not uncommon for there to be some constitutional recognition of economic, social and cultural rights, it is rare for them to be endowed with the same mechanisms for review or enforcement as civil and political rights.

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<sup>240</sup> Cap 113 of the revised Laws of Tanzania mainland

In the main, they have tended to be regarded as non justiciable or policy oriented rights,<sup>241</sup> unsuited to judicial enforcement in any form. Such an approach tends to overplay the characteristic differences between the two categories of rights and ignores the multifaceted nature of rights that embody a range of different types of claims. For this reason the trend in recent years has been to accept the possibility of judicial enforcement of such rights, but to confine it to areas that do not pre-empt entirely governmental decision making.<sup>242</sup>

Something is justiciable if it is capable of being brought within the legal framework with the possibility of being invoked by an individual or a group as a cause of action before the courts leading to possible measures of enforcement or the provision of remedies.<sup>243</sup> The question of whether ESC rights are justiciable has historically been one of the least clearly understood and most hotly debated issues in the literature of ESC rights.<sup>244</sup> Most courts around the world have been reluctant to make rulings on ESC rights. They have generally deferred to the policymakers and politicians, hesitant to “step on the toes”<sup>245</sup> of those they believe to be the rightful decision-makers in these matters. They have refused to explore the legal terrain of ESC rights, in which there are few precedents.<sup>246</sup>

However, the enjoyment of human rights will depend primarily on the state’s domestic conduct. “It should be kept in mind that only effective domestic protection can ensure the observance of internationally recognized rights.”<sup>247</sup> Domestic protection cannot be assured without the judiciary, which is the ultimate guarantor of rights.

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<sup>241</sup> Circle of Rights, Economic Social and Cultural Rights Activism: A Training Resource, Strategies for Enforcing ESC rights through domestic legal systems, Module 22,Section 7; Para 4 <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm> Accessed on 20 February,2012

<sup>242</sup> Ibid, Para 4

<sup>243</sup> Ibid para9

<sup>244</sup> Ibid Para 10

<sup>245</sup> Ibid Para 10

<sup>246</sup> Ibid Para10

<sup>247</sup> Circle of Rights, Economic Social and Cultural Rights Activism: A Training Resource, Strategies for Enforcing ESC rights through domestic legal systems, Module 22,Section 7; Para 4 <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm> Accessed on 20 February,2012, Para11

Therefore, a key task facing activists is to ensure the enforcement of human rights treaties by domestic courts. In this regard, the challenge at this turn of the century is the national incorporation of universal rights, as the only way to enforce them domestically.<sup>248</sup> The effective protection of ESC rights thus requires that the necessary mechanisms be put in place or adapted to carry out the obligations signed by the states.<sup>249</sup>

Ultimately, it is the state's obligation to ensure the judicial protection of internationally protected ESC rights.<sup>250</sup>

International law is indifferent as to whether that obligation is carried out administratively, judicially, or legislatively.<sup>251</sup> Nonetheless, in the face of non-performance, whether total or partial, it is the justice system that should set in motion the machinery to guarantee the enjoyment of the right, both because under domestic law the Judiciary is the ultimate guarantor of persons' rights, and because it is the judiciary that has responsibility for incorporating the international rules to the domestic legal system.<sup>252</sup>

Moreover, it is now generally established that ESC rights, like civil and political rights, are justiciable.<sup>253</sup> The states parties to international human rights treaties that recognize ESC rights have adopted specific and enforceable obligations that arise principally from the ICESCR and the General Comments adopted by its implementing body.<sup>254</sup>

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<sup>248</sup> Ibid, Circle of Rights, Para10

<sup>249</sup> Ibid, Circle of Rights, Para 10

<sup>250</sup> Ibid,Circle of Rights, Para 11

<sup>251</sup> Ibid, Circle of Rights Para12

<sup>252</sup> Ibid, Circle of Rights, Para 12

<sup>253</sup> Ibid Para13; Also CESCR General Comment 9

<sup>254</sup> Ibid, CESCR Para 13

### **3.6 Conclusion**

This chapter has explored the Contemporary issues on the Economic Social and Cultural rights, where it looked on the an analysis on the inclusion of social economic rights in the constitution of Tanzania, It also stressed on the indirect ways of enforcing social economic right such as the use of Directive Principles of state Policy and also the use of Civil and political rights to enforce social economic rights in Tanzania. The chapter also give emphasis on the importance of inclusion of social economic rights in the country constitution which being the direct justiciability of the rights.

Moreover this the legal justiciability of social economic rights is also emphasized in this chapter to show that the ultimate protection of these rights depends so much in the incorporation of the rights in the domestic constitution.

From this analysis, the way is given to the succeeding chapter to look into challenges to the justiciability of social economic rights in Tanzania.

## CHAPTER FOUR

### CHALLENGES TO THE JUSTICIABILITY OF SOCIAL ECONOMIC RIGHTS IN TANZANIA

#### 4.1 Introduction

Generally in domestic law and municipal institutions such as courts, tribunals and human rights commissions, enforcement of international law is much easier, this is due to their approachability. For realizing this, the CESCR in its general comments provides that, state obligations under the covenant must be reflected in the contents of domestic law<sup>255</sup> for ESC rights to be effectively protected. Also as a general rule of requirement of the exhaustion domestic remedies, reinforce the primacy of national in this respect; as it was ones argued that “*The international order is still a community of states. Human rights and freedoms are primarily realized through the state. Individual can effectively enjoy human rights only when the state provides its citizen with appropriate remedies*”.<sup>256</sup>

This chapter discusses Challenges to the justiciability of social economic rights in Tanzania which includes the inadequate provisions of economic social and cultural rights in the Constitution of Tanzania 1977, challenges to judicial enforcement of social economic rights, the doctrine of separation of power, challenges in the enforcement of ESCR in CHRGG.

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<sup>255</sup> CESCR, General Comments 9: The Domestic Application of the Covenant, UN Doc E/C.12/1998/124 (1998); Also, Mnisuli S., (2009) *Economic, Social and Cultural Rights in International Law*, Hart Publisher, p.149.

<sup>256</sup> Roman Wieruszewski, (1990) *National Implementation of Human Rights Human rights in a changing East/West perspective*. P.264

#### **4.1.1 The Inadequate provision of social economic rights in the Constitution of United Republic of Tanzania 1977**

#### **4.1.2 Social economic rights provided in the Constitution**

##### **The Right to Work**

In Tanzania's Constitution there is right to work<sup>257</sup> There is, neither specific provision as to safe and healthy working conditions<sup>258</sup> nor right to form and join in trade union, Instead in the Constitution the rights to form trade union are traced within person's freedom of association, as 'no one shall be compelled to join any association,<sup>259</sup> and under provisions of the Employment and Labour Relations Acts of 2004.<sup>260</sup> Furthermore, unlike Tanzania's Constitution, the ICESCR provides not only for the right to seek employment freely, but also imposes specific obligation on the state to work towards achieving that right. This includes, having in place technical and vocational guidance and training programmes, policies and techniques.<sup>261</sup>

##### **The Right to Just Remuneration**

The Constitution of Tanzania<sup>262</sup> provides that every person, without discrimination of any kind, is entitled to remuneration commensurate with his or her work, and all persons working according to their ability shall be remunerated according to the measure and nature of the work done.

Furthermore, the Regulation of Wages and Terms of Employment Order of 2010 provides that the minimum wage payable to the employee shall be at the rate applicable to particular sector. However there are no obligations imposed in the Constitution on the state towards achieving this right.

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<sup>257</sup> Article 22 of the Constitution of united Republic of Tanzania 1977

<sup>258</sup> Article 7 of ICESCR

<sup>259</sup> Article 20(4) of the Constitution of United Republic of Tanzania 1977

<sup>260</sup> Section 3 (f) which says that this law shall give effect to the provision of the Constitution of Tanzania. Under this law one of the requirements for the registration of the trade union is that it must be established at a meeting of at least 20 employees -section 46-. This is unnecessary restriction because some of the working places have less than those required 20 employees, this limit the enjoyment of the intended rights.

<sup>261</sup> Article 6 of ICESCR.

<sup>262</sup> Article 24

### **Right to Own Property**

Right to own property<sup>263</sup> includes, right to protection of the property, fair and adequate compensation in case of dispossession. Here, property right relates to land. However, the right to own property is still inhibited in some ways by presence of some of the provisions of the laws of Tanzania. Despite repeated calls of civil rights' groups to the government; The Customary Laws Declaration Orders of 1963<sup>264</sup> that prohibits women from owning properties remained un-amended.<sup>265</sup>

In 2006, two widows from Shinyanga region with the assistance of WLAC unsuccessfully challenged this in Court.<sup>266</sup> They were challenging the customary law because it discriminates against women and violates the country's Constitution.<sup>267</sup> In Tanzania, under Customary Law, women are restricted to inherit property from their husbands. Only sons, uncles and other male relatives are given preference over women in matters of inheritance. Additionally, women are restricted from disposing of clan land. In this case, women were restricted in where they may live and how they choose to live their lives. This is contrary to Tanzania's obligation to the international human rights instruments.<sup>268</sup>

#### **4.1.2 Consequences of Inadequate Provisions of ESCR in the constitution of Tanzania**

Non incorporation of bulk provisions of social economic rights led to the non realization of these rights in the Domestic constitution, non justiciability of the rights in the Judiciary, non enjoyment of the rights to the individuals. In general the non inclusion of social economic rights in the constitution causes a lot of sufferings to the individuals in Tanzania as here under discussed:

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<sup>263</sup> Article 24 of the Constitution of United Republic of Tanzania 1977

<sup>264</sup> G.N 276 of 1963.

<sup>265</sup> LHRC, Tanzania Human rights Report 2009, P.76. Available at <http://www.humanrights.or.tz/> Accessed 20 November 2011

<sup>266</sup> Elizabeth Stephen and another V. The Attorney General, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 82 of 2005.

<sup>267</sup> Article 13(2) of the URT Constitution, bars discrimination

<sup>268</sup> For example Article 2(f) and (g) of the CEDAW

#### **4.1.3 Right to Health Services**

The right to health is crucial because it is part of the right to life. However, the Constitution of the United Republic of Tanzania of 1977 does not recognize such right as one of the fundamental rights. This is contrary to ICESCR, which recognizes it and directs state parties to ensure availability of physical and mental health to their people, adequate health and medical care for all.<sup>269</sup> Lack of this right in the constitution causes the enjoyment of the right to health to be a puzzle to the majority of Tanzanians. For instance, the high maternal and child mortality deaths are associated with the lack of facilities and skilled human resource. Recently, it is only 40 percent of HIV positive women, who have access and receive nevirapine prophylaxis or start on Ant-Retroviral Treatment (ARV) in 2008/09.<sup>270</sup>

#### **4.1.4 Right to Education**

According to ICESCR, right to Education is one of the basic rights for everyone.<sup>271</sup>

The right to education assists in fighting and protecting one's rights as it gives people ability to be aware of their rights.<sup>272</sup> It is unfortunate that the URT Constitution does not include the same in its Bill of Rights.

Instead, it is under fundamental principle of state policy,<sup>273</sup> which is non-justiciable part of the constitution. Therefore, it cannot be justiciable under the Enforcement of Basic Rights and Duties Act, 1994.<sup>274</sup>

#### **4.1.5 Right to Food, Clothing and Housing**

Under the Tanzania's Bill of Rights, right to adequate standard of living including adequate food, clothing and housing are not guaranteed. This is contrary to ICESCR,<sup>275</sup> which recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Instead, it is

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<sup>269</sup> Article 12 of ICESCR

<sup>270</sup> The Millennium Development Goals report 2009 Tanzania at 47

<sup>271</sup> Article 13 of ICESCR

<sup>272</sup> Nyerere, J. K. , (1968) Freedom and Development,P

<sup>273</sup> Article 11 of the constitution of United Republic of Tanzania which provides for Right to work, to educational and other pursuits

<sup>274</sup> This 1994 legislation enforces the rights, which have only been mentioned in the Bills of Rights and Duties, which are Articles 12 to 29 of the Constitution of Tanzania.

<sup>275</sup> Article 11 of the ICESCR

provided under fundamental objectives and directive principles of state policy. The state policy provides that the State authority shall make appropriate provisions to ensure that every person earns his livelihood.<sup>276</sup> Apart from being non-justiciable, the provision is too general compared to that of ICESCR. The absence of housing right in the Constitution leads to difficulties in justiciability of the same before courts. Hence, majority of Tanzanians find themselves in the pond of poverty following evictions from their land and destruction of their houses in the process.

Moreover, as pointed up above, failure to incorporate some of the ESC rights in the enforceable part of the Tanzania Constitution, the Government of Tanzania has limited the chances of litigants to directly access judicial remedy in case of violation of any of these rights; as it is elaborated in the Committee's General Comments that If ESC rights claims are placed beyond the reach of the courts, the Committee noted, this would 'drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged group of society.'<sup>277</sup>

Moreover, nonetheless that, even where some of the ESC rights are not incorporated into Tanzania domestic law, the courts must assume that the domestic law is in accord with the ICESCR and with the requirement of effective remedies.

The courts must therefore actively strive to achieve interpretations of domestic law and exercise decision-making in a manner, which conforms, to the recognitions of ESC rights as fundamental rights rather than policy objectives, that is, as rights, which gives rise to effective remedies.<sup>278</sup>

## **4.2 Challenges to Judicial enforcement**

### **4.2.1 The Jurisdiction of the Court**

The judicial arm of the states exercises judicial power that is dispensing justice. An individual who feels wrong or aggravated can resort to the body. In order to have

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<sup>276</sup> Article 11 of the ICESCR

<sup>277</sup> CESCR, GC No.9

<sup>278</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9, *The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, <http://www.refworld.org/docid/47a7079d6.html>, Accessed on 15<sup>th</sup> July, 2012

legitimacy, the judicial organ must be able to carry their functions without fear or favours, impartiality, and should be seen to be impartial. It is for these reasons, the Democratic Constitution of Tanzania provide for an independence of judiciary, under its 13th Amendment of the Union Constitution passed in 2000.<sup>279</sup>

An independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights.<sup>280</sup> That is to say, ESC rights should be granted judicial or quasi-judicial protection which is effective and capable of attaining efficient remedy.

However, there is a question of justiciability of ESC rights in Tanzania courts of law, even after establishment of proper mechanisms for implementation of bill of rights in 1994, following enactment of Basic Rights and Duties Enforcement Act,<sup>281</sup> which empowers High Court<sup>282</sup> to enforce human rights. That, allows any person who alleges contravention, of the basic rights provided under Article 12 to 29 of the Constitution to bring his or her complaint to the High Court for redress

#### **4.2.2 Judges' capability to give effect to social economic rights claims**

For social economic rights litigation to succeed in court it is not sufficient only that the judges are responsive in the sense that they accept the case but they must also be capable of giving the claims legal effect; and in this effect the legal effect is judge's ability to handle social economic rights issues.<sup>283</sup>

In Tanzania, legal system it is noted that, many of decision makers such as judges, perhaps unreflectively and they don't have sensitisation to social economic rights issues, on a routine basis. Most of them are unlikely to be capable about ESC rights.

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<sup>279</sup> The URT Constitution; Article 107A (1) The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania ;...( 2) 107B. In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land...

<sup>280</sup> Vienna Declaration and Programmed of Action adopted by the World Conference on Human Rights in Vienna, June 25, 1993, Para. 27

<sup>281</sup> No.7 of 1994

<sup>282</sup> Section 13(1) of the Basic Rights and Duties Enforcement Act, No7 of 1994

<sup>283</sup> Gloppen S., public interest litigation, social rights and social policy, New Frontiers of Social Policy– December 12-15, 2005 Christian Michelsen Institute: Arusha Conference

Hence, put at risk the guarantee of justice to individuals whose ESC rights have been violated.

For example as far as right to own property is concerned, there are number of cases where the HC of Tanzania failed to provide justice to the victims, and if there is justice, enforcement of the decision has been problematic. **Lekengere Faru and Others vs. Attorney General and Others, Tanzania High Court, Moshi,**<sup>284</sup> for instance, where Maasai Pastoralists living in Mkomazi Game Reserve, North Eastern Tanzania claimed against evictions from ancestral lands within the Game Reserve.

The High Court per Munuo, J. found that the evictions were illegal and ordered that alternative land be sought and claimants be compensated. However, under the Court of Appeal, presided by the CJ,<sup>285</sup> in his Judgment on 1999 the verdict was that the Maasai are not natives of contested area (Mkomazi), but recent immigrants who were only residing there under a license.

He ordered partly damages for only those who gave evidence in the Court of law and also orders for alternative land to be sought. Unfortunately, the last order remains unimplemented to date.

In the case of **Yoke Gwaku and 5 Others vs. Gawal Farms Ltd and NAFCO,**<sup>286</sup> Barabaig pastoralists in Hanang District claim over extensive pasture lands appropriated by NAFCO, where by the High Court's decision awarded a nominal victory as follows:(1) Yes, the pastoralists have been illegally dispossessed (2) But representative suit covers only those in Court and not the odd 780 others. (3) Claimants should be paid monetary compensations and not to be re-granted the land.

In another case, the **Ako Gembul and 100 Others vs. Gidagamowd and Waret Farms Ltd and NAFCO,**<sup>287</sup> HC Arusha, whereby the Barabaig Pastoralists in Hanang District, claim over extensive pasture lands appropriated by NAFCO, the Parastatal. The High Court dismissed the case and held as follows: (1) That the Government has priority in food security and the acquisition of the Barabaig land is proper, as national interest overrides all other interests... (2) That the suit is bad in

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<sup>284</sup>Civil cause No 33/1994, CV No.33/1995, Court of Appeal- CVA No. 53/1998.

<sup>285</sup>Refers to Nyalali, the then Chief Justice of Tanzania

<sup>286</sup>Civil case No. 52/1988, Tanzania HC, Arusha.

<sup>287</sup>Civil case No. 12/1989

law as it should have been consolidated with the *Yoke Gwaku Case*. The litigants were at fault and maybe guilty of abuse of the process of Court.

In the case of *Nyamuma Villagers case*<sup>288</sup> also the HC of Tanzania, first failed to provide justice to the victims, by declaring that it has no jurisdiction to enforce recommendations provided by the CHRGG.

Apart from existing dilemma of justiciability of ESC rights in Tanzania's judicial system, however, the HC, in some occasions has managed to protect ESC rights through civil and political rights. Judicial authorities have been hard pressed to hold that the right to clean environment is related to the right to life. In **Festo Balegele and 784 Others v. Dar es Salaam City Council**,<sup>289</sup> the High Court ruled that any act of a public authority or an individual, which pollutes the environment, thereby endangering people's health, is contrary to Article 14 of the URT Constitution. The constitutional provision establishes the right to life and protection of human life.

In terms of judicial precedent, the above decisions are not sufficient in the interpretation and enforcement of ESC rights in the URT Constitution. This evidenced the deficiency of ESC rights litigation and the weakness of judicial powers in enforcing such rights in Tanzania.

Therefore, although the High court has powers of adjudicating social economic rights but the court itself cannot exercise its jurisdiction without the existence of the rights.

In order for the court to adjudicate social economic rights there should be specificity regarding the exact content of ESC rights, and therefore of the legal obligations that stem from them, because this certainly seriously impede their judicial enforcement as without clear requirements for the content and scope of a right, combined with a failure to identify rights-holders and duty-bearers, judicial enforcement would be difficult.

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<sup>288</sup>Ibrahimu Korosso and 134 others and Legal and Human Rights Centre V the District Commissioner and Officer Commanding District (OCD) for Serengeti District, case No. HBB/S/1032/MARA

<sup>289</sup>High Court of Dar es Salaam, Misc. Civil Cause Number 90 of 1991(unreported).

The process of judicial decision making needs a relatively clear rule of judgment which can be used to assess compliance or non compliance with certain obligations.<sup>290</sup>

#### 4.2.3 Locus Standi and Access to Court

Locus Standi is a Latin term, which means legal standing before a court. *Locus standi* ('place of standing') means the right to bring an action or to be heard in a given court or forum.<sup>291</sup> It is the existence of a right of an individual or group of individuals to have a court enter upon an adjudication of an issue before that court by proceedings instituted by the individual or group.<sup>292</sup>

In Tanzania the doctrine of locus standi was discussed In the case of **Rev. Christopher Mtikila V Attorney General;**<sup>293</sup> the Hon. Justice Lugakingira (as he then was) discussed at length the principle of locus standi and how locus standi is vested under our constitution. It is vested in every person in the capacity of an individual by virtue of Articles 12 to 24 of the Constitution and in the capacity of a member of the Community by virtue of Articles 25 to 28 of the Constitution.

Moreover in terms of Article 13 of the Constitution; All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. Therefore, applying Article 13(1), to socio-economic rights, it is clear that litigants have the right to approach the High court to enforce socio-economic rights which has been allegedly to be breached, in view of the fact that access to court is intrinsically linked with *locus standi* i.e. the power to bring a matter to court.

In terms of Article 30(3) any persons may approach a court alleging an infringement of a right.

Conversely this research observes that the broad *locus standi* provisions of Article 30(3) accord with the non inclusion of social economic rights in the Constitution

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<sup>290</sup> International Commission for Jurists(ICJ)(2008)Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Switzerland, <http://www.icj.org> P. 15, Accessed on 8 April, 2012

<sup>291</sup> <http://www.law.cornell.edu/wex/standing>

<sup>292</sup> Ibid, Meaning of Locus Standi

<sup>293</sup> [1995] TLR 31

created a great challenge in the enforcement of social economic rights. In normal understanding the inclusion of a wide *locus standi* provision is a significant tool and makes a great deal of sense in the adjudication of social economic rights by the high Court to the affected parties. However the given locus stand in Article 30(3) has overcome obstacle in the procedure of application of the petition of human rights matter arise under section 10 of the BRDEA; In this section the petition for the application of social economic rights and other human rights cases should be assessed and determined by three judges of the High Court to see whether an application is frivolous, vexatious or otherwise fit for hearing.

#### **4.2.3 Separation of Power Doctrine as a challenge to the enforcement of ESCR**

An aspect of socio-economic rights enforceability is believed to be possibly blurring the doctrine of separation of powers.

When courts enforcing socio-economic rights essentially step into the shoes of what should ordinarily be a function of the executive (i.e. through judgments which have the effect of deciding how state money should be spent) it is argued that the courts may have overstepped their allocated powers as the implementation of most of social economic rights depends on the national policy of social economic services which should be implemented by the executive.<sup>294</sup> Hence, this is a great challenge in the judicial enforcement of social economic rights in Tanzania, despite the wide locus stand provided by the constitution provisions.

#### **4.2.4 Challenges in the enforcement of ESC rights in the CHRGG**

Apart from judicial enforcement of social economic rights which is exercised by the courts, there are other institutional mechanisms for the enforcement of human rights under the Tanzanian Constitution.

##### **4.2.4.1 Introduction to the CHRGG**

The Commission for Human Rights and Good Governance (CHRGG) is an independent government department. It is established as the national focal point institution responsible for the promoting and protecting human rights and duties as

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<sup>294</sup> Nola,(2008)*The justice Review*, Vol. 7,No.1,Mkuki na Nyota:Dar es salaam P. 39

well as good governance in Tanzania. The CHRGG was established under the Article 129(1) of the Constitution of the United Republic of Tanzania of 1977 as amended by Act No. 3 of 2000.<sup>295</sup>

The Commission became operational on 1 July 2001 after the coming into force of the Commission for Human Rights and Good Governance Act.<sup>296</sup> The President of the URT officially inaugurated the Commission in March 2002 and followed by the appointment of Commissioners to be work for the Commission.

#### **4.2.4.2 Jurisdiction of the Commission**

The jurisdiction of the CHRGG to determine social economic rights is vested in the Constitution of United Republic of Tanzania 1977 as stipulated under Article 130(1)(c); The CHRGG have the function to conduct inquiry, on matters relating to infringement of human rights and violation of principles of good governance. Other function of the CHRGG are to sensitise countrywide about preservation of human rights and duties to the public in accordance with the Constitution and the laws of the land; to receive complaints in relation to violation of human rights in general to conduct inquiry on matters relating to infringement of human rights and violation of principles of good governance; to conduct research, to impart or disseminate to the public countrywide education in respect of human rights and good governance; if necessary, to institute proceedings in court in order to prevent violation of human rights or to restore a right that was caused by that infringement of human rights, or violation of principles of good governance; inquire into the conduct of any person concerned and any institution concerned in relation to the ordinary performance of his duties or functions or abuse of the authority of his office; to advice the Government and other public Institutions and private sector in respect of human rights and good governance; to take necessary action in order to promote and enhance conciliation and reconciliation among persons and various institutions appearing or being brought before the Commission.

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<sup>295</sup> Shivji, I. G., Majamba, I., Makaramba, R., and Maina C.P., (2004). Constitutional and Legal System of Tanzania. Dares salaam: Mkuki na Nyota Publishers. P 98

<sup>296</sup> Act No 7 of 2001 as amended by Act No 16 of 2001 and Government Notice No. 311 of 8th June 2001

The Commission for Human Rights and Good governance Act also give power the Commission to deal with social economic rights and other human rights as spelt out under section 6(1) (a-o)<sup>297</sup> to include, *inter alia*: Promoting within the country protection and the preservation of human rights and of duties to the society in accordance to the Constitution and the laws of the land. To receive allegations, and complaints related to the violation of human rights generally; to conduct research into human rights, when necessary, to institute proceedings in Court designed to terminate activities involving the violation of human rights or redress the right or rights so violated...et al.

It is significant to note that over and above these functions, the Commission has the powers to investigate any human rights abuses.<sup>298</sup> The Commission can act based on its own initiative or upon receipt of a complaint or allegation to this effect. The aggrieved person or any other person acting on behalf of such person can lodge complaints, or it can be a person acting in the interest of a group or class of persons.<sup>299</sup>

#### **4.2.4.3 Locus Stand and the Access to the Commission**

Unlike courts of law, access to the Commission has been made very easy. An individual can complain in various ways, by word of mouth, a simple letter, a partition etc.

Moreover, any individual or body of person or person may have the locus to make complaint in the Commission.<sup>300</sup>

#### **4.2.4.4 Status of the Decision of the Commission**

Despite the wide locus stand to all individuals and the easy way of making the complaint in the commission for the violation of social economic rights the decisions of the Commission have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an

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<sup>297</sup> Act No. 7 of 2001

<sup>298</sup> Section 15(1), CHRGG Act, Act No. 7 of 2001

<sup>299</sup> Section 15(1)(b), CHRGG ACT, 2001 No 7 of 2001

<sup>300</sup> Section 22 of the CHRGG Act No 7 of 2001

investigation has been carried out.<sup>301</sup> Therefore, unlike a decision of a courts of law which is binding on the person on whom it is directed, this is not the case with the decisions of the Commission.

In the particular context of ESC rights, the CHRGG's investigations to date, has only conducted one major inquiry which is the burning of houses in the Nyamuma village in Serengeti district.<sup>302</sup> In this case the Commission conducted a long and protracted inquiry in Musoma, in which all parties including the Office of the Attorney-General were fully involved.

The Commission investigated the complaints and after an interview with more than 120 witnesses for the complainants and the appellants, and 20 for the respondents. On the 13th December 2004, The Commission released its decision, where as the government was reviled to have violated the rights to property of the complaints. In addition, the commissions recommended that the complainants should be resettled in their native land. At the same time, the Government of Tanzania was ordered to pay compensation amounting to more than Tshs 800 millions.<sup>303</sup>

Interestingly, however, on receipt of the CHRGG's decision, the Government through the then Attorney General of Tanzania,<sup>304</sup> wrote to the then Chairman of the Commission, Hon. Justice Robert Kisanga, informing him that the government was not going to respect or implement the decision. The objection frustrated affected villagers, the Commission and other pioneers of Human Rights promoters in the Country. The Commission felt helpless and asked the parties to proceed to the judiciary and seek remedy there.<sup>305</sup>

Pursuant to section 28 (3) of the Act, the CHRGG recommended LHRC on behalf of 135 villagers to bring an action to the High Court of Tanzania for resettlement and

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<sup>301</sup> Ibid, Section 17

<sup>302</sup> Ibrahimu Korosso and 134 others and Legal and Human Rights Centre V the District Commissioner and Officer Commanding District (OCD) for Serengeti District, case No. HBB/S/1032/MARA

<sup>303</sup> Policy Forum, LHRC Wins Court of Appeal(Nyamuma Human Rights) <http://www.policyforum-tz.org/node/3149>, Accessed on 8<sup>th</sup> April, 2012

<sup>304</sup> Refers to Hon. Andrew Chenge who was in office

<sup>305</sup> Legal and Human Rights Centre. 2006. *The human calamity of the evictions at Nyamuma Serengeti: Legal and human rights implications*. Dar es Salaam: LHRC.

Compensation, suit for enforcement at the High Court (HC), Main Registry for claim of Compensation and Land Division for Resettlement of villagers to their native land. However, at the HC, both cases were dismissed on the ground that the HC did not have the jurisdiction to enforce the recommendations by the Commission. The LHRC filed an appeal to the Court of Appeal, which is the Supreme Court in Tanzania.

The Court of Appeal of Tanzania in Dar es Salaam<sup>306</sup> ruled that the HC erred in not considering the matter on merit. The Court of Appeal decided that it was proper for LHRC to have filed an application to the HC for enforcement of the Commission's decision after being refused to be enforced by the Government.

Moreover, ordered that the matter be referred to the HC in order to be considered on merit. The Court of Appeal further suggested that the Commission should advise the Minister to make regulations, thus providing procedure for the enforcement of recommendations.

The *Nyamuma Village* complaint is one extreme case to have laid bacon of hope for individual Tanzanians especially the victims of ESC rights violations. However the entire ordeal has established the limitations as to what the Commission can and cannot do;<sup>307</sup> that is despite its nobility, the Commission is, cannot investigate high-ranking officials such as the President of the URT.<sup>308</sup> According to the above, after investigating and hearing complaints, the Commission has no legal power to give binding orders. This means that the commission has no teeth to bite violator of the fundamental rights and freedom of the country.

#### **4.2.4.5 Remedies and their Enforcement**

Section 17(1) of the CHRGG Act<sup>309</sup> provides that if the Commission finds that there has been a violation of a human right it shall make recommendations to the appropriate authority or person having control over the person in respect of whose

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<sup>306</sup> CA Case of 2009

<sup>307</sup> Section 16 of the CHRGG Act No. 7 Of 2001

<sup>308</sup> Section 16(1) of the CHRGG Act No.7 of 2001

<sup>309</sup> Act No. 7 Of 2001

act or conduct- an investigation has been carried out to remedy the situation, including payment of damages. It is further stated that the proceedings of the Commission and its decisions and any information, document or thing produced by any person in relation to an inquiry under this Act shall be privileged in the same manner as the proceedings and other matters before a court.<sup>310</sup>

This is a positive step towards enforcement of social economic rights in Tanzania because it is wider mandate to all government institutions and individuals. It is hoped that the Government would use this mandate to its maximum to give remedies of social economic rights victims.

Conversely, the social economic rights violator may make his own investigation and refuse the order and recommendation of the CHRGG as it was appeared in the Nyamuma villages case<sup>311</sup> when the CHRGG ordered the Government to remedy the Nyamuma village victims; The Government refused to implement the recommendations of the Commission, which among other things called for compensation amounting to 890 million shillings to the complainants. It has been declared that the recommendations are simply not implementable.<sup>312</sup> It cited the amount of compensation and argued that that amount was too big. But this is unacceptable. The Government should address core issues. If it agrees that people were ruthlessly evicted then it should bear the responsibility for its action.

To the extent that the government refused to implement the recommendations of the Commission, it condones violation of social economic rights.

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<sup>310</sup> Section 17(2) of the CHRGG Act No 7 of 2001

<sup>311</sup> On 18th May 2005 the Government through Attorney General give statement on the response to the CHRGG concerning recommendations issued to him by the CHRGG after being founding responsible for conducting violation of social economic rights at Nyamuma village; where it states that; the Government has conducted its own independent investigation and found out there is no human rights violation committed by the District commissioner and his District Police Commander at Nyamuma Village.

<sup>312</sup> Bakari Mwapachu, the Minister for Justice and Constitutional Affairs (when emphasise the statement of the Government on the recommendations of CHRGG)

### **4.3 Conclusion**

This chapter has looked critically into the constitutional non realization of social economic rights; for it provide a minimal guarantee of ESC rights protection as only right to own property ; right to work, and right to just remuneration are under the Bill of Rights, leaving the bulk of those rights un incorporated and therefore not justiciable before national courts.

Tanzania constitution provide a minimal guarantee of ESC rights protection, as only right to own property and right to work are under the Bill of Rights, leaving the bulk of those rights un incorporated and therefore not justiciable before national courts.

The analysis also revealed the challenges faced on the part of enforcement mechanisms which are the judiciary and CHRGG on the justiciability of social economic rights. On the side of the judiciary the study looked on the lack of proficiency of the judges and lawyers in dealing with social economic rights, it was observed that victims of social economic rights have been denied of the appropriate remedies from the court.

And on the side of the CHRGG, this study observed the denial of appropriate remedies on the part of victims also. This is the result of the status of the decision provided by the Commission being of recommendations only and not the legal binding decision. These challenges have been hindering the justiciability of social economic rights. Hence, the coming chapter registers the major findings of the research.

## **CHAPTER FIVE**

### **FINDINGS OF THE RESEARCH**

#### **5.1 Introduction**

This Chapter discusses the major findings of the research, including the challenges and obstacles that have been discovered in the implementation of social economic rights in Tanzania. In this chapter, the findings provide answers to the research questions, which are: Whether the Constitution of United Republic of Tanzania 1977 sufficiently protects economic, social and cultural rights; Whether social, economic rights can be justiciable in Tanzania and Whether there are challenges to in the judiciary and the Commission for Human Rights and Good Governance in the enforcement of social economic rights.

#### **5.2 Does economic, social and cultural rights sufficiently protected in the Constitution of United Republic of Tanzania 1977**

In regard of this research question, it has been found that there is an inadequate provision of social economic rights in Tanzania Constitution and even those very few incorporated provisions are not adequately provided for,<sup>313</sup> an aspect which presents challenges in the effective enforcement of these rights. This finding is concerned with an imperative need for a rationalization of URT Constitution with the view of incorporating all ESC rights as stipulated under the ICESCR in order to provide a full realization and more effective domestic implementation of ESC rights.

Furthermore, other few rights have been included in the Directive Principles of State policy<sup>314</sup> where they cannot be enforceable by the court. The enforcement of this part of the Constitution depends on the formulation of good social economic policies which can be beneficial to the citizens.

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<sup>313</sup> Article 22- Right to work, Article 23- Right to just remuneration and Article 24- Right to own property

<sup>314</sup> Article 11 of The Constitution of United Republic of Tanzania- Right to work, to educational and other pursuits

**Table: 5.1 Adequacy of provision and protection of socio- economic rights in Constitution of Tanzania 1977**

| CATEGORY               | SAMPLE SIZE | RESPONSE | ANSWERS  |              |           |
|------------------------|-------------|----------|----------|--------------|-----------|
|                        |             |          | ADEQUATE | NOT ADEQUATE | NO ANSWER |
| ADVOCATES              | 20          | 18       | 2        | 15           | 1         |
| HUMAN RIGHTS ACTIVISTS | 40          | 38       | 2        | 35           | 1         |
| MEMBERS OF THE PUBLIC  | 40          | 36       | 4        | 30           | 2         |
| TOTAL                  | 100         | 92       | 8        | 80           | 4         |

Source: Interview and Questionnaires

### **5.3 Can social, economic rights be justiciable in Tanzania**

In regard of this research question; the findings have revealed that economic social and cultural rights cannot be justiciable in Tanzania due to various reasons such as inadequate constitutional provisions; non effectiveness of judiciary which caused by the lack of awareness and sensitiveness to social economic rights in the side of decision makers; and also lack of effectiveness on the CHRGG in the enforcement of social economic rights.

**Table 5.2 possibility in the enforceability of social economic rights in Tanzania**

| CATEGORY               | SAMPLE SIZE | RESPONSE | ANSWERS    |                |           |
|------------------------|-------------|----------|------------|----------------|-----------|
|                        |             |          | SUFFICIENT | NOT SUFFICIENT | NO ANSWER |
| ADVOCATES              | 20          | 18       | 2          | 15             | 1         |
| HUMAN RIGHTS ACTIVISTS | 40          | 38       | 2          | 35             | 1         |
| MEMBERS OF THE PUBLIC  | 40          | 36       | 4          | 30             | 2         |
| TOTAL                  | 100         | 92       | 8          | 80             | 4         |

Source: Interview and Questionnaire

### **5.4 Are there any challenges in the Judiciary and the Commission for Human Rights and Good Governance in the enforcement of social economic rights?**

In regard of this research question, the findings have revealed that there are challenges to the judiciary and CHRGG in the enforcement of social economic rights due to lack of effectiveness in the judiciary in the determination of social economic rights such as failure of giving adequate remedies to the victims of social economic rights violations and lack of effectiveness in the CHRGG in the determination and

protection of social economic rights due to lack of legal binding decision as provided CHRGG Act<sup>315</sup>

**Table: 5.3 The effectiveness of the Judiciary in the determination and protection of social economic rights**

| CATEGORY               | SAMPLE SIZE | RESPONSE | ANSWERS    |                |           |
|------------------------|-------------|----------|------------|----------------|-----------|
|                        |             |          | SUFFICIENT | NOT SUFFICIENT | NO ANSWER |
| ADVOCATES              | 20          | 18       | 2          | 15             | 1         |
| HUMAN RIGHTS ACTIVISTS | 40          | 38       | 2          | 35             | 1         |
| MEMBERS OF THE PUBLIC  | 40          | 36       | 4          | 30             | 2         |
| TOTAL                  | 100         | 92       | 8          | 80             | 4         |

Source: Interview and Questionnaire

#### 5.4 Effectiveness of the CHRGG in the enforcement of ESC rights

| CATEGORY               | SAMPLE SIZE | RESPONSE | ANSWERS    |              |           |
|------------------------|-------------|----------|------------|--------------|-----------|
|                        |             |          | SUFFICIENT | INSUFFICIENT | NO ANSWER |
| ADVOCATES              | 20          | 18       | 2          | 15           | 1         |
| HUMAN RIGHTS ACTIVISTS | 40          | 38       | 2          | 35           | 1         |
| MEMBERS OF THE PUBLIC  | 40          | 36       | 4          | 30           | 2         |
| TOTAL                  | 100         | 92       | 8          | 80           | 4         |

Source: Interview and Questionnaire

#### 5.5 Conclusion

This chapter revealed the findings in the challenges to the enforcement of economic social and cultural rights in the United Republic of Tanzania. They range from the inadequate provisions of social economic rights in the Constitution of United Republic of Tanzania 1977 an aspect which hinders both the judicial enforceability, and the CHRGG to give sufficient enforcement of social economic rights and also to give appropriate remedies to the victims of violation of social economic rights.

Moreover, the chapter revealed the findings that it is not possible to make social economic rights enforceable in Tanzania, due to the challenges with face the judiciary and CHRGG.

<sup>315</sup> Section 17(1),CHRGG Act No 7,2001

Thus, the general observation is that the adequate provisions of social economic rights in the URT Constitution of 1977 cause challenges in realization of social economic rights, and also the available mechanisms which is the Court and the CHRGG which are established in the same Constitution do not give efficient justiciability and enjoyment of social economic rights.

This gives room to the last chapter to conclude and give recommendations for reform.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Conclusion

This research is concerning with Challenges to the enforcement of economic, social and Cultural Rights in the United Republic of Tanzania: A critical Analysis.

The Research questions formulated was: (i) Does economic social and cultural rights sufficiently protected in the Constitution of United Republic of Tanzania?

(ii) Can economic, social and cultural rights be justiciable in Tanzania and (iii) Are there any challenges to the judiciary and the Commission for Human Rights and Good Governance in the enforcement of social economic right.

In this research, both primary and secondary data were collected in order to answer the research questions. As a result the findings revealed answers to research questions as follows: there is an adequate provisions of social economic rights in the Constitution of Tanzania, that in the United Republic of Tanzania it is not possible to make social economic rights enforceable and that there are challenges to the judiciary and CHRGG in the enforcement of social economic rights.

#### 6.2 Recommendations

##### **6.2.1 The Courts should play a role of domesticating the contents of ICESCR provisions.**

Even if Tanzania has not incorporated the ICESCR in full content in its domestic law, the court can play a major role in domesticating these rights. This can be done through its judgments, thus making it the law of the land through common law; For example failure of the High Court to interpret Article 2(2)<sup>316</sup> of ICESCR in the case of **Elizabeth Stephen and Another V. The Attorney General**<sup>317</sup> whereas the two widows unsuccessfully challenged the Customary Laws Declaration Orders of 1963 for the reason that nullification of the law would create confusion amongst members of different societies because Tanzania has many tribes can be interpreted as the

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<sup>316</sup> The provision obliged the state to exercise ESC right without discrimination of any kind.

<sup>317</sup> Elizabeth Stephen and another V. The Attorney General, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 82 of 2005.

courts negligence on domesticating the provisions of ICESCR, hence failure in adjudicating ESC rights.

### **6.2.2 The Parliament should allow the domestication of the provisions of the ICESCR**

The legislature is the only body, which can through incorporation in national laws, effectively implement the ICESCR; as it has the primary function to use the parliamentary processes to allow the domestication of the provisions of the ICESCR. This is crucial in assuring the justiciability of ESC rights in Tanzanian judicial systems. The parliament, within its mandate, has the duty to pressurize the government to conform to the Constitution through Statutes.

### **6.2.3 Academicians are obliged to write about ESC rights; Lawyers, judges, and other decision makers must be reflectively with the issue of ESC rights.**

The big challenge we are now facing is how to have rights conscious people in the state organs, in the judiciary, among lawyers and the citizenry at large. There is lack of rights consciousness at various levels and so the immediate task is to help to raise rights-consciousness by disseminating legal information on rights and violations thereof up to and including testing and vindicating of citizen's rights in court.<sup>318</sup>

Lawyers and judges are the person vested with the power to exercise the administration of justice in the courts and other enforcement mechanisms, therefore their effective awareness of social economic rights will generate to the enjoyment of the rights to the individuals.

### **6.2.4 Tanzania should adopt to ratify The Optional Protocol to the International Covenant on Economic Social and Cultural Rights as it will enhances states' compliance with the ICESCR.**

The ratification of the OP-ICESCR will help Tanzania to honour its commitments that have made for ratification of the Covenant. Individual complaints procedure, for example will help the Tanzanian government through the CESCRs' jurisprudence, in

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<sup>318</sup> Hon. Justice Mwalusanya in Bassiouni. M. C and Motala. Z. (Eds) (1994:305-306.

elucidating its obligations under the ICESCR, which will arguably improve both implementation and compliance.<sup>319</sup>

Moreover, through Individual complainant procedure there is assurance of ESC rights improvements, since the victim of ESC rights will be able to stand before the body of experts and his case discussed in detail.

Further, individual complaint procedure will give an opportunity, though limited, to vulnerable Tanzanian victims of ESC rights violations to make the executive accountable.

Generally, ratification of OP-ICESCR will affirm Tanzania's deeper commitment to the realization for all people of a life of dignity.

#### **6.2.5 Tanzania should follow an example of Kenya and South Africa holistic inclusive Bill of Rights, which includes a comprehensive set of ESC rights.**

The discussion about justiciability of ESC rights under URT Constitution comes in a 'ripe' time, as now Tanzania is under consideration of having a new constitution. It is recommended that, Tanzania should follow an example of neighbouring country of Kenya and of South Africa to a holistic inclusive Bill of Rights, which includes a complete set of ESC rights. In regard to the above, the claims that Tanzania is a democratic country with free individuals who enjoying freedom, justice, fraternity and concord, and that preservation of the human dignity, will be nonsense if the majority of Tanzanians will continue to be hooked by the chain of poverty, discrimination and inequality.

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<sup>319</sup> Simmons, A.B., (2009) *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press: Cambridge University Press p. 65.  
[www.scholar.harvard.edu/bsimmons/publications](http://www.scholar.harvard.edu/bsimmons/publications), Accessed on 11,Nov,2012

### **6.2.6 The CHRGG should be given power to give decision with the status of legal binding nature**

The law should be amended to give the CHRGG the power to give legal binding decision on matters of human rights and especially social economic rights, rather than the less power it has been provided by under section 17(1) of CHRGG Act,<sup>320</sup> which is the power to give decisions with the status of only the recommendations.

Furthermore, the government should respect recommendations given by the Commission; otherwise it defeats its very purpose of establishing it.

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<sup>320</sup> Act No. 7 of 2001

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**SAMPLE OF QUESTIONNAIRES**

(Advocates, Human rights Activists and Members of the Public)

Dear respondents, My name is Martha Thobias and i am currently conducting a research on the Challenges to the enforcement of Economic Social and Cultural rights in the United republic of Tanzania: A Critical analysis; as Partial Fulfilment of Requirements for Award of the Degree of Master of Laws of the Mzumbe University.

I am very much in need of your assistance in making this research successful. Your response to the questions below will be of great help for the fulfilment of this research and will be treated confidential.

**PART I**

**RESPONDENTS PARTICULARS**

**Name**..... (Not necessary),

**Age**.....

**Occupation**.....

**PART II**

**QUESTIONS**

1. Are you aware of the Economic social and Culture rights?(tick the appropriate answer)
  - a. Yes
  - b. No
  - c. I hear about it
  
2. i) Are social economic right, in fact rights or mere political statements?(tick the appropriate answer)
  - a) They are rights
  - b) They are mere political statement

ii) Can you give reasons for your answer?

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3. Are the social economic rights justiciable or non enforceable in the United Republic of Tanzania?

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4. Is it possible to enforce economic social and culture rights under the Judiciary and the Commission for Human Rights and Good Governance?

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5. (a) Does the Constitution of Tanzania 1977 recognize economic social and culture rights?

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(b) To what extent does the constitution of Tanzania 1977 recognize social economic rights?

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6. Is there any importance for the full realization of the economic social and culture rights in the constitution of Tanzania?

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7. What are the challenges to the enforcement of Economic social and Culture rights in Tanzania

- i) .....
- ii) .....
- iii) .....
- iv) .....

8. General Comment on the enforcement of economic social and cultural rights in the United Republic of Tanzania

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**AN INTERVIEW GUIDE**

My name is Martha Thobias, and i am conducting a research on the Challenges to enforcement of economic social and culture rights in the United Republic of Tanzania: A Critical Analysis, as Partial Fulfilment of Requirements for Award of the Degree of Master of Laws of the Mzumbe University.

I am very much in need of your assistance in making this research successful. Your response to this interview will be of great help for the fulfilment of this research and will be treated confidential.

1. Can you tell me what economic social and cultural rights are?
2. (a) Are social economic right, in fact rights or mere political statements?  
(b) Can you give reasons to your answer?
3. Are the social economic rights justiciable or non enforceable in the United Republic of Tanzania?
4. Do you think it is possible to enforce economic social and culture rights under the Judiciary and the Commission for Human Rights and Good Governance?
5. (a) Does the Constitution of Tanzania recognize economic social and culture rights?  
(b) To what extent?
6. What are Challenges facing the enforcement of social economic rights in Tanzania
7. What is your opinion on Constitution recognition of social economic rights in Tanzania?