



JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN TANZANIA

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ABSTRACT

Since the adoption of the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), there has been an unjustifiable propensity to prioritise civil and political rights over economic, social and cultural rights (ESCRs). However, given the understanding towards interdependence, indivisibility and interrelatedness of all human rights, it is now realised that civil, political, economic, social, and cultural rights can, and should, be treated on the same footing as far as justiciability is concerned. Tanzania's Constitution guarantees the right to work, right to just remuneration and right to own property as justiciable rights in the Bill of Rights. Nonetheless, in light of Tanzania's international commitments regarding ESCRs, the scope is limited and hence hinders the enjoyment of ESCRs in Tanzania. This paper therefore, recommends for constitutional amendment or alternatively constitutional change in order to ensure that, all ESCRs are guaranteed as fully justiciable rights in the Constitution of the United Republic of Tanzania.

Keywords: 'economic, social and cultural rights', 'justiciability', and 'indivisibility, interdependence, and interrelatedness of human rights', 'realisation of rights'.

1. INTRODUCTION

This article examines justiciability of ESCRs in the Constitution of the United Republic of Tanzania, 1977 (Tanzania's Constitution) in light of Tanzania's international obligations under the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and the African Charter on Human and Peoples' Rights, 1981 (African Charter). Moreover, given the prominence of the unfinished constitutional review process in Tanzania that begun in 2011, this article also examines the ESCRs in the Draft Constitution of the United Republic of Tanzania, 2014 (Draft Constitution) with a view to determining the progress made in relation to justiciable ESCRs.

2. DEFINITION OF KEY TERMS

The main concepts used in this study are: 'human rights and human rights law', 'economic, social and cultural rights', 'justiciability', 'indivisibility, interdependence, and interrelatedness of human rights' and 'realisation of rights'. For purposes of clarity, these concepts are delineated below.

2.1 Human Rights' and 'Human Rights Law

The concept 'human rights' is understood to mean a particular form of 'moral claim' that every person is entitled to by virtue of being human. Such claims or entitlements are inherent in every person regardless of culture, station in life, physical condition, mental state, social or other status. Human rights law is a manifestation of human rights in positive law for example by entrenching the rights in constitutions, laws, treaties and other binding instruments in a manner that creates rights and obligations. Hence, governments and non-state actors can be held accountable through national, and sometimes international, mechanisms when rights are violated (Viljoen, 2012).

2.2 Economic, Social and Cultural Rights

Since the adoption of the Universal Declaration in 1948, various ways of categorising human rights have surfaced. The ICCPR and the ICESCR contain two categories of rights namely, civil and political rights and ESCRs respectively. On the basis of the two instruments, ESCRs are those rights which appear in the ICESCR. Human

rights have also been categorised into generations i.e. first generation (civil and political rights), second generation (ESCRs) and third generation (collective rights). Through this approach, ESCRs would be those falling under the second generation of rights. Another way of categorising human rights is to identify which rights are of an economic, social, cultural, civil, political or collective nature. For purposes of this study economic and social rights means rights whose realisation aims at upgrading the welfare of the people by improving their quality of life. These rights include the right to work, right to food, right to water, right to housing, right to health, right to social security and right to education. Moreover, cultural rights are those that enable a person to develop spiritually and culturally and finally become a spiritual and a cultural being. They include right to participate in cultural life and the right to cultural development according to one's choices and wishes.¹

2.3 Justiciability

Justiciability refers to the possibility of bringing an action in a court of law or a quasi judicial body for purposes of enforcing human rights. In this sense, a justiciable right is one that is protected (e.g. in a constitution or legislation) in a manner that it can be judicially examined by a court of law in the event it is violated (Aiyar, 2005).

2.4 Indivisibility, interdependence, and interrelatedness of human rights

The principles of indivisibility, interdependence and interrelatedness of human rights mean all human rights, regardless of any category they fall under, should be accorded equal status and treated on the same footing. Based on the principles, there is no hierarchy of rights and the realisation of one right should not be done at the expense of other rights. Moreover, interdependence and interrelatedness of rights further denote that the fulfilment of each right should contribute to the well-being of human beings. In this sense, realisation of one right is often dependant on the fulfilment of other rights. For example, for a person to enjoy the right to information, he/she must be in position to comprehend the information in question, i.e. the right to education can play a great role in realising the right to information.²

2.5 Realisation of Rights

There are different concepts which have been used to describe the process of transforming human rights enshrined in human rights instruments into tangible outcomes i.e. giving meaning to the rights in ways that improve peoples' lives. The common terms that have been used include: 'implementation', 'enforcement', 'enjoyment of rights', 'observance of rights', 'operationalisation', 'protection', 'fulfilment', 'give effect to', and 'guarantee.' From these concepts, the most commonly used in human rights instruments and human rights discourse are 'enforcement', 'realisation' and 'implementation'. Enforcement is more associated with the use of some force in pressurizing states and or other organs to meet their human rights obligations. It involves the use of fact finding missions, consideration of complaints by judicial and quasi judicial bodies and imposition of sanctions. Implementation on the other hand suggests carrying out what is necessary to achieve a desired goal. Realisation means to bring a plan, ambition, etc. into fruition or make it actual or concrete (Encarta, 2007). Therefore, realisation encompasses a wide range of actions which are taken to make rights real. In this sense realisation is wide enough to cover the aspects of implementation and enforcement. Moreover, the concept of realisation is used in the UN Charter³ and Universal Declaration⁴ which are the founding documents of international human rights law. The concept is also used in the context of socio-economic rights (progressive realisation), and in the Convention on the Rights of the Child. The term realise is therefore more inclusive and covers what the other concepts convey. In this sense the term realisation is used in this study to mean all efforts, activities and processes geared towards ensuring people enjoy ESCRs.⁵

3. BACKGROUND OF THE STUDY

The Universal Declaration of Human Rights, 1948 (Universal Declaration) is the first United Nations (UN) human rights instrument to proclaim the rights of all people regardless of birth, property, social or national origin, political or other opinion, religion, language, sex, colour, race or other status.⁶ The Declaration is widely respected for its foundational nature and has, since its adoption, informed domestic legal frameworks on protection and promotion of human rights. According to the Vienna Declaration and Programme of Action of 1993, the Universal Declaration constitutes both a source of standard and inspiration from which the efforts by the United Nations to advance human rights through international binding instruments find their basis.⁷ Moreover, the Declaration embodies the indivisibility, interdependence and interrelatedness of all human rights in that, it provides for economic, social, cultural,⁸ civil and political rights without any material categorisation. The ESCRs in the Universal Declaration are the right to social security and social protection, the right to work and equal pay, the right to form trade unions, the right to health, the right to food, the right to housing, the right to education and the

right to participate in cultural life. Given the non-binding nature of a declaration in international law and the prominence of the Universal Declaration, it was necessary to forge an international mechanism that would accord the norms contained in the Universal Declaration a binding nature at the international level (Onyango, 1995).

The process of transforming the Universal Declaration into a binding international legal framework culminated in the adoption of two separate treaties namely, ICCPR and the ICESCR. The ICCPR provides for civil and political rights while the ICESCR covers ESCRs. The main reason for the adoption of the two instruments was the tension between the East and the West and disagreements over the justiciability of ESCRs. The East was in favour of social and economic rights while the West prioritised civil and political rights (Chirwa, 2002). Political and ideological differences necessitated a compromise manifested by the adoption of the two instruments (Hardowar, 2009). The Universal Declaration together with the ICCPR and the ICESCR constitute the International Bill of Rights.

Regional human rights instruments have also been adopted especially to address specific regional circumstances. The main ones are the European Convention on Human Rights, 1950, the American Convention on Human Rights, 1969 and the African Charter. The latter is the main instrument that contains the institutional and normative structures for implementation of human rights on the African continent. In terms of the normative scope and the principles of interdependency and interrelatedness of human rights, the African Charter is unique particularly when compared to the ICCPR and the ICESCR.

The African Charter provides for economic, social, cultural, civil and political rights in one document. Besides, the Charter provides for collective rights⁹ and duties¹⁰ of people. It is therefore a departure from the dichotomy created by the ICCPR and the ICESCR and reaffirmation of the spirit of the Universal Declaration that all human rights must be treated equally (Mbazira, 2009). Both the UN and the regional human rights treaties, require state parties to take measures towards realisation of the rights provided for in the treaties. Tanzania,¹¹ a member state of the United Nations¹² and the African Union,¹³ has signed and ratified most of the human rights instruments under the two organs, including the ICESCR¹⁴ and the African Charter¹⁵ which impose the obligations to respect, protect and fulfil the range of rights they provide for. In most jurisdictions, the constitution is the main instrument used to recognise and protect human rights.

Since attainment of independence in 1961, Tanzania has had five constitutions.¹⁶ A Bill of Rights was included in Tanzania's Constitution in 1984 through the Fifth Amendment Act¹⁷ which came into force on 15 March 1985. However, the government passed the Constitution (Consequential, Transitional and Temporary Provisions)¹⁸, which had the effect of suspending the application of the Bill of Rights in order to allow the government to put its house in order i.e. to review legislation and bring them into conformity with the Bill of Rights. Eventually on 1 March 1988 the Bill of Rights became operational (Maina, 1997).

4. TANZANIA'S INTERNATIONAL OBLIGATIONS ON JUSTICIABILITY OF ESCRS

The rules governing international treaties are found in the Vienna Convention on the Law of Treaties, 1969. One of them requires states to honour their international agreements in good faith (*pacta sunt servanda*). Tanzania follows the dualist system in that, international treaties require ratification by the National Assembly before they can take effect at the domestic level. The Constitution of Tanzania does not have an express provision on the status of international treaties.¹⁹ The same is inferred from its Article 63 (3) (e) which provides that, "for the purpose of discharging its functions the National Assembly may...deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification".

When Tanzania signed and ratified the ICESCR and the African Charter, it expressed willingness and commitment to honour a number of obligations including to respect, protect and fulfil the rights contained in the two instruments. The obligation to protect requires states to refrain from conducts that inhibit enjoyment of ESCRs by the people through their own initiatives. This obligation is immediate and therefore not subject to resources and progressive realisation. A state's laws, policies and programmes should therefore be enabling for people to pursue and enjoy ESCRs. The obligation to protect requires states to ensure that a legal and institutional framework for redressing ESCRs violations is in place. A state is therefore obligated to investigate, punish and provide relief when for example private actors violate ESCRs. This obligation is also immediate and not subject to resources or progressive realisation. The obligation to fulfil is not generally immediate. It requires a state to use maximum of its available resources to progressively realise ESCRs. The obligation to fulfil has three dimensions. First, the state should facilitate realisation of the rights through putting in place enabling programmes for people to enjoy the rights. Second the state should provide such rights especially to those who are most vulnerable or who are affected

by disasters. Third, the state should promote the rights by ensuring that people within its jurisdiction are fully aware of them.

With regards to the ICESCR, Tanzania is required to take progressive measures according to its available resources towards full realisation of the rights in the Covenant. However, it should be noted that progressive realisation cannot be used as an excuse for Tanzania not to take steps that are within its means and power.²⁰ Concerning protection, Tanzania should entrench ESCRs in its constitution in order to set standards for legislation, policies, programmes and other measures for realising ESCRs.²¹

4.1 Tanzania's Obligations under the ICESCR

4.1.2 Domestication and Realisation of Rights

The ICESCR is the main international instrument that addresses ESCRs within the UN human rights framework. As of October 2019, 170 out of the 193 member states of the UN have become parties to it. This high level of acceptance indicates a consensus on the part of the international community on the importance and universality of ESCRs.²² The ESCRs provided in the ICESCR are the following:

- (i) the right to work;²³ It includes: the right to choose employment, the right to safe and satisfactory working conditions, the right to fair wages, non-discrimination in employment, the right to periodic holidays, the right to associate and form trade unions, the right to strike and absolute prohibition of forced labour.
- (ii) the right to social security including social assistance;²⁴ It includes: the right to social security, the right to social assistance, the right to minimum goods and services and protection from discrimination.
- (iii) the right to food;²⁵
- (iv) the right to housing;²⁶ It includes: security from threats, healthy living environment, freedom to choose place of settlement and protection of vulnerable groups.
- (v) the right to highest attainable standard of physical and mental health;²⁷ It includes: dignified life and availability of best possible of healthcare services.
- (vi) the right to education;²⁸ It includes: access to education, non-discrimination, freedom to choose educational pursuits and universal primary education.
- (vii) the right to take part in cultural life and to benefit from scientific progress;²⁹ It includes: freedom to choose cultural identity, protection of cultural diversity, protection of minority groups and indigenous people, and non-discrimination – which includes cultural practices are in line with human rights standards.
- (viii) the right to water.³⁰

Tanzania's obligations with regards to these rights include the duty to protect, to respect and to fulfil the rights without discrimination of any kind, to take progressive measures towards their full realisation subject to its available resources. Besides, states parties may also seek international cooperation towards realisation of the rights.³¹ From the above list, Tanzania's Constitution only guarantees the right to work and the right to just remuneration. Aside from the obligation to domesticate the rights in the ICESCR, Tanzania is also required to submit periodic reports indicating the steps taken to give effect to the rights in the Covenant.³²

4.1.2 State Reporting under the ICESCR

Tanzania submitted its initial report to the UN Committee on ESCRs (Committee on ESCRs) in 1979 and was considered in 1981. After a span of 32 years Tanzania submitted its combined initial, second and third periodic reports to the same Committee in August 2011. The combined reports complemented the 1979 initial report and covered those that were overdue since 1990. In its report Tanzania presented a range of measures including policies, legislation and programmes taken by the government to realise the rights contained in the ICESCR. The report covered both the justiciable and non-justiciable ESCRs in Tanzania's Constitution and did not attempt to explain or rather justify why most of the rights contained in the ICESCR are non-justiciable rights in Tanzania.

In its Concluding Observations,³³ Committee on ESCRs noted with concern that Tanzania had not done enough to fully incorporate the ICESCR in its legal system. This is apparently a general remark given the fact that the ICESCR requires states to take, among others, policy and legislative measures to ensure realisation of the rights. The Committee advised Tanzania to ensure that ESCRs are guaranteed in such a manner that victims of their violations may seek redress from the courts of law. The bottom line of the Committee's concern and recommendations is that, while Tanzania may be implementing a number of programmes, legislation and policies geared towards realisation of ESCRs, it remains important to guarantee the rights in Tanzania's Constitution in order to provide

avenues for redress and holding the government accountable should it fail in its obligations to protect, fulfil and respect the rights.

On a different occasion, during the examination of its report by the Human Rights Council,³⁴ Tanzania was advised to sign and ratify the Optional Protocol to the ICESCR (OP-ICESCR).³⁵ Moreover, the Human Rights Council recommended that Tanzania should adopt measures to protect and preserve cultural heritage and indigenous peoples' traditional ways of life,³⁶ safeguard land rights; protect citizens against forced evictions, and recognise the rights of indigenous peoples, pastoralists, hunters and gatherers.³⁷ It is clear that Tanzania was advised to guarantee the right culture and protection from unlawful evictions.

4.2 Tanzania's obligations under the African Charter

4.2.1 Domestication and Realisation of Rights

The African Charter imposes two broad obligations on state parties with regards to realisation of the rights enshrined in it. The obligations are to recognise the rights and to give effect to the rights through, among other things, adoption of legislative and other measures.³⁸ Although the African Charter does not categorise rights into the traditional generations, the ESCRs found in it may be identified as follows: (i) the right to access public services;³⁹ (ii) the right to property;⁴⁰ (iii) the right to work which also covers equal pay and satisfactory working conditions;⁴¹ (iv) the right to health;⁴² (vi) the right to education;⁴³ the right to take part in cultural life;⁴⁴ (vii) the right to freely dispose of wealth and natural resources;⁴⁵ and (viii) the right to economic, social and cultural development.⁴⁶

It is worth mentioning that the African Charter does not contain the right to food and the right to housing. However, through the implied rights theory, the African Commission has held that the rights to food and housing are implicit in the African Charter and should be read into the right to life.⁴⁷ Moreover, unlike the ICESCR, the African Charter does not subject the realisation of rights to available resources. It obligates states parties to recognise the rights and take appropriate measures to give effect to the rights.⁴⁸ Tanzania's Constitution only recognises and guarantees the right to work (including just remuneration) and the right to property. Further, the African Charter requires states parties to submit periodic reports to the African Commission on Human and Peoples' Rights (African Commission) in every two years indicating the steps taken to implement the rights in the Charter.⁴⁹

4.2.2 State Reporting under the African Charter

Since its ratification of the African Charter, Tanzania has reported twice to the African Commission. In its first state report, Tanzania declared that it has always been committed to upholding the human rights enshrined in the African Charter and the Universal Declaration. It went further to state that before the enactment of the Bill of Rights in 1984, the said rights were guaranteed in the preamble of the Interim Constitution of 1965 and its successor, the Constitution of the United Republic of Tanzania of 1977. However, the report provides that according to the legal principles of interpretation, the preamble is not regarded as a substantial part of Tanzania's Constitution and so the rights stated or rather reflected in the preamble cannot be enforced by courts. This report did not indicate how specific rights in the African Charter were being realised by the Government of the United Republic of Tanzania (GURT). One could argue that, perhaps since it was the first report, GURT was not yet conversant with proper reporting.⁵⁰

The second state report was consolidated in that it comprised a compilation of the second to the tenth report that were all due by 2006. This was a better report compared to the first one because it provided information on measures taken by the GURT to give effect to the specific rights contained in the African Charter. The report covered the right to work, right to just remuneration, right to property, right to education, cultural rights, and right to health. With regards to these rights the GURT presented the policy and legislative measures that it had taken to ensure enjoyment of the said rights including legislation and policies on land, education and health. The government also demonstrated the possibility of enforcing the said rights.

The report was however silent on the non-justiciable rights and the remedies available to victims of violations therefrom. The report also contained a general section on ESCRs indicating that ESCRs have been incorporated in the Bill of Rights. The report did not contain an intention on the part of the GURT to guarantee the missing rights in Tanzania's Constitution. It only concentrated on the strategies that the GURT had taken to realise the rights, for example, adoption of a cultural policy and a range of programmes on poverty reduction and financial

empowerment. It is clear that measures taken to realise ESCRs, including legislative and policy measures, may sometimes fall short of constitutional standards. Therefore, it remains important that a constitutional guarantee of ESCRs should be comprehensive to ensure that the African Charter has full effect in Tanzania.⁵¹ In its concluding observations, the African Commission advised Tanzania to take, among other things, immediate steps to domesticate the African Charter and other international human rights instruments ratified by it in order to provide its people an opportunity to enjoy the wide range of rights in the said treaties.⁵²

5.0 JUSTICIABLE AND NON-JUSTICIABLE ESCRs IN TANZANIA

5.1 Justiciable ESCRs

The Bill of Rights in Tanzania's Constitution contains three justiciable rights under the category of ESCRs. These are the right to work, the right to just remuneration, and the right to own property.

5.1.1 The Right to Work

The right to work is central to human life as it is, in most cases, considered to be the best measure of an opportunity and a means to facilitate both intra-generational and inter-generational social mobility. In fact, viewed from the understanding of indivisibility and interdependency of human rights, it is part of an indivisible whole that is meant to make a human being live a complete life. Stressing on the importance of constitutional guarantee of the right to work in the case of *Augustine Masatu v. Mwanza Textiles Ltd Civil Case No. 3 of 1986* Judge Mwalusanya uttered the following words:

A right to work is now a fundamental right which is over and above ordinary legislation. And so if the right to work had been taken away by ordinary legislation, then the same stood a good chance of being declared void and unconstitutional by 16/3/1988 when the Bill of Rights became justiciable.

The right to work is provided in Article 22 (1) - (2) of Tanzania's Constitution in the manner of according every person the right to work and for every citizen of the United Republic of Tanzania (URT), to have equal opportunity and right to equal terms to hold any office or discharge any function under the state authority. In the ICESCR⁵³ the right to work encompasses one's right to choose work of their choice, safe and health working conditions, non-discrimination in employment promotion, fair wage, right to associate, right to form trade unions, right to strike and absolute prohibition of forced labour. The provision on the right to work in Tanzania's Constitution should be expanded to accommodate these essential components.

Tanzania's Constitution also imposes duties with regards to the right to work. It requires everyone to pursue work that is lawful and to work honestly and responsibly. Moreover, workers are obligated to observe work ethics with a view to attaining individual, collective or productive targets set by law.⁵⁴ The Africa Charter contains a duty with respect to the right to work that, everyone who works must use his/her best abilities and competence and must pay all the taxes imposed by law in the interest of the society.⁵⁵ For improvement, the tax aspect in relation to the duties imposed on workers should also be included in Tanzania's Constitution.

5.1.2 The Right to Just Remuneration

The right to just remuneration is provided in Article 23 (1) - (2) of Tanzania's Constitution as follows; "[e]very person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work...Every person who works is entitled to just remuneration." The provision captures the standards provided for under international instruments. However, an important aspect of this right is found in Article 23 (3) of the Universal Declaration which urges states to ensure that just remuneration is at least able to sustain a dignified life and where necessary the same should be supplemented by social protection set up by the state. A similar addition in Article 23 of Tanzania's Constitution would add value to the content of the right and eventually the well-being of workers. The importance of constitutional protection of the right to just remuneration as a justiciable right is exemplified by the following case.

In 1993 N.I.N. Munuo Nguni, an advocate, was assigned six court briefs for a criminal session in Babati but refused to accept them for the reason that the remuneration (500 TZS for each brief) for the task was not commensurate to the work assigned. In terms of section 4(2) of the Legal Aid (Criminal Proceedings) Act⁵⁶, the remuneration was at least 120 TZS but not exceeding 500 TZS. Consequently, the Judge in Charge of the High Court (Arusha) suspended his practice. Mr. Nguni filed a suit in the High Court (Civil Cause No. 3 of 1993) claiming, among other things, that the suspension was illegal and a declaration that the Legal Aid Act was unconstitutional because it provided for unjust remuneration contrary to Article 23 of Tanzania's Constitution. He won the case in the High Court but the Attorney General appealed to the Court of Appeal (Civil Appeal No. 45 of 1998). The Court of

appeal upheld the finding of the High Court that section 4(2) of the Legal Aid Act was unconstitutional. The Court held:

Admittedly, the Act was enacted in 1969 and at that time shs. 500/= was substantial. But at the present time that amount is peanuts. As such we entertain no doubt at all in our minds that that amount obviously infringes Article 23(2) which provides: Every person who works is entitled to just remuneration. The decision in the above case is a clear indication that judicial enforcement of ESCRs can help to protect people from unjust treatment. With regards to the current position of the law, the Legal Aid Act No. 1 of 2017 provides for a favourable and flexible approach for remunerating advocates who provide legal aid in criminal matters.

5.1.3 The Right to Own Property

The right to own property is found in Article 24 (1) and (2) of Tanzania's Constitution in the following words:

Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law. Subject to the provisions of sub article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation.

The phrase 'in accordance with the law' in Article 24(1) indicates that the right to property is not absolute. The normative content of the right echoes Article 14 of the African Charter which provides that, the right to own property should be guaranteed but, if need be, it may be encroached upon in the interest of the public or general interest of the community and in accordance with appropriate laws. Surprisingly, the ICESCR does not contain a provision on the right to own property.⁵⁷ The Universal Declaration provides that, everyone, alone or in association with others, has the right to own property and that no arbitrary deprivation of such property is allowed.⁵⁸ This suggests that individual property may be taken away by means which are 'not arbitrary' and that are 'in accordance with the law.' While the latter may be justified, they have been sometimes misused by the state. The following court decision in Tanzania bears witness to this fact.

In *John Mwombeki Byombalirwa v. The Regional Commissioner, Kagera and Another* Miscellaneous Civil Case No. 22 of 1986, Mr. John Mwombeki's personal properties were seized by the state under the Economic Sabotage (Special Provisions) Act⁵⁹ on allegations of economic sabotage. He was arrested and charged before a special tribunal established under the said Act after which he was acquitted. Despite the acquittal, the government refused to return his properties. He then applied for an order of mandamus to the High Court. In deciding the matter, the High Court ordered the GURT to return the said properties and held that the right to own property under Article 24 of Tanzania's Constitution was encroached upon unlawfully. This case shows the importance of constitutional protection of the right to property in Tanzania. Acts of the GURT were weighed and found to fall short of constitutional standards.

Although the right to property is recognised in Tanzania's Constitution, it only provides for the aspect of ownership. It lacks some key elements with regards to acquisition and disposition of property. In contrast, Article 16 of the Constitution of the Republic of Namibia, 1998 provides for the right to property which covers acquisition, ownership and disposition of any form of movable or immovable property. A similar provision is also found in Article 40 of the Constitution of Kenya, Revised Edition of 2010.

5.2 Non-Justiciable ESCRs

Given the scope of Tanzania's international obligations to recognise and guarantee ESCRs arising under the ICESCR and the African Charter, the following ESCRs are not included in Tanzania's Constitution as justiciable rights: (i) the right to food, (ii) the right to housing, (iii) the right to education, (iv) the right to water, (v) the right to culture, (vi) the right to enjoy the highest attainable standard of physical and mental health, (vii) the right to social security, and (viii) the right to benefit from scientific innovations and research. Although there are challenges (mainly objections) associated with justiciability of ESCRs, it is the Authors' submission that these rights should be incorporated in Tanzania's Constitution in order to honour international and regional human rights commitments. Not only that, but also justiciability of ESCRs comes with multiple advantages including developing a broader understanding of the rights and ensuring victims of violations are afforded remedies. Moreover, court decisions resulting from adjudication of ESCRs will have the potential to influence institutional and systemic changes for stronger protection of the rights and prevention of potential violations. However,

achieving the goal of incorporating all ESCRs as justiciable rights in Tanzania's Constitution requires a common understanding of the rights and the issues around them. One of these issues concerns arguments against justiciability of ESCRs.

6.0 OBJECTIONS ASSOCIATED WITH JUSTICIABILITY OF ESCRs

The justiciability of ESCRs is fraught with a number of objections. It is important to shed light on the common arguments against justiciability of ESCRs so as to enable readers to grasp the meaning of the debates around the rights. The objections can be broadly divided into two namely; legitimacy based objections, and institutional competency objections (Mbazira, 2009).

6.1 Legitimacy Based Objections

6.1.1 The Counter-Majoritarian Difficulty

The counter-majoritarian argument revolves around the question of democracy, in particular representative democracy. The central thesis in the argument is that, the realisation of ESCRs, which rests on legislative, policy and other measures adopted by government, is based on decisions made by elected representatives i.e. members of parliament and the executive. In this regard, the decisions taken and plans adopted by the two state organs represent the will of the majority which may not legitimately be questioned or rather scrutinised by an unelected body of judges (the judiciary). The counter-argument is that, representative democracy does not automatically mean the parliament and the executive always act according to the will of the people. In that sense, the executive and parliament may not necessarily be perfect in terms of setting programmes and policies towards implementation of ESCRs and therefore an impartial eye is necessary. At times, elected representatives act under the influence of party and self interests (Langford, 2011; Currie & Waal, 2013).

6.1.2 ESCRs are Costly and Qualified

It is argued that ESCRs have huge resource implications while civil and political rights do not. While it is true that the realisation of ESCRs requires the state to use its available resources to progressively realise them, it is not true that realisation of civil and political rights does not require resources. For example in the case *August and Another v. The Electoral Commission and Others*⁶⁰ the Constitutional Court of South Africa remarked that, the realisation of the right to vote requires the setting up of an electoral commission which has a number of mandates with huge resource implications including registration of voters and delivery of ballot papers and boxes. Similarly, the protection of the right to life requires the state to ensure adequate health services, putting in place an effective judiciary and police force, all of which require financial resources. It is therefore an established fact that, albeit at varying degrees, the realisation of all human rights requires resources. Moreover, the duty to protect and respect ESCRs requires the state to address violations and refrain from actions that prevent people from enjoying the rights. Meeting these two obligations is not as costly as it has been claimed. Therefore, the blanket description of ESCRs as 'costly rights' is partly unfounded (Mbazira, 2009).

6.1.3 Human Rights Engender Negative Obligations

The argument is that, human rights only engender negative obligations and so, ESCRs cannot be made justiciable because they demand positive actions from the state to realise them. This notion is heavily attributed to the traditional understanding of human rights in terms of individual freedoms that the state should refrain from interfering with. This argument is dispelled by the fact that, both civil and political rights and ESCRs engender positive and negative obligations. As noted earlier, even the realisation of classical civil and political rights such as the right to life and the right to vote requires positive actions by the government. Moreover, the obligation of the state to prevent non-state actors from violating civil and political rights requires positive action by the government. Furthermore, the state obligation to respect rights means the government should not conduct itself in such a manner that prevents people from enjoying ESCRs through their own efforts. This is clearly a negative obligation. Therefore, both ESCRs and civil and political rights impose on the state positive and negative obligations (Mbazira, 2009; Currie & Waal, 2013).

6.1.4 Vagueness of ESCRs

This argument asserts that civil and political rights are precise while ESCRs are mere aspirations that lack material content and therefore cannot be interpreted and applied by courts of law. As such their realisation should not be a subject of judicial scrutiny. The argument is not relevant because, the jurisprudence on civil and political rights in various jurisdictions shows that courts have grappled with fundamental questions of scope and content of various rights. The landmark case of the *State v. T Makwanyane and M Mchunu CCT/3/94* on the right to life in South

Africa is a perfect example in which the Constitutional Court of South Africa endeavoured to give meaning to concepts like open and democratic society in the context of the right to life. In this sense, the interpretation of ESCRs by courts will pave the way for defining concepts and contents of the rights (Mbazira, 2009).

6.1.5 ESCRs are not Universal

The notion of universality of rights suggests that human rights accrue to an individual for the simple reason of being human. The argument that ESCRs are not universal is rooted in the understanding that, such rights are for a particular class of people and thus lack universality. On the other hand, as the argument goes, civil and political rights cannot be detached from human beings. The counter-argument to this is that, ESCRs aim at according a particular standard of life that matches the decency and dignity of every person. The right to food for example cannot be said to be a domain of certain people and not others because food is a necessity. If the entire population of Tanzania was illiterate for example, what would the right to vote and the right to information mean to the people? All human rights constitute an indivisible whole and they are interrelated and interdependent in that their full realisation brings value to human life (Mbazira, 2009).

6.2 Institutional Based Objections

6.2.1 Competence of Courts

It has been argued that, the obligations engendered by ESCRs, which among other include allocation of resources according to certain priorities, setting appropriate policies and programmes and passing relevant legislation, are directly under the competence of the parliament and the executive and not courts of law. This is because the issue usually requires debates and consensus within the mandate of democratically elected representatives in Parliament. In this sense the argument revolves around the principle of separation of powers and political accountability. The argument therefore provides that the three organs of the state should perform separate functions without interference and socio-economic issues fall exclusively under the mandate of the parliament and the executive.

Given the reality that separation of powers cannot be applied mechanically, there are inevitable overlaps that emanate from the principle of 'checks and balances.' In this regard, the argument takes a slightly different shape in that, courts may legally be mandated to check parliament and executive actions. However, when it comes to socio-economic matters judges are incompetent to rule on them because they lack the necessary knowledge and skills on matters relating to budgetary and resource allocations. For that reason, the argument rather shifts its base from democracy to technical deficiency on the part of courts. The counter-argument is that, the parliament and executive are not always competent to decide on socio-economic policies and programmes. On the other hand, democracy extends to issues such as constitutionalism and rule of law and therefore courts are still needed to handle and correct infractions by government which may in one way or the other affect minorities in the society (Mbazira, 2009).⁶¹

6.2.2 Polycentricity

The argument around polycentricity is that, decisions and orders issued by courts of law have far reaching consequences and that, matters of socio-economic nature concern the whole society and have diverse dimensions beyond the reach of courts. Therefore, in issuing decisions and orders on socio-economic matters, courts may not adequately address the circumstances on the ground. Moreover, court decisions and orders may negatively impact on society given the fact that courts are not exposed to vast information on relevant issues. At times courts remain confined to evidence adduced in court by two parties to a dispute who present arguments in line with their interests (Currie & Waal, 2013). Because of that, the executive and parliament are said to have the necessary information to make policy decisions; especially in response to socio-economic problems. This argument is rendered irrelevant by the fact that, even civil and political rights have polycentric implications. Moreover, as a matter of inspiration, socio-economic rights jurisprudence in South Africa indicates that courts are aware of polycentricism and have been careful not to issue decisions that are impractical to implement (Mbazira, 2009). For example, in *Minister of Health and Others v. Treatment Action Campaign 2002 5 SA 721 (CC)* the Constitutional Court of South Africa remarked that it was aware of the polycentric interests that are implied in socio-economic rights adjudication.

7.0 ESCRS IN THE DRAFT CONSTITUTION

As noted earlier, the constitutional review process that begun in 2011 was not completed. It ended with adoption of a Draft Constitution in 2014 by the Constituent Assembly. The next, and final, step was to conduct a country-wide referendum. Nonetheless, the Draft Constitution has made significant strides with regards to justiciable ESCRs. The changes are twofold; improvements on the ESCRs currently in Tanzania's Constitution and inclusion of new ESCRs.

7.1 Improvements on the ESCRs in Tanzania's Constitution

7.1.1 The Right to Work

The right to work is presented more comprehensively in Article 43 (1) of the Draft Constitution with the effect that it includes a person's right to employment and self-employment.

7.1.2 The Right to Own Property

The provisions in the Draft Constitution are the same as those in Tanzania's Constitution except for one small addition that, if a person's property is taken for public interest, compensation must also be 'prompt.' This is a significant improvement. Moreover, Article 45 (3) of the Draft Constitution contains an additional sub-section to the existing right to property under Tanzania's Constitution that, the right to acquire and retain one's property shall not apply to property that is proved to have been acquired through illegal means. However, it is noted that Article 24 (1) of Tanzania's Constitution already provides that the right to own property shall concern 'property held in accordance with law.'

7.2 New ESCRs

7.2.1 Rights of Employees and Employers

Article 44 (1) of the Draft Constitution makes provisions for various rights attached to employees; they include: (i) the right to work without discrimination of any kind; (ii) the right to receive remuneration and legal pay in proportion to the work done and qualifications possessed;⁶² (iii) the right to form and join trade unions at the place of work; (iv) the right to participate in the activities of a trade union; and (v) the right to participate in collective bargaining and negotiate agreements on better work conditions through trade unions. For employers' associations the rights are:⁶³ the right to decide on management, programmes and activities of their associations and right to form, join, and manage their federations. Despite the few shortcomings⁶⁴ identified, the Draft Constitution contains better and broader standards on the right to work as compared to Tanzania's Constitution. If these standards are embedded in the latter constitution, they would be yardsticks for measuring the fairness of labour legislation and policies in the country.

7.2.2 The Right to Education

The right to education in Tanzania's Constitution appears in the Directive Principles. Article 49 (1) of the Draft Constitution contains the right to education as a justiciable right. This new provision provides for: (i) everyone's right to get quality primary education which properly prepares them to proceed to the next level of education and that puts a foundation for self-reliance; (ii) everyone's right to get higher education and to choose education and employment in accordance with the level of education and skills. It also obligates the GURT to ensure that an education system that takes into account the ability and needs of the nation is put in place.

7.2.3 Children's Rights

In Article 50 the Draft Constitution makes provisions for children's rights that include some ESCRs. These are the right to be provided with an adequate environment for playing and receiving primary education, and the right to adequate nutrition, healthcare, and shelter and environment that ensures physical, mental and moral development.

7.2.4 Youths' Rights

Article 51(1) of the Draft Constitution provides, among other things, that every youth has the right and duty to participate in the development activities of the country and the community at large. Moreover, it imposes an obligation on the government to put in place an appropriate environment for youth to become good citizens and to participate fully in political, economic, social and cultural affairs. The provision is rather omnibus and general. The phrase 'participation in economic and development activities' is wide and it does not seem to impose a specific obligation on the state. Moreover, the right to participate in cultural affairs is implied in Article 51 (1).

7.2.5 Rights of Persons with Disabilities

Article 52 of the Draft Constitution lists several rights of persons with disabilities. ESCRs from the list include the right to education with the aid of special equipment and through appropriate language, forms of writing and other appropriate means. Other rights on the list are the right to access employment, the right to work, the right to adequate health services, the right to safe maternal care, and the right to rehabilitation and integration as per Article 52 (e) and (f) of the Draft Constitution.

7.2.6 Rights of Small Groups

The Draft Constitution defines 'special groups' as "a community of people whose life depends on natural vegetation and surrounding environment for food, shelter and other life needs." In this sense the Draft Constitution equates 'small groups' with 'indigenous people' who need special protection. Article 53 provides for the right to education, the right to self-economic advancement, and the right to employment for special groups. It also provides for the right to land which is culturally used by such groups for habitat and as a source for food production. Article 53 further imposes a general duty on the GURT to advance and develop economic activities and to put in place infrastructure for habitat, education, water and health for the benefit of present and future generations of those belonging to the special groups.

7.2.7 Women's Rights

Article 54 of the Draft Constitution covers women's rights. They include the right to employment opportunities and to receive equal pay with regards to jobs that demand the same qualifications, the right to security of employment during pregnancy and after delivery, the right to get adequate health services including maternal care, and the right to own property.

7.2.8 Elderly Peoples' Rights

Article 55 of the Draft Constitution provides for the right to participate in economic and social activities, and the right to health services. Moreover, the right to essential services is made a primary responsibility of the family and the community; the state will only be responsible when necessary. While it is a reasonable provision, the obligation of the state in this regard is implied and at times only secondary.

7.2.9 Freedom of Education, Innovation, Discovery and Research

The Draft Constitution provides for everyone's right to benefit from scientific progress and protection of the moral and material interests of authors of scientific, artistic or literary works. It further compels the GURT to ensure that everyone has the freedom to learn, to teach, to research and to disseminate research findings in line with professional etiquette and research ethics.⁶⁶ To realise the latter, the GURT is obligated to promote and develop research, innovation, discovery in art, science and technology by enacting laws that, among other things: (i) protect copyright and patents for researchers, artists, and innovators respectively; (ii) capacitate research and educational institutions to apply their works for the benefit of the nation; and (iii) empower human resource in the areas of science, technology and innovation.⁶⁷

7.3 Other Improvements relating to ESCRs

7.3.1 Limitation of rights

The limitation clause in the Draft Constitution appears different from the one in Tanzania's Constitution in that courts are given the parameters when adjudicating upon the limitation of rights. It provides that the limitation must be used in an open and democratic way taking into account the dignity, equality and freedom. In particular, courts are supposed to consider:

- (i) the nature of the right;
- (ii) the importance and purpose of the limitation;
- (iii) nature and extent of the limitation;
- (iv) the relation between the limitation and its purpose;
- (v) less restrictive measures to achieve the purpose; and
- (vi) importance of protecting national security.⁶⁸

The limitation clause is comprehensive enough. However, its wording may be improved if the phrase "...in case they [rights] need to be limited the limitations should be used in an open and democratic way based on human dignity, equality and freedom...is replaced by "...in case they [rights] need to be limited the limitations must be reasonable in an open and democratic society and must be in terms of a law of general application..." This is the

language used in some international instruments (e.g. Article 4 of the ICESCR) and, as a matter of inspiration, in the Constitution of the Republic of South African, 1996 (section 36) and the Constitution of Kenya, Revised Edition 2010 (Article 24).

7.3.2 Interpretation of the Bill of Rights and locus standi

In interpreting the human rights contained in the Bill of Rights courts and other forums are supposed to take into account international law and human rights; and rights of the community and interests of the community at large. Moreover, under Article 62 of the Recommended Constitution, the locus standi with regards to the rights included in the Bill of Rights has been broadened. The following are entitled to file cases:

- (i) the Attorney General;
- (ii) a person representing himself/herself or an institution representing its members;
- (iii) a person representing a person who cannot represent himself/herself;
- (iv) a person representing a group of persons sharing common interests or a community of people whose rights have been violated.

8. CONCLUSION AND RECOMMENDATIONS

8.1 Conclusion

It has been revealed that, the scope of justiciable ESCRs in Tanzania's Constitution is very limited given Tanzania's obligations under the ICESCR and the African Charter. ESCRs are given less attention when compared to civil and political rights. In that regard, Tanzania's Constitution does not recognise and affirm the indivisibility, interrelatedness and interdependency of all human rights despite the fact that, it has regional and international obligations to protect, fulfil, respect and promote ESCRs. Given the fact that Tanzania's Constitution is the supreme law of the land, recognition and protection of all ESCRs would provide an avenue for measuring legislative and executive actions to ensure that they conform to human rights standards. The arguments against justiciability of ESCRs no longer hold water. In fact, it is not easy to conjure up strong and convincing arguments against justiciability. In the context of a developing country, guaranteeing ESCRs is not only important for the people but also for the government as they offer an opportunity to chart a national socio-economic vision which is rooted in equality and fairness. The Draft Constitution contains improvements in the area of ESCRs, both in the Bill of Rights and in the Directive Principles. Although the fate of the Draft Constitution remains unknown, it is expected that the progress already made will not be reversed but rather maintained and possibly expanded in the event the process is continued or started anew.

8.2 Recommendations

History shows that recognition and protection of human rights by states is not an automatic process. Indeed it takes concerted effort to domesticate international human rights norms. Tanzania is no exception to this reality; actually the incorporation of the Bill of Rights in Tanzania's Constitution in 1984 bears witness to the fact. Moreover, the expansion of the scope of justiciable rights in the Draft Constitution was largely a result of collective effort by activist organisations and pressure groups during the constitutional review process. This experience remains relevant with regard to ESCRs. However, there are a number of other ways which are equally important towards ensuring Tanzania honours its international commitments regarding justiciability of ESCRs. The ways include the following: (i) the populace should be enlightened about the nature of ESCRs and the importance of their justiciability. This can be achieved through a number of ways including scholarly research and publications, coverable by the media, civic education, and inclusion of human rights in educational curricula at secondary and tertiary levels. (ii) Government officials and members of Parliament should accept the idea of justiciable ESCRs. To achieve this, the Commission for Human Rights and Good Governance, the Ministry of Constitutional and Legal Affairs and the Office of the Attorney General must effectively fulfil their duty to advise the government on the nature of international human rights commitments generally and the importance of entrenching justiciable ESCRs in Tanzania's Constitution in particular. (iii) the people of Tanzania must, particularly through civil society and other organisations, relentlessly continue to demand a new constitution. This will be the most strategic opportunity for ensuring all ESCRs in the ICESCR and the African Charter are justiciable in Tanzania.

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¹ For more on classification of human rights see National Centre on Human Rights Information and Documentation "Classification of human rights" <http://tandis.odhr.pl/documents/hre-compendium/en/CD%20SEC%203/HRE%20Package%20for%20Schools%20Tajikistan/HRE%20Package%20Textbook%20Tajikistan%20ENG.pdf> - accessed on 5 September 2019.

² <https://www.unfpa.org/resources/human-rights-principles> - accessed on 25 October 2019.

³ See Article 13 (1) (b).

⁴ See the Preamble and Article 28.

⁵ See generally VILJOEN, Frans, *Realisation of Human Rights in Africa through Inter-Governmental Institutions*, unpublished LL.D. thesis, University of Pretoria, 1997, pp. 5-15.

⁶ Article 2 of the Universal Declaration.

⁷ See the eighth recital of the Preamble to the Vienna Declaration and Programme of Action.

⁸ Articles 22-27.

⁹ Collective rights include the right to self-determination (Article 20), the right to freely dispose of wealth and natural resources (Article 21), the right to development (Article 22), the right to peace (Article 23) and the right to a general satisfactory environment (Article 24).

¹⁰ The African Charter is the first international human rights instrument to provide for duties of people in the spirit that rights come with duties. See Articles 27 – 29.

¹¹ The United Republic of Tanzania is a union of the former British Trust Territory of Tanganyika which became independent in 1961 and the neighbouring British Protectorate Island of Zanzibar which gained independence in 1963. Both territories merged in April 1964 under Acts of Union forming the United Republic of Tanganyika and Zanzibar and later adopted the name United Republic of Tanzania. The Constitution of the United Republic has force in the Republic except for non-union matters which are taken care of by the Constitution of Zanzibar of 1984. Human rights are not a union matter and thus the human rights framework in the UTR Constitution is limited to Tanzania Mainland.

<http://www.comparativeconstitutions.org/2012/07/tanzanias-constitutional-review-new-era.html> - accessed on 15 August 2019.

¹² Tanzania, then Tanganyika, became a member of the UN on 14 Dec. 1961. It should be noted that before the Union between Tanganyika and Zanzibar in 1964, Zanzibar had joined the UN on 16 Dec. 1963. After the ratification of the Acts of Union on 26 April 1964, the two states became a single member of the UN under the name, the United Republic of Tanganyika and Zanzibar until when the name was changed to United Republic of Tanzania on 1 Nov. 1964.

¹³ Became member on 16 Jan. 1964.

¹⁴ Ratified on 11 Jun. 1976.

¹⁵ Ratified on 18 Feb. 1984.

¹⁶ The Independence Constitution 1961, the Republican Constitution 1962, The Constitution of the United Republic of Tanganyika and Zanzibar 1964, the Interim Constitution of Tanzania 1965 and the Constitution of the United Republic of Tanzania 1977. For more on constitutional history see Shivji, Issa *et al.* (2004). *Constitutional and Legal System of Tanzania*. Dar es Salaam: Mkuki na Nyota Publishers.

¹⁷ No. 15 of 1984.

¹⁸ No. 16 of 1984.

¹⁹ The Draft Constitution has a similar provision with regards to dualism (article 126 (3) (g)). It is recommended that, an express provision on the status of international law be included in the URT Constitution. The 2010 Constitution of Kenya for example provides for a monist system in article 2 (6) that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

²⁰ See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) Par. 4. See also Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) Par. 8 & 21.

²¹ See UN Committee on Economic, Social and Cultural Rights, General Comment 9.

²² See International NGO Coalition for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Booklet 1 on “Refreshing Your Knowledge About the International Covenant on Economic, Social and Cultural Rights” p. 4.

²³ Article 6.

²⁴ Article 9.

²⁵ Article 11.

²⁶ Article 11.

²⁷ Article 12.

²⁸ Article 13.

²⁹ Article 15.

³⁰ The right to water is not provided in the ICESCR. However, in its General Comment 15, the Committee on ESCRs stated that it is implied in article 11, in particular with regards to ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing.’

³¹ Article 2 of the ICESCR.

³² Article 16 of the ICESCR.

³³ Concluding observations on the initial to third report of the United Republic of Tanzania, adopted by the Committee at its forty - ninth session (12-30 November 2012). http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.TZA.CO.1-3_en.pdf - accessed on 15 August 2019.

³⁴ Human Rights Council (United Nations General Assembly (A/HRC/19/4)). http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-2_en.pdf - accessed 20 Aug. 2019.

³⁵ See recommendation 86.1 of Report of the Working Group on the Universal Periodic Review, p. 19.

³⁶ See recommendation 86.49 of Report of the Working Group on the Universal Periodic Review, p. 22.

³⁷ See recommendation 86.51 of Report of the Working Group on the Universal Periodic Review, p. 22.

³⁸ Article 1.

³⁹ Article 13 (2).

⁴⁰ Article 14.

⁴¹ Article 15.

⁴² Article 16.

⁴³ Article 17 (1).

⁴⁴ Article 17 (2).

⁴⁵ Article 21.

⁴⁶ Article 22.

⁴⁷ This was held in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁴⁸ Article 1.

⁴⁹ Article 62.

⁵⁰ For more information see the URT, Periodic report submitted by the government of the United Republic of Tanzania under the OAU Charter on Human and Peoples’ Rights, 1992. http://www.achpr.org/files/sessions/11th/state-reports/1st-1990-1992/staterep1_tanzania_1992_eng.pdf - accessed on 16 September 2019.

⁵¹ For more on the report see: URT, The second to tenth consolidated periodic report submitted by the United Republic of Tanzania under the African Charter on Human and Peoples’ Rights, 2006. http://www.achpr.org/files/sessions/43rd/state-reports/2to10-1992-2008/staterep2to10_tanzania_2006_eng.pdf - accessed on 15 August 2019.

⁵² For more information see: Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples’ Rights held from 7 to 22 May 2008, Ezulwini, Kingdom of Swaziland. http://www.achpr.org/files/sessions/43rd/conc-obs/2to10-1992-2008/achpr43_conc_staterep2to10_tanzania_2008_eng.pdf - accessed on 16 August 2019.

⁵³ In the ICESCR the right to work encompass one’s right to choose work of their choice, safe and health working conditions, non-discrimination in employment promotion, fair wage, right to associate, right to form trade unions, right to strike and absolute prohibition of forced labour. See Articles 6, 7, 8 and 10. See also Article 15 of the African Charter. The provision on the right to work in the URT Constitution should be expanded to accommodate these components.

⁵⁴ Article 25.

⁵⁵ Article 29 (6).

⁵⁶ Chapter 21 of the Laws of Tanzania, Revised Edition of 2002.

⁵⁷ This can partly be attributed to the ideological differences between the West and the East that caused the adoption of two separate instruments; the ICESCR and the ICCPR. It should be noted that the East which favoured ESCRs was pursuing a socialist ideology which was openly opposed to private ownership of property.

⁵⁸ Article 17.

⁵⁹ Act No. 9 of 1983.

⁶⁰ (1999] ZACC 3).

⁶¹ See also Bangalore Declaration and Plan of Action adopted by the International Commission of Jurists in 1995. p. 5.

⁶² The aspect of 'fair/just remuneration' is not reflected for what is legal may not necessarily be fair/just.

⁶³ Article 35 (2).

⁶⁴ Other key standards related to the right to work contained in international instruments include: favourable and just conditions of work and protection against unemployment (Article 23 (1) of the Universal Declaration), right to a dignified life and where needed supplemented social protection (Article 23 (3) of the Universal Declaration), leisure, rest and reasonable limitation of working hours, periodic holidays and paid holidays (Article 7 (d) of the ICESCR).

⁶⁵ For more on indigenous peoples' rights see *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) in which the African Commission found Kenya in violation of the African Charter by failing to protect the rights of an indigenous group.

⁶⁶ Article 56 (2).

⁶⁷ Article 56.

⁶⁸ The aspect of national security is a catch all phrase that has, and can, often been used to justify state actions that violate human rights. To make it more meaningful, parameter on its application should be provided.