

Constitutional Protection of the Right to Social Security in Tanzania, Kenya and South Africa.

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## EXECUTIVE SUMMARY

This thesis looks at the constitutional protection of the right to social security in the United Republic of Tanzania, The Republic of Kenya and the Republic of South Africa. The right to social security is one of the social rights provided for under the International covenant on Economic, Social and Cultural Rights 1976.

The discussion starts by looking at different assumption advanced by human rights scholars on justiciability and non justiciability of economic, social and cultural rights as against civil and political rights. Basing on the arguments of historical differences between these groups of rights, resources constraints, as well as judicial incapacity, it can be seen that reasons for non justiciability fail following the South African Constitutional Court developed jurisprudence under the Post-Apartheid 1996 Constitution which provided for justiciable economic and social rights. In 2010, Kenya also followed South African path recognizing economic and social rights justiciable.

The thesis goes further to explain the meaning, content and relationship of the right to social security, which is the main focus of the thesis, and states parties' obligations on both ILO covenants on the right to social security and the International covenant on economic social and cultural rights. Courts in the Republic of South Africa and Kenya, provide a very good illustration to the interpretation of states obligation to the realization of economic and social rights and the right to social security. Constitutional values such as Human dignity, equality, nondiscrimination and democracy are used well in attaching states obligation to the fulfillment of constitutionally provided economic and social rights despite resources scarcity.

The thesis ends by recommendations to Tanzania, to reconsider judicial enforcement of economic and social rights treating social security as a right rather than generosity. Tanzania initiated

Constitutional review process in 2011 aiming at promoting social justice and human rights observation, regrettably the process ended by producing the draft constitution (awaiting for a referendum to take place in April 2014) which does not recognize the right to social security and other economic and social rights as justiciable. The Indian supreme court which, despite of constitution non-recognition of enforceable economic and social rights has interpreted those rights to be enforceable under the fundamental right to life and to live with dignity has also been recommended to be an inspiration to the Tanzanian judiciary on facilitating the enforcement of this important right for the wellbeing of the Tanzanian society.

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## INTRODUCTION

18<sup>th</sup> November 2011 was indeed a celebrated day in Tanzanian. The day when the Parliament of United Republic, passed the Constitutional Review Bill and subsequently signed into an Act of the parliament<sup>1</sup> initiating the making of Constitution of the “people”.<sup>2</sup> The day was expected to be a turning point to the country’s constitutional history relieving more than 80% of the rural poor peasants depending on agriculture as their means of survival.<sup>3</sup>

The constitutional review process which started officially in 2012 aimed at solving *inter alia* the problem of the so called “outdate and severely patched”<sup>4</sup> constitution to conform to the current global socioeconomic and political environment respecting human rights standards and monitoring misuse of public funds and embezzlement for the wellbeing of the whole Tanzanian society.<sup>5</sup> The constitutional review commission, (hereinafter referred to as the Commission)<sup>6</sup> which was required to collect, analyze and evaluate peoples opinion throughout the country and complete its task by handling the draft constitution to the constituency assembly,<sup>7</sup> to the large extent did well

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<sup>1</sup>The Constitutional Review Act No.8 of 2011[Cap. 83 R.E 2012]

<sup>2</sup> Constitution of the “the people” because the Act provided for inclusiveness of citizens in all stages of constitution drafting and adoption procedures, unlike the current constitution of 1977 which despite of being enacted by the constituent assembly, it’s process was not inclusive throughout. See s. 4 of part II to the Act. Also, C. Murray and C. Kirkby; Constitutional making Process in Anglophone Africa: we the people? From Imposition to participation in Constitutional Making pp3. Available at <http://www.academia.edu/6026889/> for the meaning and wave of inclusiveness and public participation in Anglophone Africa constitutional making processes.

<sup>3</sup> In Tanzania, 80% of the population live in rural areas and depend on agriculture (peasantry). See Legal and Human Rights Centre and Zanzibar Legal Services Centre; Tanzania Human Rights Report 2013, LHRC & ZLSC, Dar es Salaam & Zanzibar 2014 pp. 148.

<sup>4</sup> It has been argued that one among the reasons for initiating a constitutional review process is because of many amendments made to the current constitution since its promulgation in 1977. The current constitution has been amended 14 times and the last amendment was on 2005(made under section 4 of the Laws Revision Act, chapter 4 of the laws) on nondiscrimination on the basis of gender. Also see the Constitutional Review Commission report on the United Republic of Tanzania Constitutional Review Process; December 2013 pp 5.

<sup>5</sup> Ibid

<sup>6</sup> Established under s. 5 part III of Act No.8 of 2011

<sup>7</sup> Ibid.s17, 18, 19, 20 and 22

its part to the expectation of the people especially with regard to laws, policies and programs of the government.

Bearing in mind the modern concept of the rule of law, entailing the recognition of importance of social and economic rights which admits a need of certain economic standard and wellbeing of the people<sup>8</sup>, the commission came up with a draft constitution incorporating enforceable socio and economic rights including the right to social security and assistance to disadvantaged and most vulnerable groups such as elders and disabled.<sup>9</sup>

Although it was inspired by the 1937 Irish, 1949 Indian constitutions and the 1977 constitution of the united republic of Tanzania which separate the fundamental rights from the Directive Principles of State Policy, (hereinafter referred to as DPSP) rendering the latter part unenforceable as being more of a policy matters to be handled by the parliament and not the court, the proposed draft constitution did not incorporate any provision ousting court's jurisdiction.<sup>10</sup> Reaching the court seeking remedy for violation of constitutional rights was also softened as the draft provided for the possibility of group and public interest litigation.<sup>11</sup>

Unexpectedly, all these aspirations which citizens had on having a constitution providing for social justice, were turned down following the provision of section 25 of the Constitutional Review Act which was interpreted to empower the constituent assembly to write and pass the proposed

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<sup>8</sup> Ziyad Motala and Cyril Ramaphosa; Constitutional Law, analysis and Cases, Oxford university press, Cape Town, South Africa. 2002 Pp396.

<sup>9</sup> Articles 10 of Chapter II to the Commission's Draft constitution, (famously known as the "Waryoba" Draft following the name of the Chairman of the Commission, Retd. Judge Joseph Sindi Waryoba)

<sup>10</sup> Article 11 empowers any state authority and citizens to use the objectives and goals as outlined in the DPSP part as a guidelines to the interpretation of other provisions of the constitution and other laws of the land in the implementation of any policy decision for the purpose of creating a free, better and effective society.

<sup>11</sup> Op.cit Art 54 Waryoba draft.



constitution for presentation to a referendum.<sup>12</sup> Consequently, the constituent assembly inserted a provision in the constitution barring court's jurisdiction on the DPSP part.<sup>13</sup> This provision which looks very similar to the provision ousting court's jurisdiction to the economic and social rights contained in the DPSP in the current 1977 Constitution of the United Republic of Tanzania<sup>14</sup> the fact which made no difference at all to the aims of getting a new constitution for social justice.

This thesis aims at exploring the reasons as to why most constitutions especially the Tanzania constitutions, for this matter both the current and draft constitution bar court's jurisdiction to the economic and social rights, particularly the right to social security and assistance.<sup>15</sup> The thesis based on assumptions that human rights are universal, indivisible and interrelated and in order to achieve the just, equal and society respecting human dignity freedom and social justice in the light of the Universal Declaration of Human rights 1948, (hereinafter UDHR) constitutional protection of most vulnerable population is indispensable and this can only be achieved by extending provision of social security and social assistance to cover them.

In achieving such goals, the thesis will explore Constitutional protection of the right to social security and its relation to other economic and social rights in Tanzania, Kenya and South Africa. The reasons as to why these three countries have been chosen are that, first, all these countries are found in African continent. Therefore, they all share almost the same social, economic and political

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<sup>12</sup> Section 25(1) of the Act no 8 which provided for powers of the constituent assembly, provided; "The Constituent Assembly shall have and exercise powers to make provisions for the New Constitution of the United Republic of Tanzania and to make consequential and transitional provisions to the enactment of such Constitution and to make such other provisions as the Constituent Assembly may find necessary". See *Saed Kubenea v. Attorney General*. Misc. Civil cause No.28 of 2014, In the High Court of Tanzania at Dar es Salaam (unreported).

<sup>13</sup> Article 20(2) of the official draft constitution provides; "The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter."

<sup>14</sup> See art 7(2) of the 1977 Constitution of the United Republic of Tanzania

<sup>15</sup> It is important to note that, due to close relationship between the right to social security and other economic and social rights, to be explained in substantive chapters, for the purpose of this thesis both "social security right" and "economic and social rights" will be used interchangeably throughout the thesis.

history. Secondly, in 1996 South Africa got a “revolutionary”<sup>16</sup> constitution. The South African Constitution of 1996 enshrines justiciable economic and social rights.<sup>17</sup> In *Grootboom* case the South African constitutional court endorsed and developed its own jurisprudence on how to interpret the wording of the constitution especially when it comes to states obligation on economic and social rights taking into consideration inadequacy of resources.<sup>18</sup>

In 2010, Kenya made a significant Constitutional change adopting a transformative constitution aiming at fighting poverty, inequality upholding social justice and raising living standard of the people.<sup>19</sup> With this respect, to the large extent, the provisions of the new Kenyan Constitution were inspired by the 1996 South African Constitution including incorporation of justiciable economic and social rights in the Bill of rights.<sup>20</sup> In the case of *Mitu Bell Welfare Society v. the Attorney General and two others*,<sup>21</sup> like the South African Constitutional Court in *Grootboom* case, the High Court of Kenya also endorsed the enforceability of these rights under the new 2010 constitution.

As described above, Tanzania though initiated constitutional review process aiming at achieving social justice, the official proposed draft constitution reiterates the same non enforceable provisions on economic and social rights as its counterpart 1977 Constitution.<sup>22</sup>

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<sup>16</sup> “Revolutionary” in the sense that following the apartheid regime before south African majority Independence in 1994 blacks were denied access to equal social economic rights under the notion of inferior race by the minority South African government. The 1996 constitutional aimed at removing racial and socio-economic classes establishing egalitarian society. See Christiansen E.; Adjudicating non-justiciable rights; socio-economic rights and South African Constitutional Court in Columbia Human Rights Law Review Vol. 38, 321(2007) pp3. Also available at: <http://ssrn.com/abstract=999700>.

<sup>17</sup> Chapter 2 to the 1996 Constitution of South Africa, the part on Bill of rights. Also see articles 26, 27, 28 and 29 to the constitution.

<sup>18</sup> *Government of the Republic of south Africa and others v. Grootboom and others*, 2001(1) SA 46(CC).

<sup>19</sup> See N. Orwago. Limitation of socioeconomic Rights in the 2010 Kenyan Constitution: A proposal for the adoption of Proportionality approach in the judicial adjudication of Socioeconomic rights disputes. PER / PELJ 2013(16)5 pp 1.

<sup>20</sup> Article 43 to the 2010 Kenyan constitution provides for enforceable economic and social rights.

<sup>21</sup> Petition No 164 of 2011, High Court of Kenya at Nairobi (Constitutional and judicial Review Division)

<sup>22</sup> Op.cit. articles 7(2) of 1977 Const. and 20(1) of the official Draft constitution 2014

The thesis aims at making some proposals and recommendations to Tanzania to reconsider the importance of economic and social rights particularly the right to social security and adopt South African and Kenyan Courts interpretations and good practices in order to promote the rule of law welfare and social justice. Some recommendations from other jurisdictions such as India, will also be considered because for Tanzania, to the large extent, both the present and draft constitutions were inspired by the 1949 Indian constitution.

The thesis starts by examining the reasons for and against non justiciability of economic and social rights in the first chapter. The second chapter will explain the meaning of the right to social security and its content the target being expounding the right to social security as a human right and its relationship with other human right. The third chapter bears the analysis of above mentioned three jurisdictions on how their constitutions, laws and policies on economic and social rights are interpreted by courts of law to meet obligations under International conventions such as the International Covenant on Economic Social and Cultural Rights (hereinafter, the ICESCR) the International Labor Organizations (ILO) conventions and other human rights instruments on the right to social security. The last chapter is on recommendations to undeveloped constitutional jurisprudence on protection of economic and social rights mainly Tanzania basing on the analysis made in the preceding chapters. The thesis will end by concluding remarks on what have been surveyed throughout the whole thesis.

## CHAPTER I

### TENSION BETWEEN CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

#### **Introduction;**

The friction between civil and political rights on the one hand and economic and social rights on the other, was a product of the division of rights contained in the UDHR into separate binding conventions.<sup>23</sup> These binding conventions are the International Covenant on Civil and Political rights (ICCPR) and the International Convention on Economic Social and Cultural rights (ICESCR) in 1966.<sup>24</sup> The division of the rights enshrined in the UDHR was essentially necessitated by two major reasons namely the rise of controversial and contested United Nations General Assembly decision whether to include or leave out economic and social rights when the UDHR was being drafted<sup>25</sup> and the Cold war politics between the communist states which favored and gave priority to social rights as against the US which opposed any legal force to this group of rights.<sup>26</sup>

Thereafter, more advanced supervisory mechanism within the United Nations system for implementation and enforcement of the civil and political rights than that for economic and social

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<sup>23</sup> The General assembly resolution does not have any force of law. Accord to Art 38 ICJ statute, the UNGA is not mentioned as a source of law having the force of law, the proposition that United Nations General Assembly should have powers to enact legally binding rules of international law was put forward by the Philippines during the San Francisco Conference 1945, only to be turned down by the parties to the conference, granting recommendation and advisory powers to the General Assembly. See Kerwin J.G, The role of UN General Assembly Resolutions in determining principles of International law in the US Courts, in the Duke Law Journal, Vol. 876, and 1983 pp876 pp879.

<sup>24</sup> Christiansen E.; Adjudicating non-justiciable rights; socio-economic rights and South African Constitutional Court in Columbia Human Rights Law Review Vol. 38, 321(2007) pp9. Also available at: <http://ssrn.com/abstract=999700>

<sup>25</sup> Asbjorn E; Economic Social and Cultural Rights as human rights in Asbjorn E. et al(Eds); Economic Social and cultural rights a textbook Martinus Nijhoff Publishers London 1995, Pp 21, pp22.

<sup>26</sup> Daphne B. and Gross A; Introduction; Do we Need Social rights? Question in the Era of Globalization, Privatization, and the Diminished Welfare State in Daphne B. and Gross A.(Eds); Exploring Social Rights, Between Theory and Practice; Hart Publishing Oxford and Portland, Oregon 2007 Pp 1, pp4.

rights.<sup>27</sup> Immediate duty on implementation of civil and political rights was put on states while implementing economic and social rights only required states to take steps necessary to achieve progressively the fully realization of these rights within states available resources.<sup>28</sup>

Following that difference on the mode of implementation of the two covenants, many International, regional and National human rights non-governmental systems and organizations as well as states constitutions being justified by different assumptions as to the status of economic and social rights have put much consideration and attention in both theory and practice to the civil and political rights while least emphasizing on economic social and cultural rights.<sup>29</sup>

This chapter will explain the debate by different human rights actors and scholars on the legal nature of rights provided under the International convention on economic social and cultural rights, specifically the right to social security which is the main subject of the thesis and whether they can be raised in the court of law. The chapter will end by explaining the concept of justiciability of economic and social rights and the present position as to the justiciability debate.

### The nature of states' obligation

The first line of argument as to non justiciability of socio-economic rights underpins the relationship between the two groups of rights regarding state obligation; that is to say,

civil and political rights require the state to refrain from intervening into individual's exercise of his rights hence negative obligation, while economic and social rights impose a positive obligation and may require the state to actively provide certain requirements in the socio-economic welfare

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<sup>27</sup> Op.Cit

<sup>28</sup>See Limburg principles on the implementation of the International covenant on Economic, social and Cultural rights, UN Doc. E/CN.4/1987/17.

<sup>29</sup>Op. Cit Asbjorn Economic, Social and Cultural Rights Pp15.

to an individual or society.<sup>30</sup> Economic and social rights cannot be justiciable because they are merely aspirational and vaguely worded hence may unnecessarily impose positive obligation to the government.<sup>31</sup>

Arguing against this assumption, scholars defending justiciability of socio-economic rights propose that even civil and political rights involve active state obligation. Protection of the right to freedom of speech being an illustration for that. If the state aims at effective protection of such right, the state might be obliged to legislate providing for a framework for the enjoyment of such right followed by allocation of police resources to protect demonstrators and other measures facilitating the right to free speech.<sup>32</sup> With regard to the alleged positive nature of socio-economic rights, it has been argued that it is not always that economic and social rights require government action, but also restraint.<sup>33</sup> The rights to health care and clean water for example might require protection measures from the government, restraining third party infringement of enjoyment to such rights and these actions can be as important as state provision of health care facilities.<sup>34</sup>

It can therefore be concluded that both economic and social rights and civil and political rights require positive and negative state obligations, though to some degrees and not substance, economic and social rights might require greater positive obligations necessitating need for resources.

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<sup>30</sup> Op cit. Christiansen E. Adjudicating non justiciable Rights. pp 10.

<sup>31</sup> Ibid.

<sup>32</sup> Op.cit Daphne B and Gross A; Do we need Social rights?pp 6.

<sup>33</sup> See Malcom L. The Justiciability of Social rights: From Practice to Theory in Malcom L.(ed) Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, Cambridge University Press, New York. Pp3,pp 30.

<sup>34</sup> Ibid

## The question of cost and limited resources

This assumption underlies the fact that civil and political rights, because they only involve passive state obligation, they are not cost full in terms of resources. On the contrary, economic and social rights because they involve positive obligation which requires government to act positively, may attract much government expenditure even in situations of limited state resources.<sup>35</sup>

In countering this assumption, academicians in support of socio-economic rights justiciability argue that both categories of rights attract huge financial burden to the state. Henry Shue gives an example of civil and political right to security.<sup>36</sup> He says that in order to for the right to physical security to be effected to a citizen the government must advance some payments and incur cost. The cost which may be incurred include forming up the police forces, building military camps and training schools, educating lawyers as well as creating proper and sufficient systems of detection and prevention of violation of personal security.<sup>37</sup> All those “positive obligations” attract the use of government expenses.

Moreover, Asbjorn Eide<sup>38</sup> regards the question of cost as being considered as a narrow understanding of the nature of social economic and cultural rights. Pointing out that states obligation on economic social and cultural rights does not only entail the obligation to assist in terms of direct provision of basic needs, he refers to the Declaration on the Right to Development.<sup>39</sup> Article 2 of the declaration states that the individual is the active subject of all economic and social development. Therefore, the individual is expected to deploy his own efforts whenever possible

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<sup>35</sup> Op. cit. Asbjorn E. Economic social and cultural rights pp 36.

<sup>36</sup> Desai D. Countering Legitimacy; Democratic Agency and the justiciability of Economic and Social Rights in *Interdisciplinary Journal of Human Rights Law* Vol.4:1 (2009-2010) pp 25, pp27.

<sup>37</sup> Ibid.

<sup>38</sup> Op. cit. Asbjorn E. Economic social and cultural rights pp36.

<sup>39</sup> A/RES/41/128 4 December 1986.

and by using his own or shared resources to ensure the satisfaction of his own need.<sup>40</sup> In this aspect, individual or collective rights become important hence the state is obliged to respect resources (emphasis is mine) individually or collectively owned in order to enable them to satisfy their own needs. He gives an example of the duty to respect such as making sure the state does all necessary steps to ensure the land rights of all indigenous people and land tenure of small holders whose titles are uncertain be registered and recognized respectively.<sup>41</sup>

The duty to respect is followed by the duty to protect the freedom to use such individual and community resources from fraud or assertive and aggressive subjects. The protective role of the state can essentially be through putting up legislations which must be amenable to judicial review. For example legislations for equality on ownership of land in places where agriculture is the major means of economy.<sup>42</sup> Obligations to respect and protect therefore, do not require the government to incur cost in terms of resources, there are much regulatory.

### Legitimacy of Judicial intervention and courts' competence

Democracy is one among the notions advanced by supporters for non justiciability of economic and social rights in arguing against judicial intervention. Adherents argue that economic and social rights are regarded as matters of policy and involve making decisions on resource allocation. Therefore unelected judiciary is not better placed to decide matters of such nature to the society hence decisions are to be made by the legislative and the executive institutions of the government.<sup>43</sup>

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<sup>40</sup> Op. cit. Asbjorn E. Economic social and cultural rights pp 36.

<sup>41</sup> Ibid pp 37.

<sup>42</sup> Ibid pp 37-38.

<sup>43</sup> Lord Lester and O'Conneide C. The effective Protection of Socio-economic Rights in Yash Ghai and Jill Cottrell(Eds); Economic, Social and Cultural Rights in Practice, the Role of Judges in Implementing economic social and cultural rights, Interights 2004 pp20.



The judicial branch should only intervene in the situation where there is a clear failure or nonperformance of these democratic governmental institutions.<sup>44</sup>

The constitutional principle of separation of powers in which each state organ is granted powers to resist encroachment as against the other as well as noninterference in all the functions and duties entrusted to that particular state organ is also used as a justification to judicial noninterference in economic and social matters.<sup>45</sup> According to this assumption it can be concluded that judicial encroachment to policy matters leads to usurpation of executive and parliamentary powers leading to conflict between state organs which may threaten constitutionalism and rule of law.

The argument also resides in the notion of limits of judicial expertise. This involves the question as to whether the judiciary, given procedural limitations has the capacity of assessing the information beforehand provided by the plaintiff and ultimately be able to provide potential remedy.<sup>46</sup> Unlike the legislature which can easily collect sufficient and satisfactory information from the public, the judiciary is only capable of assessing the individual's concrete case especially on the violation of the claimant's right and provide a remedy.<sup>47</sup> Again, contrary to socio-economic rights, the judiciary will need to go further step assessing the information about resource availability which is difficult for the judiciary to have in hand.<sup>48</sup>

### Responses as to Legitimacy of Judicial Intervention and courts' competence

The first concerns undemocratic argument that socio economic rights, because they involve allocation of society's recourses, are to be done only through a political process. According to this

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<sup>44</sup> Ibid pp21.

<sup>45</sup> Ibid pp 20.

<sup>46</sup> Christiansen E.; Adjudicating non-justiciable rights; socio-economic rights and South African Constitutional Court in Columbia Human Rights Law Review Vol. 38, 321(2007) pp11. Also available at: <http://ssrn.com/abstract=999700>.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid pp12.

assumption therefore the judicially, not democratically elected cannot be capable of debating and compromise.

In countering such assumption, scholars for economic and social rights have involved the concept of democratic agency to create interrelatedness and ultimately legitimate court intervention to social economic rights.<sup>49</sup> According to the democratic agency assumption, it is presumed that the government must make sure that it meets all necessary social and economic make ups in order to ensure citizens minimum agency to participate in democratic processes.<sup>50</sup>

The Government should be accountable for the minimum range of social economic conditions to ensure citizens are free to make informed and sound decisions. These socio-economic conditions can be such as civic education, basic nutrition which will make citizens physically and mentally fit so as they properly participate in voting.<sup>51</sup> Also other economic needs such as healthcare and availability of clean water will ensure every citizen's participation in the political process.

Considering the requirement of socio-economic needs, both categories of rights can be found to be affected when it comes to citizen's participation in the democratic process. The Government therefore must ensure efforts are made to realize at least minimum standard realization of social economic rights which may impact in ensuring democratic process. Griffin<sup>52</sup> summarized the link between agency and rights as follows;

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<sup>49</sup> Op.cit.Desai D. Countering Legitimacy pp 31. The concept of democratic agency entails that, individual's liberty and autonomy to participate in democratic processes requires proper and sufficient social and economic structures to be in place. The author gives an example of right to sufficient education which is necessary at the basic level to inform the voter of how to read the ballot and cast vote.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Griffin. Discrepancies between the Best philosophical Account of Human rights and International Law of Human Rights cited as 101 PROC. ARIST. Soc.1,7(2001) in Desai D. Countering Legitimacy; Democratic Agency and the justiciability of Economic and Social Rights in Interdisciplinary Journal of Human Rights Law Vol.4:1 (2009-2010) pp 25-41, pp 31-32.

The first stage of agency is taking our own decisions for ourselves not being dominated or controlled by someone else (autonomy). To be more than empty tokens, our decisions must be informed; we must have basic education, access to information and to other people's views. And then, having formed a conception of a good life, we must be able to pursue it. So we need enough of material provision to support ourselves. And if we have all that, then we need others not to stop us (liberty).<sup>53</sup>

Judicial intervention comes in where the government fails to fully engage a section of citizens in a democratic process due to failure to implement the required minimum socio-economic needs necessary for the fulfilment of democratic process. In this situation, the government's legitimacy is considered to be reduced as not all citizens got chance to act as agents of democracy hence the will of the polity will not be represented in *toto*.<sup>54</sup> In that situation, the court will come in to act as a legitimate governmental institution directing the state to provide the necessary minimum social economic needs and the doctrine of separation of powers will not have been violated.

In addition to the democratic agency argument, the response to the argument of undemocratic legitimacy has been disapproved basing on the universality principle of human rights in a genuinely inclusive sense. Professor An Naim believes that if the state is committed to provide and protect human rights including the social economic rights, there is need for judicial supervision in the performance of normal political and administrative processes<sup>55</sup>. He believes that this intervention will ensure non-discrimination in the protection of economic and social rights as well

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<sup>53</sup> Op. Cit Griffin.

<sup>54</sup> Ibid.

<sup>55</sup> Muralidhar S. Economic, Social and Cultural Rights; An Indian Response to the Justiciability Debate in Yash Ghai and Jill Cottrell(Eds); Economic, Social and Cultural Rights in Practice, the Role of Judges in Implementing economic social and cultural rights, Interights, London 2004pp23 pp 24.

as binding states not to avoid responsibility by simply doing nothing concerning socio-economic rights.<sup>56</sup>

On the argument of judicial lack of enough expertise, scholars for economic and social rights argue that the proponents are quite misled by the fact that the court is only supposed to rely on plaintiff's information. The argument is defeated by the contemporary judicial activism development in many constitutions which allows anyone not necessarily affected by the action to file a complaint in the court of law under public interest litigation doctrine.<sup>57</sup> This can be either an individual or organization. Relying on the information in these public interest litigation, the court of law can be informed on the matter at hand. Also, courts of law may use their mandate to summon witnesses as well as amici if the matter may need any expatriate information. Therefore, instead of relying on the judicial notice only, the judiciary can gather necessary information from its constitutional or statutory mandate.

The remedy issue though it has been a burning concern to opponents of justiciability of economic and social rights, to courts, it seems not to be a very serious problem. The language of ICESCR has provided remedy by ordering states to fulfil progressive realization of the rights in question within its available resources. In interpreting provisions of the convention which have been enshrined in the South African constitution,<sup>58</sup> South Africa Constitutional Court in *Grootboom* case, successfully granted the remedy to the plaintiffs without assessment or actual interference to

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<sup>56</sup> Ibid.

<sup>57</sup> Public interest litigation is the kind of litigations pursued by Lawyers in the court of laws regarding constitutional rights or different statutory laws which affect the whole society, with the aim of either changing the laws or their application for the betterment of the whole society. See Edwine R. et al(Eds) Pursuing the public interest; A handbook for legal professionals, Public interest Law Initiative, Columbia Law school, New York 2001 pp 81 and Lord Lester and O'Conneide C. The effective Protection of Socio-economic Rights in Yash Ghai and Jill Cottrell(Eds); Economic, Social and Cultural Rights in Practice, the Role of Judges in Implementing economic social and cultural rights, Interights London 2004 pp 19.

<sup>58</sup> See internal limitation clauses under articles 26, 27 28 and 29 South African constitution 1996.

planning of governmental resources by declaring the policy presented by the government unreasonable for the failure to respond to the need of the most desperate group.<sup>59</sup>

This tension between civil and political rights on the one hand and economic and social rights on the other, is what led to pre and post 20<sup>th</sup> century constitutional non-recognition<sup>60</sup> or recognition without any legal force<sup>61</sup> to economic and social rights resulting to the concept of non justiciability of socioeconomic right. Some modern constitutions, which have been referred to as *transformative constitutions* such as the 1996 democratic Constitution of South Africa,<sup>62</sup> has provided an answer to the justiciability debate by giving judicial protection to these rights. Before turning to South African example for the solution of tension between the two groups of rights, let us first examine the concept of non justiciability.

### The notion of non justiciability

The United Supreme Court decision in *Baker v. Carr*<sup>63</sup> can be helpful in understanding the concept of non justiciability.<sup>64</sup> In rendering the decision, the court invented six factors which would *disqualify* (emphasis is mine) the judicial ability to try matters of political nature under the doctrine of the “political question”.<sup>65</sup> Among other things, all matters which seem to require prior policy

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<sup>59</sup> Op.cit. *Grootboom* case, the South African constitutional court though admitted that the government had presented and put in place the national housing program to meet the obligation of progressive realization of the right to access to housing within available resources, still it declared the program as unreasonable as it failed to meet the needs of the most vulnerable groups. See para 99, *Grootboom* decision.

<sup>60</sup> The constitution of the United States of America 1787 ratified in 1789 has been interpreted to be excluding Economic and Social rights. See Sunstein C.; Why Does the American Constitution Lack Social and Economic Guarantees; The Law School of University of Chicago January 2003. pp 5 also available at <http://www.law.uchicago.edu/academics/publiclaw/index.htm>

<sup>61</sup> See Indian 1949 Constitution Articles 38, 39, 41-48, Tanzanian 1977 constitution Part II of 1st chapter; Ghana 1992 Constitution; Arts 34-41. Also See Young K., Constituting Economic and Social Rights, Oxford University Press U.K 2012 pp16

<sup>62</sup> See Sunstein C. Designing Democracy; What Constitutions do. Oxford University; New York 2001. pp 224

<sup>63</sup> 369 U.S 186

<sup>64</sup> The supreme court was called to determine the constitutionality of malapportionment of state legislatures under the equal protection clause of the 14<sup>th</sup> Amendment to the US constitution

<sup>65</sup> Op. Cit *Baker v. Carr* pp 199 to the Supreme Court decision.

determination as well as lack of judicially discoverable and manageable standards to resolve them would disqualify the judiciary to adjudicate on.

According to Professor Ghai, there are two aspects of non justiciability. The first aspect is what he referees to it as explicit non-justiciability.<sup>66</sup> Here, the Constitution or any other law may provide specifically that entitlement provided therein cannot be raised in the court of law. It has to be left for interpretation and implementation in the hands of the legislative or executive branches of the government because only these two organs have the obligation to the fulfilment of such entitlement.<sup>67</sup> This notion has been embedded in some nations' constitution as Directive Principles of Social Policy (DPSP) originated from the Irish constitution of 1937.<sup>68</sup> The range of issues covered in these directive principles of policy involve politics, economics, social health education and culture.<sup>69</sup> The major reason explained as to the why these entitlements are categorized and treated in such a way is limited resources to provide for those matters, hence planning and allocation of such resources are to be determined by political process.<sup>70</sup>

The second aspect of non justiciability is non justiciability as a matter of appropriateness. Here, the Judicial organ is not prohibited either by law or by the legislature to adjudicate on the matter, but due to technical complexity of the matter, lack of clear judicial standard of enforcement, or the involvement of policy determination in the matter in hand, the judiciary is regarded as

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<sup>66</sup> Yash G. and Cottrell J.; The role of the courts in the protection of Economic social and Cultural rights in Yash G. and Cottrell J (eds); Economic, Social and Cultural Rights in Practice, the Role of Judges in Implementing economic social and cultural rights, Interights London 2004 pp 58 pp66.

<sup>67</sup> Op. cit. Ghai and Cottrell pp 66.

<sup>68</sup> Art 45(1) Irish constitution 1937; "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution."

<sup>69</sup> Kabudi P. Human rights jurisprudence in East Africa; A comparative study of fundamental Rights and freedoms of the Individual in Tanzania, Kenya and Uganda. Baden-Baden : Nomos Verlagsgesellschaft; Berlin 1995 pp 92.

<sup>70</sup> Op. cit. Ghai Economic Social and Cultural rights in Practice pp67.

unsuitable to adjudicate.<sup>71</sup> The judiciary therefore, avoiding illegitimate intrusion into policy and political matters and respecting the doctrine of separation of powers surrenders the matter to political institutions as a political question.<sup>72</sup>

### South African Transformative Constitution and Justiciability debate

Entrenchment of justiciable economic and social rights in the post-apartheid South African constitution has provide a significant global standpoint on perceiving economic and social rights.<sup>73</sup> Aiming at dealing with problems of persistence socioeconomic deprivation during apartheid regime, socioeconomic rights were included in the constitution.<sup>74</sup>

Answers to justiciability debate was given by the south African Constitutional Court in the case certifying the Constitution.<sup>75</sup> In the case, the Court held that economic and social rights are subject to judicial enforcement.<sup>76</sup> Regarding resources, policy determination and separation of powers issues, the court said even civil and political rights depend on resources hence including both groups of rights for courts determination would not have breached separation of powers.<sup>77</sup>

To the large extent the South African constitutional court managed to counter non justiciability assumptions with regard to economic and social rights as discussed in the preceding debate even in states with developing economies as will be seen further in the third chapter of this thesis.

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<sup>71</sup> Ibid pp 69.

<sup>72</sup> Ibid

<sup>73</sup> Op.cit. Young K. Constituting Economic and Social Rights pp 19.

<sup>74</sup> 1996 South African Constitution s.s 26&27

<sup>75</sup> *Exparte Chairperson of Constitutional Assembly; in Re certification of the Constitution of the Republic of South Africa* 1996. 1996 (4) SA 774(CC)

<sup>76</sup> Ibid at para 78. Also see op.cit Susntein C. Designing Democracy pp 225.

<sup>77</sup> Op.cit at Para 77 Recertification case.

## Conclusion

This chapter has demonstrated the debate among human rights scholars regarding justiciability and non justiciability of economic and social rights. This debate revolves around different assumptions namely, the negative nature of civil and political rights as against the positive nature of economic and social rights, the question of limited states' resources to provide economic and social needs as well courts' legitimacy and lack of expertise. As see from the discussion, the South African constitutional court to the large extent managed to settle the debate by declaring economic and social rights enforceable. The next chapter will explain the concept and content of the right to social security the specific subject to this thesis.



## CHAPTER II

### THE RIGHT TO SOCIAL SECURITY

#### **Introduction**

The right to social security is a basic human right.<sup>78</sup> The International community, through both the UDHR and ICESCR has fully recognized this right mentioning various forms of social security.<sup>79</sup> Such recognition, it has been argued, does not only impose obligation to individual states but the entire international community to guarantee its implementation.<sup>80</sup> This chapter will analyze the meaning, content and relationship of the right to social security, other economic and social rights and other human rights recognized in international human rights instruments.

#### **Social security**

Social security covers both social insurance and social assistance.<sup>81</sup> The legal basis for social security benefits lies either in constitutional provisions or private contracts and collective agreements binding private individuals and companies.<sup>82</sup>

The right to social security is very important to the realization of other rights provided for in the convention such as the right to work, the right to health, education, rights of persons with disabilities and older persons as well as general measures for poverty reduction.<sup>83</sup>

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<sup>78</sup> See Ursula K. The Present and future role of ILO standards in realizing the Right to Social Security in *International Social Security Review*, Vol. 60, 2-3/2007 pp. 119. Pp 120.

<sup>79</sup> See UDHR 1948 Articles 22& 25, also ISECR 1976 Articles 9 and 10.

<sup>80</sup> Op. cit Ursula K. The present and future role of ILO. pp 120

<sup>81</sup> Ibid pp 159 While the earlier involves paying of contributions by workers and employers in order to finance future social risks such as sickness or injury at place of work as well as old age, the later involves state sponsored social benefits to individuals or a group normally from public funds raised through tax revenues. Also see Kwabena O. and Clara O. Foundation Chapter: Social Protection Schemes in Africa in Trywell K. et al.(Eds.) *Unique Expressions*, Accra Ghana 2012. Pp14.

<sup>82</sup> Scheinin M. The Right to social security in Asbjorn E. et al.(eds); *Economic Social and Cultural rights A textbook*, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1995 pp 159, pp 160.

<sup>83</sup> See Articles 6, 7, 10, 14 ICESCR, also para 28 to General Comment no. 19 on the Right to Social Security E/C.12/GC/19 4th February 2008.

## Social security Right and the ILO

As part of its international obligation towards realization of social security right,<sup>84</sup> the International Labor organization has been concerned with the right to social security since its foundation.<sup>85</sup> The Preamble to the original constitution, *inter alia* mentioned the importance of addressing issues of unemployment, sickness at work place as well as disability and pension benefits.<sup>86</sup> These objectives were reiterated in the Declaration of Philadelphia of 1944.<sup>87</sup>

In 1952, the social security (Minimum standard) convention was adopted.<sup>88</sup> The convention has been described as the most important and the basic reference in the field of social security.<sup>89</sup> Though it does not explicitly provide for the definition of social security, the meaning of social security can be constructed by considering the parts to the convention which address the nine social risks provided for in the earlier ILO convention.<sup>90</sup>

The convention obliges state parties to comply with at least three of the social risks provided in the convention as a pre-condition for ratification, amongst these, there must be one indispensable

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<sup>84</sup> Since the Adoption of the international covenant on economic social and cultural rights, the task of promoting and ensuring implementation of social security rights has been seen as a special task for UN agency ILO. Also, both the UDHR and ISECR had enshrined very general texts on the right to social security without specifying the minimum core standard of social security needed for the realization of human dignity and personal development of an individual. See Lamarche L. The right to Social security in the International Covenant on Economic Social and Cultural Rights in Chapman A and Russel S.(eds); Core Obligations: Building a Framework for Economic Cultural and Social Rights, Intersentia, Antwerp; Oxford, New York 2002 Pp 87, pp 89. Also see op. cit. Schenin M. The right to Social Security pp 161-162.

<sup>85</sup> See Colin F. The International Labour Organization; An Integrated Approach to Economic and Social Rights in Malcom L.(ed) Social Rights jurisprudence, Emerging Trends In International and Comparative law. Cambridge University Press, New York 2008 pp591. Pp606

<sup>86</sup> Ibid

<sup>87</sup> Declaration Concerning the Aims and Purposes of the International Labour Organization (ILO), 1944, Paragraphs I (d) and III (f) provide for the need of promotion of social security measures and medical care.

<sup>88</sup> ILO Convention No. 102 of 1952; The ILO has adopted 22 conventions on social security to date, See op.cit. Colin F. pp 607.

<sup>89</sup> See Ibid Colin F. pp. 607 and op.cit. Lamarche L. pp90.

<sup>90</sup> The convention brings together nine branches of social security, the social risks namely, medical care, sickness benefit, unemployment benefit, old age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit survivors benefit from part II to part X. See op.cit.Lamarche L. pp 90.

provision of either unemployment, workers compensation, old age, survivors benefit or disability to be complied with.<sup>91</sup>

The convention however has shortfalls. It gives a room for discrimination by imposing obligation to a state party to declare the specific percentage of protected workers or economically active from the accepted risk. Also, in all provisions of the convention, a woman is not described as a “worker” but a “wife”. The convention is income based cash benefits for workers and their families focusing on wage other than need. It leaves out the non-working population, female atypical workers, self-employed or the population working in the informal sector.<sup>92</sup> As a result, in most of the African states, Tanzania being the case in this thesis, the prevailing social security and protection regimes leave out those who are in need of it, because it only cover a small section of population in the formal employment setting while the majority are poor and depend on the informal sector of the economy.<sup>93</sup>

In 2008, the Committee on economic social and cultural rights, issued a general comment on the right to social security addressing the issue of the right to social security which among other things it addresses the issue of non-discrimination and equality on the right of social security in aspects of sex, color, age, language, religion, nationality or social origin.<sup>94</sup> This general comment explains elements of the right to social security repeating the social risks and contingencies covered in the ILO convention no 102.

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<sup>91</sup> See Art 2, ILO convention No. 102. Also see op.cit.Lamarche L. pp91

<sup>92</sup> See op.cit Lamarche L pp.95

<sup>93</sup> See op. cit Tanzania Human rights Report 2013 pp 148. Also see Barya J. Social security and Social Protection in the East African Community, Fountain Publishers , Kampala 2011.pp. 61 for the Tanzanian population social security and social protection schemes coverage.

<sup>94</sup> General comment No. 19 on the Right to Social Security E/C.12/GC/19 4 February 2008 para 29

The general comment taking into consideration the issue of resources availability as stated in the convention<sup>95</sup> it imposes specific and core obligation to state parties.<sup>96</sup> The obligation to respect, protect and fulfil make up the specific obligation while the obligation to ensure the satisfaction of at a very risk a minimum essential level of the rights in the covenant making up the core obligation.<sup>97</sup> In each aspect of obligation, state parties are obliged to adhere to inclusion and nondiscrimination taking into consideration the importance of the right in guaranteeing human dignity for all persons.<sup>98</sup> There are also other specific conventions which emphasizes on nondiscrimination on social security rights.<sup>99</sup>

### Social Security right in other International Human Rights Instruments

In Africa, though the African Charter on Human and Peoples rights, does not explicitly provide for the right to social security, it has provisions on the right to health, the aged and disabled and on the provision of individual duties towards the society.<sup>100</sup> The protocol to the charter on the rights of women provide for the obligation to state parties to establish social insurance and social protection schemes for women working in the informal sector, paid maternity leave and health care.<sup>101</sup> The African Charter and the Welfare of the child, while recognizing the primary role of

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<sup>95</sup> Art 2(1)ESECR 1976

<sup>96</sup> Part III to the General Comment No. 19 2008.

<sup>97</sup> These obligation were taken from the CESCR General Comment No. 3 of December 1990 on The Nature of States Parties' Obligations, Art. 2, Para. 1, of the ICESCR.

<sup>98</sup> Para 1 part I to the General comment No.19.

<sup>99</sup> The International convention on the Elimination of all Forms of Discrimination against Women (CEDAW) identifies the forms of social security benefits which must be granted to women on a non-discriminatory basis; The Convention on the Rights of the child (CRC) obligates state parties to provide material assistance for the realization of parents primary role in realizing wellbeing of children; also, both the Convention on Elimination of All forms of Racial Discrimination (CERD) and the International Convention on the Protection of the rights of All Migrant workers and Members of their families requires nondiscrimination and equal treatment of all regardless residence or nationality.

<sup>100</sup> Arts16, 18 (4) and 29 Banjul Charter 1981.

<sup>101</sup> Art 13(f) and (i) and Art 14 Maputo Protocol 2003.

parents for child upbringing and development, it obliges state parties to provide assistance to parents facilitating that role.<sup>102</sup>

## **Conclusion**

This chapter has analyzed the meaning, content and relation of the right to social security and other human rights. International conventions mainly the ILO convention have also been analyzed. The ultimate aim of the ILO convention is to attain universality of coverage.<sup>103</sup> This may entail extending the coverage to excluded groups in order to ensure non-discrimination and equality as provided for under Art 2(2) of the ICESCR as well as in the convention above stated. Because it may require some resources, it has been argued that, the ILO convention remain central to the interpretation of the right, but determining violations to the right, one must resort to the ICESCR which has been interpreted to determine the minimum states obligations with regard to this right.<sup>104</sup>

The next chapter will analyze how, constitutions, laws policies of three jurisdiction target of this thesis reflect the provisions of international instruments on the right to social security and how the judicial branch interprets such provision.

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<sup>102</sup> Art 20 ACRWC 1990.

<sup>103</sup> Op. cit. Lamarche L. pp 95

<sup>104</sup> Ibid 95 & 100

## CHAPTER III

### COMPARATIVE ANALYSIS

#### **Introduction**

Article 9 to the ICESCR provides that; states parties to the covenant recognize the “right of everyone to social security including social assistance”.<sup>105</sup> Taking into consideration constraints of resources towards full realization of this right, the Covenant provides for progressive realization, however imposing immediate obligations in relation to some rights including social security right.<sup>106</sup> Nondiscrimination, gender equality and obligation to take steps towards full realization are obligations of immediate effects which states must adhere to.<sup>107</sup> Some specific obligations such as the obligations to respect, protect and fulfil are also imposed upon state parties towards realization of this right.

This chapter will analyses three state parties to the convention on how their constitutions, laws, policies and courts have dealt with fulfilment of the right to social security. The analysis will start with the United Republic of Tanzania followed by a comparative analysis of Kenya and South Africa.

#### **The Constitution of the United Republic of Tanzania and Directive Principles of State Policy**

The constitution of the United Republic of Tanzania of 1977 recognizes various aspects of socioeconomic rights and obligates the state to make appropriate provision for the realization of persons right to work, self-education and social welfare at times of old age, sickness or disability

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<sup>105</sup> Also see op.cit Arts 22 and 25(1) UDHR and para 1 to the general comment no. 19 on The Right to social Security.

<sup>106</sup> General comment no. 19 of 2008 para 40

<sup>107</sup> *ibid*

and other cases of incapacity.<sup>108</sup> These rights together with other principles such as respect to human dignity and human rights, non-discrimination and poverty eradication are reflected in the second part of chapter one to the constitution entitled Fundamental Objectives and Directive Principles of State Policy.

The essence of including The Part of Directive Principles of State Policy in the constitution has been explained to be achieving the aim of a programmatic constitution by including designated political goals and programs to be realized by a political process in a democratic order.<sup>109</sup> Being policy objectives to be realized by a political process, this part of the constitution is therefore not justiciable.<sup>110</sup> The constitution provides explicitly that;

The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this chapter.<sup>111</sup>

Therefore with respect to the right to social security which is the subject to this thesis, it is clear that it is not justiciable in the constitution of the United Republic of Tanzania.<sup>112</sup> It is however, important to note that, Tanzania is a member state to the ICESCR.<sup>113</sup> Also, Article 9(f) to the constitution obligates state authorities to set policies and programs upholding human dignity in accordance with the Universal Declaration of Human rights through these provision, the

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<sup>108</sup> Art. 11 of the URT Constitution of 1977

<sup>109</sup> See Op. cit. Kabudi P. Human Rights Jurisprudence in East Africa. pp 93

<sup>110</sup> However, despite non enforceability of this part, Article 7(1) obligates the government and all its organs exercising executive, legislative and judicial functions, to consider and observe the provisions of that part of the constitution when exercising their constitutional and administrative powers.

<sup>111</sup> Art 7(2) 1977 constitution

<sup>112</sup> See op. cit. Barya J. Social Security in East Africa pp 48.

<sup>113</sup> Tanzania ratified the ICESCR in 11 June 1976.

government adopted the National social security policy in 2003.<sup>114</sup> The policy defines social security as;

Any kind of collective measures or activities designed to ensure that members of society meet their basic needs and are protected from the contingencies to enable them maintain a standard of living consistent with social norms.<sup>115</sup>

This definition and objective of the policy statement is however geared to protection of citizens from economic and social distress resulting from the loss of income and contingencies and therefore not aimed at addressing problems associated with lack of income, the weakness reflected even in the law enacted to regulate social security matters.<sup>116</sup> This notion seems to be supported by the statement of the then Deputy Minister for Constitutional and Legal Affairs Hon. Angela Jasmine Kairuki presenting on progress made by government regarding its obligations to the ICESCR.<sup>117</sup> With regard to social security, the Hon. Deputy Minister said;

.....the Social Security Regulatory Authority (SSRA) was established in 2008 to regulate social security schemes and to ensure they provide better services to their beneficiaries. To a large extent, most of the Social Security schemes have ensured that *retired employees* (emphasis is mine) get their pension as soon as possible after retiring from the service and that they live a reasonable and decent life after retirement.<sup>118</sup>

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<sup>114</sup> See Ministry of Labour Youth Development and Sports; Tanzania Social Security Policy January 2003.

<sup>115</sup> O.p cit. Tanzania Social security Policy pp2.

<sup>116</sup> See op.cit. Barya, J. pp 50 and the Social security Regulatory Authority Act (Act No 8. 2008).

<sup>117</sup> The United Republic of Tanzania; Statement by Hon. Angela Jasmine Kairuki, Deputy Minister for Constitutional and Legal Affairs at the 49<sup>th</sup> Session of the committee on Economic Social and Cultural Rights at Geneva, Switzerland 13<sup>th</sup> -14<sup>th</sup> November 2012.

<sup>118</sup> Ibid pp11



Further in her statement, the hon. Deputy Minister says with regard to the universal social pension, the government is still working on the policies and schemes for social protection to cover elderly citizens.<sup>119</sup>

Aiming at improving fulfilment of human rights and going with changing times and environment, the Government initiated the constitutional review process in 2011.<sup>120</sup> Surprisingly, the draft constitution, while recognizing the right to access to social security and social assistance to disabled, elderly, children and people with disabilities, again it places the right in the same Directive Principles of State policy rendering the right unenforceable.<sup>121</sup>

All in all assessing the constitution, laws and policies on social security to include social protection and assistance, in Tanzania, does not cover population from informal sectors such as agriculture through which the country's economy most depend on,<sup>122</sup> self employed and unemployed. Therefore one can conclude that social security is not regarded as a right, rather as a mere state's generosity. This is because, the right is not justiciable hence meaningless and including it in the constitution makes it a mere "parchment barrier" as Sunstein expresses it.<sup>123</sup>

Having analyzed the status of the status of protection of the right to social security in Tanzania, the following part will analyze in a comparative manner the status of economic and social rights in South Africa and Kenya. The section also aims at identifying developments made by the two jurisdiction, basing on constitutional recognition and enforceability of economic and social rights,

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<sup>119</sup> Ibid pp 12.

<sup>120</sup> Op. cit Deputy Minister's Statement. pp 6.

<sup>121</sup> Chapter II of the second part to the Draft constitution 2014 , Arts 14(1)(d) and 20(2)

<sup>122</sup> See op.cit Deputy Minister's statement .pp 4.

<sup>123</sup> See op.cit. Sunstein C. Designing Democracy pp 221; also Madison J. Federalist No. 48

to extension of social protection and assistance to the most desperate, poor and marginalized groups.

## Analysis of South Africa and Kenya on constitutional protection of the right to social security

The constitution of South Africa of 1996 has the Bill of rights which do not separate the rights provided for in the two conventions.<sup>124</sup> It has been argued that the inclusion of both kinds of rights reflects the democratic participation in the process of South African democratic transition, aiming at protection of democratic values of human dignity, equality and freedom.<sup>125</sup> South Africa is a good example of the countries which have made progress and taken steps towards realization of the rights under the ICESCR.<sup>126</sup>

Section 27(1) (c) to the constitution provides for “qualified”<sup>127</sup> provision entitling every one access to the right to social security and appropriate social assistance for those who are unable of supporting themselves and their dependents. Other social rights such as basic nutrition, shelter and health care are also provided for under s. 27.

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<sup>124</sup> The preamble to the constitution provides for the goal of establishing a society based on democratic values social justice and fundamental human rights and improving the quality of all citizens.

<sup>125</sup> See Klug H. *The Constitution of South Africa, A Contextual Analysis*. Hart Publishing Limited U.K pp 114, also see s. 7 South African 1996 Constitution

<sup>126</sup> Under s. 7(2) the state is obliged to respect, protect and fulfil the rights provided for in the Bill of Rights including socioeconomic guarantees. It is important to note that, during the making of the South African constitution, South Africa was not a state part to the ICESCR, therefore, Interpretation of the economic and social rights to conform to international standards was being guided by the provisions of s. 39(1) (b) which obliges courts when interpreting Bill of rights provisions to consider international law. The convention was ratified later in 2015, 12<sup>th</sup> January and from that date having the domestic binding legal force in accordance with s. 231(4).

<sup>127</sup> “Qualified” as it is subject to states limited resources. See Coomans F. *Reviewing implementation of social and economic rights: an assessment of the “Reasonableness” test as developed by the South African Constitutional Court 2005 available at <http://www.zaer.dePp170>*

The constitution of Kenya of 2010 was to the large extent inspired by the Constitution of South Africa on provisions economic and social rights.<sup>128</sup> Article 43 to the constitution provides for the economic and social rights. The incorporation of these rights, matches state obligation to recognition of economic and social rights in accordance with the ICESR as wells and states constitutional obligations to observe, respect, protect, promote and fulfil the fundamental freedom provided in the bill of rights.<sup>129</sup> With particular interest to this thesis, art 43(1)(e) and 43(3) on the rights to social security to everyone and states responsibility to provide for appropriate social security to those unable to support themselves are of a very important concern.

### Justiciabilty of the right to social security and other economic and social rights

The provision of section 38 to the South African constitution grants courts ability to provide the appropriate relief including declaration of rights to any one alleging infringement or threaten of the rights provide for in the bill of rights.<sup>130</sup> The rules of standing are also stated in the constitution,<sup>131</sup> providing for, *inter alia* public interest litigation. Despite the ability of any person to seek for courts remedy, the rights in the bill are however subject to the internal limitation<sup>132</sup> as well as the general limitation provided for under section 36.

As discussed in the justiciability debate, the *Recertification case*, affirmed the inclusion of enforceable economic and social rights and court's ability to remedy violation despite of issues of recourses.

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<sup>128</sup> The constitution has entrenched provisions of economic and social rights as a part of the Bill of rights as South African 1996 did.

<sup>129</sup> Kenya ratified the ICESR in 2 may 1972. The constitution of Kenya 2010, in Art. 2(6) provides for recognition of any Treaty or Convention ratified by Kenya as part of laws of Kenya. Also see Art 21(1).

<sup>130</sup> See s.172 South African constitution 1996 on powers of courts in constitutional matters.

<sup>131</sup> Op.cit. ss 38.

<sup>132</sup> S. 27(2) resources availability.

In Kenya, the Constitution of 2010 also recognizes economic and social rights as enforceable rights.<sup>133</sup> Under the provisions of Art. 22(1) every person has the right to seek for courts assistance whenever his fundamental right or freedom has been either denied, violated or threatened. The same provision also allows institution of matters to the courts of law for the interest of the public.<sup>134</sup>

The constitution empowers the High Court to preside over matters of infringement of constitutional rights provided for under the Bill of rights and grant appropriate remedies.<sup>135</sup> Under Art. 25 however, a reasonable and justifiable limitation in a democratic society can impede the realization of the rights under the Bill. Also, as its counterpart South African constitution, the rights provided in the constitution are subject to be achieved progressively within resources availability.<sup>136</sup>

In the case of *Mittu bell*<sup>137</sup> which involved state eviction and demolition of applicants' houses in Mitumba village near Wilson airport, Nairobi, following a seven days' notice and without alternative accommodation, the court affirmed justiciability of economic and social rights in Kenyan 2010 constitution. The government claimed that the applicants were not entitled to claim violation of such social economic rights since they are rights under the second generation to be realized progressively. In refuting such argument, the court referred to paragraph 5 of Vienna Declaration on Programme of Action<sup>138</sup> which provides for universality indivisibility, interdependent nature of human rights. The court stated further that;

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<sup>133</sup> Op. cit Orwago N. pp 177/164

<sup>134</sup> Art 22(2)(c) 2010 Constitution.

<sup>135</sup> See Articles 23 and 165 constitution.

<sup>136</sup> Art. 21(2). Under Art.20 (5)(c) issues of allocation of resources are to be done by state organs and the court or tribunal should not interfere with the decision so as to reach different conclusion, however, under Art 20(5)(a) the state has the responsibility to justify to the Court or tribunal interpreting Art 43 on economic and social rights that there is insufficient resources to implement the right.

<sup>137</sup> High Court at Nairobi. Petition No. 164 of 2011.

<sup>138</sup> World Conference on Human Rights 25<sup>th</sup> June 1993.

The argument that social and economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations.

The court therefore meant that provisions of economic and social rights require the state to immediately fulfil its obligation under the constitution. The court accepted the fact that the obligation under the constitution requires progressive realization of these rights however, it held that the obligation requires the state to begin taking step towards realization of the rights.

### The question of progressive realization and minimum core obligation

Resources constraints is a crucial issue which the convention noticed when it comes to the realization of the rights provided therein.<sup>139</sup> To deal with this, the convention allowed states to ensure progressively the realization of these rights. The committee of Economic, social and cultural rights in the general comment number three on states obligations interpreted progressive realization not be treated as to depriving the obligation of all meaningful content but to be read in the overall objective of the convention or *raison d'être* hence requiring states as expeditiously and effectively as possible towards the objective.<sup>140</sup>

In order to ensure there is progress towards expeditious realization of the rights, the committee<sup>141</sup> developed the concept of minimum core content. Minimum core content is defined to mean;

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<sup>139</sup> Chapman A and Russell S. Introduction chapter in Chapman A and Russell S. Core obligation: Building a Framework for Economic, Social and Cultural Rights Intersentia, Antwerp Oxford New York 2002 pp 10

<sup>140</sup> Op.cit para 10 Gen. Comment No. 3.

<sup>141</sup> Ibid

The nature or essence of a right that is the essential element or elements without which it loses its substantive significance as a human right and in the absence in which state party should be considered in violation of its international obligation.<sup>142</sup>

This minimum content has been put to act as a floor in which the rights should not fall below. The committee also developed the concept of minimum core obligation in order to guide the attainment of minimum core content or minimum essential level obligatory to every state party to the convention taking into consideration maximum availability of resources as provided for under art 2(1) of the convention.<sup>143</sup> The committee proceeded to note that in order to plead failure to meet its minimum core obligations, states were required to demonstrate that every effort had been made in using the recourses available for attainment of its obligations. The general comment however, requiring states to attain minimum core content via minimum obligation, did not provide for methodology to achieve such objectives<sup>144</sup> hence it was left for states themselves to interpret these obligations.

### South African constitutional court and the reasonableness test

The reasonableness test was developed and cemented in the case of *Grootboom*.<sup>145</sup> The case involved a group of squatters who were evicted by the government from a village in Western Cape

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<sup>142</sup> Op. Cit. Chapman and Russell pp9

<sup>143</sup> Op.cit. pp9. The General comment interpreted the minimum core obligation to the attainment of minimum core content to mean non deprivation of individuals of basic food staff, essential primary health care, basic shelter and housing. States would have therefore failed their obligation if all those requirements were not to be achieved at a minimal level and would be regarded to be depriving the *raison d'être* of the covenant.

<sup>144</sup> Ibid pp 10

<sup>145</sup> 2001(1) SA 46(CC). In the case, the court departed from the Economic Social and Cultural Rights Committee's proposition on the minimum core obligations of the state. The court said, it was very difficult to determine the minimum core obligation of the right without having a requisite information on the need and opportunities for the enjoyment of the right because they vary according to income, employment, poverty also social historical circumstances of the country. Therefore, the court suggested the question on the constitutional obligation to be whether the measure taken by the state to realize the right are reasonable. The court however accepted that there are some cases where it might be appropriate to consider the content of minimum core obligation to determine states compliance, however, the court must have sufficient information placed before it. See para 32 and 33 case.

Province and rendered homeless. Relying on s.s 26 and 28, they applied to the State's High court for an order requiring the government to provide them with adequate basic shelter till they obtain permanent accommodation. At the constitutional court, all government plans and project put in place to deal with housing problem were thoroughly examined, only to be declared unreasonable.

The court found that failure of the policy to address the needs for emergency shelter meant that the policy failed to respond to the needs of the most desperate hence unreasonable.<sup>146</sup> The court using the reasonableness test, said that its work is not to inquire whether other more desirable or favorable measures could have been adopted or how public money could have been better spent, but only to consider the reasonableness of any measure adopted.<sup>147</sup> It also considered the general comment observations on progressive realization of the rights under the covenant especially on non-deprivation of the *raison d'être* of the covenant.<sup>148</sup> The constitutional provisions of the on the rights to dignity, equality and freedom<sup>149</sup> were decisive to prove state's obligation to the basic necessities of life such as shelter.<sup>150</sup> However it is important to bear on mind that states are not obliged to fulfil the constitutional obligation beyond resources available.<sup>151</sup>

The Constitution of Kenya of 2010, the state is required to achieve progressively the realization of the rights under art 43.<sup>152</sup> However, in the case of *Mitu Bell* the High court of Kenya interpreted this obligation as requiring the state to start taking visible steps immediately. In requiring the state to take immediate steps, the court took into consideration the condition of the applicants who were evicted without being offered alternative accommodation. The court referred to Art.10 (2) (b) of

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<sup>146</sup> Op. cit. Klug H. the Constitution of South Africa pp 133.

<sup>147</sup> See *Grootboom* case Para 41

<sup>148</sup> Ibid Para 45

<sup>149</sup> Ss 9&10 of the 1996 South African constitution.

<sup>150</sup> See *Grootboom* case Para 44

<sup>151</sup> See Art 2(1) ICESCR and ss 26 and 27 of 1996 Constitution.

<sup>152</sup> Art 21 (2) Kenya Constitution 2010.

the constitution which provides for human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of marginalized as national values and principles of good governance binding all state organs and the Kenyan community as a whole.

In the case of *Matthew Okwanda V. Minister of health and medical services & three others*<sup>153</sup>, the High court of Kenya explained the purpose of having justiciable social rights in the constitution. The applicant in the case, was 68years old retired civil servant and trade unionist suffering from diabetic mellitus.<sup>154</sup> Due to his old age, unemployment and poverty, he was unable to meet cost for managing appropriate diet and medication. Petitioning to the court, he relied on articles 43 and 57 of the constitution seeking the right to reasonable care and assistance as well as proper medical treatment as an old member of society as the new constitution aimed at ameliorating the situation he is facing and that of the poor and marginalized in the society.<sup>155</sup> The government, argued *inter alia* that, the rights under art 43 of the constitution were to be realized progressively and that availability of resources was a key factor for the realization of the rights.<sup>156</sup> The court, explaining the desire of incorporating art 43 in the constitution in dealing with problems of poverty unemployment, ignorance and diseases, it argued that it was the responsibility of the state to show at least it has taken measures including setting of the standards towards achieving progressive realization of the rights stated.<sup>157</sup>

It is very important to note that, unlike the South African constitutional court, the High Court of Kenya is not concerned with the reasonableness of the measures taken towards realization of the

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<sup>153</sup> High Court at Nairobi, Petition No. 94 of 2012.

<sup>154</sup> See *Methew Okwanda's* case Para 123.

<sup>155</sup> Ibid Para 4,5, and 6 to the case

<sup>156</sup> Ibid Para 8 to the case

<sup>157</sup> Ibid Para 16 to the case



rights provided in the constitution.<sup>158</sup> In this case, the court referred to the case of *Kenya society for mentally handicapped v. Attorney General and others*<sup>159</sup> in which it stated that;

.....The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and to a party who comes before the Court.<sup>160</sup>

Therefore, according to the court in both cases above, the interpretation of progressive realization of social rights in the Kenyan constitution relies much to the provision of s. 21 which provides for state's responsibility to observe, respect, protect, and fulfill the rights in the Bill by just setting measures and standards to achieve progressive realization. The measures need not be reasonable, but only be seen.

### The issue of limited resources

In the South African case of *Grootboom*, the court was aware of the issue of resource constraints towards realization of the right to housing. It noted that availability of resources determines both the rate of achievement of the obligation and reasonableness of the measure employed.<sup>161</sup> The court reiterated what Chaskalson P said in *Soobramoney*;

What is apparent from these provisions is that the obligations imposed on the State by s.s 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights

<sup>158</sup> Ibid Para 21 and 23 to the case

<sup>159</sup> Nairobi High Court Petition No. 155A of 2011.

<sup>160</sup> Para 18 to the case.

<sup>161</sup> See *Grootboom* case Para 46.

themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.<sup>162</sup>

The court was carefully in handling down the reasonable measure for expeditious attainment of goals depending on resources availability.

In the subsequent case *Minister for Health and others v. Treatment Action Campaign (TAC) and others*<sup>163</sup>, the constitutional court got a chance to address the issue of resources. The case involved challenge of the measure adopted by the government in addressing the problem of HIV positive mother-child transmission. The government's policy which was to supply Nevirapine drugs. However, these drugs were only made available to few research centers within the public health sector.<sup>164</sup> TAC challenged the program for the denial of a section of mothers who had no access to the research centers in violation of ss. 7(2), 27 and 28(1). The government however relied on resources constraint as a reason of not being able to supply the full package of the treatment and throughout the country.<sup>165</sup>

In court's view when rendering the decision, resources was not a constraint.<sup>166</sup> This is because according to the agreement, the manufactures of drugs accepted to offer drugs free of charge for five years to South Africa.<sup>167</sup> As its obligation is only to supply to mothers and children, it was within its available resources.<sup>168</sup> Again, in the course of the proceedings of the case it came to be

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<sup>162</sup> Ibid

<sup>163</sup> 2002(5) SA 721(CC).

<sup>164</sup> See Avnash G. Social assistance as a Framework for Social Policy in South Africa, The Constitutional Right to have Access to Social Security as a Framework for Social Policy in South Africa: Lesson from India. VDM Verlag Dr. Muller Aktiengesellschaft & Co. KG Port Elizabeth 2005 pp97

<sup>165</sup> See Op. Cit Coomans pp 174.

<sup>166</sup> Ibid pp180

<sup>167</sup> See Para 19 & 80 of the TAC case.

<sup>168</sup> Ibid

known that the government had made some substantial increase of fund for HIV treatment.<sup>169</sup> From this therefore the court concluded that budgetary constraint was not an impediment to the obligation. The issue of resource constraint was raised again in another social assistance case.<sup>170</sup> This case however has element of discrimination as against Art. 2(2) ICESR to be dealt with in the next part.

In Kenya, resource availability also guides fulfilment of states obligation towards realization of economic and social rights in the constitution.<sup>171</sup> Moreover, as explained above in the discussion of justiciability of economic and social rights in the Kenyan 2010 constitution, it is explicitly stated that courts and tribunals do not have authority to interfere with state's allocation of resources available solely on the basis of reaching different conclusion.<sup>172</sup> However, the same provision subjects the state to prove to courts and tribunals that resources are not available and obligates it to set priorities in allocating resources to ensure enjoyment of the rights to vulnerable groups.<sup>173</sup>

In the case of *Mitu bell* the High court of Kenya, addressing the issue of resources scarcity referred to Art 21(1) of the constitution to show that it is not always that the state has the duty to fulfil its obligation which may need the state to take positive measures requiring resources, rather there is the duty to *respect* (emphasis is mine) implying that the state has to refrain from interfering directly or indirectly the enjoyment of the right. The court concluded that in the case beforehand, evictions

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<sup>169</sup> Ibid

<sup>170</sup> *Khosa and Others v. Minister of Social Development and Others* 2004 (6) SA 505 (CC).

<sup>171</sup> Art. 20(5) constitution of Kenya 2010.

<sup>172</sup> Art 20(5) (c). The provision was purposely put for the respect of the doctrine of separation of powers. See op.cit N. Orago pp 186/614. However, in the case of *Trusted Society of Human Rights Alliance v. Attorney General*, [2012] eKLR, the High court of Kenya at Nairobi held that despite the doctrine of separation of powers, the Court is entitled to review the government's decisions determining if they have been rationally and reasonably made. Para 77&98.

<sup>173</sup> Art 20(5)(a) and (b) 2010 constitution.

and demolition of the applicants' houses rendering them homeless was a clear violation of the duty to respect under the constitution.

In the case of *Matthew Okwanda*, the court urged the government to take holistic approach to manage its resources rather than focusing only on specific needs of a particular individual.<sup>174</sup> The court cited two cases, South African and Kenyan<sup>175</sup> which *inter alia* held that regarding resource scarcity, the realization of socioeconomic rights meant the realization of the condition of poor and disadvantaged, however, that must be the starting point of freeing a community from socioeconomic need. The court said; “.....There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.”<sup>176</sup> This interpretation, in my view is a very big step in Kenya socio-economic rights jurisprudence, to the fulfilment of a society based on human dignity, equality, freedom as well as poverty alleviation as desired by the incorporation of economic and social rights in the bill of rights.

### Discrimination to the enjoyment of social security right and other socio-economic rights

The *Khosa* case<sup>177</sup> was about challenging some provisions of the South African Social Assistance Act 59 of 1992 as unconstitutional. The applicants were Mozambican citizens who had gotten permanent residence in South Africa. According to the Act and the Welfare Amendment Act, the applicants were not qualified for social assistance because they were not South African citizens.<sup>178</sup>

The applicants relied on the provisions s. 27(1) (c) of the constitution which obliged the state to

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<sup>174</sup> Para 16 of the case

<sup>175</sup> *Soobramoney v. Minister for Health, Kwa Zulu-Natal* 1997(12)BCLR 1696 and *John Kabui vs. Kenya National Examination Council & 2 Others*, Nairobi High Court Constitutional Petition No. 15 of 2011.

<sup>176</sup> Op.Cit Para 16 Mathew Okwanda case.

<sup>177</sup> Ibid

<sup>178</sup> Op.cit.Coomans pp. 174

provide the rights stated to “everyone” including non-citizens and for the purpose of the case permanent residents.<sup>179</sup> Sections 9 and 36 on the right to equality and the general limitation clause to the bill of rights were also called into question justifying states violation of its constitutional obligations.<sup>180</sup> The government advanced immigration reasons and the issue of limited resources to extend social security to non-citizens.<sup>181</sup> In rendering the decision and declaring the social assistance scheme as discriminatory and unfair, the court introduced *proportionality* test setting criteria justifying non-citizens exclusion to the enjoyment to the right to social security and assistance. Those criteria are the purpose of the provided constitutional right, the impact of exclusion, relevancy of citizenship requirement and lastly, the impact of the denial of the right to the enjoyment of other rights.<sup>182</sup>

The court therefore concluded by declaring the exclusion of non-citizens as discriminatory, unfair, and inconsistency with the general limitation clause of s. 36, as it failed to distinguish between those non-citizens who lived in south Africa as permanent residents whom for that reason had already been employed and integrated to the south African community on the one hand and those illegal or temporary residents on the other.<sup>183</sup>

The constitution court of South Africa, to the large extent has managed to solve the question of discrimination to the accesses to social security and assistance through carefully interpretation of the provisions of the constitution. In the *Grootboom* case for example interpreting the bill of rights provisions of right to dignity, equality and freedom it proposed that state should strive to ensure

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<sup>179</sup> Op.Cit.Avnash G. pp 100

<sup>180</sup> Op.cit Coomans pp174

<sup>181</sup> Op.Cit.Avinash G. pp 100

<sup>182</sup> O.p cit Avinash G.pp 101

<sup>183</sup> Paras 58, 59 of the case.

basic necessities of life for all especially the poor and vulnerable who require immediate attention.<sup>184</sup>

The question of discrimination in the enjoyment to the social rights in Kenya was addressed in the case of *John Kabui Mwai and 3 others v. Kenya National Examination Council and others*<sup>185</sup> whereby among other things the issue for determination was whether government policy restricting number of pupils from private primary schools who could join national high schools was discriminatory and in violation of the right to education as provided for under art. 43(1) (f) of the constitution. The court in making its determination, it referred to article 10(2) (b) of the constitution providing for national values and principles including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. The court said;

The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources....<sup>186</sup>

Therefore, as explained above, on protection of socio-economic rights the court has relied much on the constitutional values of human dignity, nondiscrimination and equality for the realization of these rights in the constitution.

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<sup>184</sup> Para 36 & 44

<sup>185</sup> High Court of Kenya at Nairobi Petition no.15[2011]

<sup>186</sup> Kabui Mwai case.

## Government responses towards the Constitution and courts interpretation of protected social rights

The government of South Africa in 2004 responded to constitutional obligation to ensure basic necessities of life through social security and social assistance for poverty relief.<sup>187</sup> The government enacted the Social Assistance Act<sup>188</sup>, which among other things it seeks to create a national policy for the efficient and effective use of the limited resources available for social assistance and promotion of equal access to government services.<sup>189</sup> The Act addresses for the provision social services and payment of social grants basing on means test and eligibility prescribed in s. 5 of the Act.<sup>190</sup>

The Act, establishing for provision of assistance and grants, it has been argued that it has brought a positive impact towards poverty alleviation.<sup>191</sup> The good thing of the Act is that it has managed to target rural area population, support to other household members including children, well-tailored to poverty and also it performs well in gender terms.<sup>192</sup>

In Kenya, responding to constitutional guarantee to socio-economic rights including of every person to social security, the government of Kenya developed the Kenya social protection policy 2011.<sup>193</sup> In the policy, Art. 43(3) of the constitution, providing for the right to appropriate social security to persons who are unable to support themselves and their dependents has been defined to mean the provision of social protection in its totality including social assistance; social security

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<sup>187</sup> See op.cit Avinash G. pp 122

<sup>188</sup> Act No. 13 2004

<sup>189</sup> Preamble to the Act No. 13 2004.

<sup>190</sup> See Avinash G. pp 124&126. Social grants are non-contributory and paid on the basis of annual budgetary allocation. They Include child support grant, care dependency grant, foster child grant, disability grant, older person grant, war veteran grant and a grant in aid.

<sup>191</sup> Ibid pp128

<sup>192</sup> Ibid pp 128-129

<sup>193</sup> Ministry of Gender, Children and Social Development, Kenya National Social Protection Policy; June 2011

and health insurance.<sup>194</sup> Among other things, the policy measures for both social security and social assistance aim at establishing institution and providing resources needed for social assistance provision to various targeted populations as well as strengthening the existing social security regimes to cover all workers including those in informal sectors.

In 2013, the Kenyan Social Assistance Act was enacted to give effect to art 43(1) (e) of the constitution and establishing the national social assistance programs for persons in need.<sup>195</sup> In the act, social assistance is defined to mean assistance provided in accordance with this Act to persons in need and other persons including financial assistance and social services.<sup>196</sup>

To the large extent, the Act has managed to fulfil the objectives of the policy as it covers persons in need in a nondiscriminatory manner including persons with disabilities and both widow and widowers however, one shortcoming is on citizenship as one of the eligibility criteria.<sup>197</sup> However in enforcing this rights basing on citizenship, still courts in Kenya may invoke South African case *Khosa case* in which the South Africa constitutional court introduced the *proportionality* test in denying non-citizens, especially those with permanent residence the right to social assistance. This would be a very big step towards realization of society respecting human dignity, equity, inclusiveness and nondiscrimination as provided for in the constitution.<sup>198</sup>

Conclusion;

The chapter has analyzed protection of social security rights and other economic rights in constitutions, policies and laws of Tanzania, Kenya and South Africa, jurisdictions subject of this

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<sup>194</sup> See P.p. 1 policy 2011

<sup>195</sup> Social Assistance Act, 2013(Act No.24 2013).Also see the long title to the Act.

<sup>196</sup> S. 2 Act No 24 2013.

<sup>197</sup> Ibid S. 17 and s. 19(1)(b).

<sup>198</sup> Art. 10(1) (b) Kenyan constitution 2010.



thesis. In the analysis, it has been seen that Tanzania still has undeveloped jurisprudence on constitutional protection of these rights, both in the current and the draft constitution. The South African constitutional court and Kenyan High court approaches as well as governments response towards protection of constitutional social rights have also been analyzed. The next chapter will include recommendations especially to Tanzanian government and courts on the realization and protection of social rights basing on the analysis made in all three chapters especially the third when it comes to good practices from South Africa and Kenyan social rights jurisprudence

## CHAPTER IV

### RECOMMENDATIONS

#### **Introduction**

The previous chapters have analyzed socioeconomic rights justiciability debate, exclusion of justiciable economic and social rights in constitutions particularly the 1977 Tanzania constitution and the current draft constitution, the meaning of the right to social security and its extension to cover disadvantageous and population in the informal sector as well as a thorough analysis of the Kenya and South Africa on the guarantee of social security right and other economic rights.

This recommendation chapter aims at suggesting some good practices basing on the Kenya and South African analysis as well as International conventions requirements to the fulfilment of the enjoyment of the right to social security without discrimination.

#### **Fallacious classification of human rights into “generations”**

The traditional classification of human rights into generations<sup>199</sup> basing on their historical development and intensified by cold war tension is a fallacy.<sup>200</sup>

This thesis therefore argues against such classification basing on the original vision of the original UDHR which provided for the interrelatedness of the rights prescribed therein.<sup>201</sup> Even on a

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<sup>199</sup> Human rights have been classified into 3 generations basing on their historical development; first generation involving civil and political rights; second generation involving economic social and cultural rights and the third generation involving right to development and solidarity rights. See B. Algan; Rethinking “Third Generation” Human Rights, Ankara Law Review Vol: 1 No: 1(Summer 2004) pp121, pp 128

<sup>200</sup> See An-Na'im A. To affirm the Full Human Right Standing of Economic Social and Cultural Rights in in Yash G. and Cottrell J (eds); Economic, Social and Cultural Rights in Practice, the Role of Judges in Implementing economic social and cultural rights, Interights London 2004 pp 7, pp 12 .

<sup>201</sup> Op. cit. see An-Naim A. gives example of art 28 of the UDHR which provides that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized”, the author interpretes such a provision to be introducing obligation at both domestic and international levels for full protection of of the rights provided therein.

practical point of view, it can clearly be seen that both kinds of rights are interrelated, indivisible and interdependent because they are both essential for the wellbeing and dignity of every person.<sup>202</sup>

The Interrelatedness and interdependent nature of these two groups of rights was even affirmed by subsequent human rights treaties abandoning the traditional “generations” classification.<sup>203</sup> The most authoritative document on interdependence nature of human rights is the Vienna Declaration on Program of Action which explicitly provides for the universal nature of human rights to be beyond question.<sup>204</sup> Basing on this notion, I therefore recommend states analyzed in this thesis, especially Tanzanian government, courts, and NGOs to reconsider implementation of human rights disregarding this artificial classification bearing in mind that all rights are essential for the wellbeing and dignity of a person as a whole being.

### The right to social security and other economic social and cultural rights as legally enforceable human rights

Classification of economic and social rights on the one hand and civil and political rights on the other, led to laxity in treatment of economic and social rights as enforceable human rights.<sup>205</sup> This

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<sup>202</sup> Ibid A. An-Naim pp 12 gives an example of the right to education and freedom of association which are dependent on each other for an individual to enjoy both rights. Again, both rights will not be of useful effect if enjoyed by someone who lacks shelter and healthcare.

<sup>203</sup> See preambles and art 1 to the Convention on Elimination of all Forms of Discrimination Against Women 1979; and The Convention on the Rights of the Child 1990.

<sup>204</sup> See art 1 to the declaration also, para 5 which provide that “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

<sup>205</sup> As seen from the analysis, the constitution of the United Republic of Tanzania for example divides two sets of rights; the first being fundamental and justiciable rights (namely basic rights and duties) and the second one those rights which are not fundamental and non-justiciable (directive principles of state policy) which the right to social security is included in this second group.

is because, of the question of the duty holder to individual enjoyment of the rights.<sup>206</sup> This has been dealt with in the UDHR which entitles everyone to the enjoyment of the rights provided for therein by impose moral obligation to states to realize social and economic rights.<sup>207</sup>

Recourses scarcity which seems to be a big problem especially to underdeveloped economies has also been interpreted in relation to states' specific obligations to respect, which does not require much resources from the government as being more of a negative nature. The obligation to fulfil comes in in attempts to rescue the life of the most vulnerable and desperate people in the society as in south African *Gootboom* and Kenya *Mitu Bell* cases taking into consideration the right to human dignity. In order to ensure the most vulnerable groups are protected and live in dignity, courts intervention is very important to enforce these rights.

### Building human rights culture and improving the living standard of the people entails adoption of a transformative constitution

Constitutional changes in the United Republic of Tanzania needed to adopt enforceable socio economic rights for promotion of respect to uphold human dignity in accordance with the spirit of the universal declaration of human rights and fulfilment of citizens' aspirations towards the move to the new constitution<sup>208</sup>

The 2010 Constitution of Kenya and 1996 South African constitution, are truly transformative entrenching justiciable economic and social rights in the bill of rights and authorizing courts to enforce them by removing impediments for instituting complaints before courts of laws. Relying

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<sup>206</sup> See Roth K. Defending Social, Economic and Cultural Rights in Human Rights Quarterly Vol. 26 (2004) pp 63 pp 65

<sup>207</sup> Op.cit

<sup>208</sup> URT Constitution 1977 Art 9(f) provides for the obligation to state organs to direct their programs and policies towards ensuring preservation and upholding of human dignity in the spirit of the UDHR 1948.

on respect to human dignity, interpretation of courts in these two countries have also been productive as courts have been granting remedies to affected populations especially those in desperate need as in cases of *Mitu bell* and *Grootboom*.

Therefore, this is to recommend the Tanzania government to reconsider its aims of building human rights culture and improving the living standard of the people especially those in informal sectors of the economy and indigents, to conform to current global environment and international standards by amending the constitution in force or which will be in force after the referendum to be truly transformative.

### The role of courts in inventing constitutional rights interpretation

The 1977 constitution of United Republic of Tanzania, was partly inspired by the 1949 Indian constitution which did not include legally enforceable socioeconomic rights but incorporated the range of unenforceable rights in the form of policies for political processes.<sup>209</sup> Still the Supreme Court of India managed to make this part of the constitution enforceable by integrating the individual's basic needs as part and parcel of the right to life.<sup>210</sup>

For the Indian Supreme Court, the right to life embodied in Art. 21 of the constitution, includes the rights to live with human dignity, and other economic and social rights under the unenforceable directive principles part.<sup>211</sup> The supreme court of India, showing that it has aimed to protect and defend the dignity and extend social justice to the most desperate and vulnerable population, it

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<sup>209</sup> See op.cit Kabudi pp 92 and Avinash G. pp 18.

<sup>210</sup> International IDEA; A practical Guide to Constitutional Building; Building a Culture of Human Rights, International IDEA, Sweden 2011 pp 48.

<sup>211</sup> See op.cit Avinash G. pp 31

also allowed public interest litigation.<sup>212</sup> By doing so the Indian Supreme Court has acquired much credibility and regarded as the Supreme Court for Indians.<sup>213</sup>

Taking the lesson from Indian Supreme Court, the Judiciary in Tanzania still has the opportunity to protect the most vulnerable population who languish in poverty by holding the state responsible for their social assistance and health care relying on the provision of articles 9(a) and (f) on human dignity and the UDHR, article 11 (1) on social security and assistance which are not legally enforceable , article 12 on equality and dignity and art 14 on the right to life which is an enforceable right in the constitution.

### Equality, non-discrimination and extension of coverage to the enjoyment of the right to social security and social assistance

Article 9 of the ICESCR entitles “everyone” to the right to social security including social insurance.<sup>214</sup> Both the covenant and the whole of general comment number 19 on the right to social security emphasize much on equality and non-discrimination to the enjoyment of this right.<sup>215</sup> This includes extension of social security programs to cover informal sector populations, non-nationals as well as the poor and desperate.<sup>216</sup> The Philadelphia convention of 1944 also called for extension of social security measures to provide for a basic income for all in need of such protection and comprehensive medical care.<sup>217</sup>

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<sup>212</sup> See the *Municipal Council, Ratlam v. Verdictand* AIR 1980 SC 1622 where by the Municipal Council was held responsible for stench and stink as a result of open drains and public excretion by nearby slum dwellers.

<sup>213</sup> See Prempeh K. Marbury in *Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa* Tulane Law Review, Vol. 80, No. 4, 2006 pp 63.

<sup>214</sup> Also see Art 22 UDHR 1948

<sup>215</sup> Art. 2(2) ISECR.

<sup>216</sup> Part II (B) and (C) General comment no.19.

<sup>217</sup> Declaration concerning the aims and Purposes of the International Labour Organization (ILO), Annex to the Constitution of the ILO, section III (f).

Therefore, this is to call upon the Tanzanian government whose current laws and policies do not cover the population out of the formal sector of the economy to reconsider the laws and take good practices which the South African and Kenyan government did in extending provisions of social security to the most vulnerable and desperate population by adopting social assistance laws as described above in the analysis.

## CONCLUSION

This thesis aimed at examining constitutional protection of the right to social security. Due to the relationship between the right to social security and other rights, therefore words “socioeconomic rights” and “social security rights” have been used interchangeably throughout the thesis. The thesis was guided by the assumption that all human rights are universal interrelated and indivisible. Also, in order to achieve creating a society respecting human rights, human dignity, equality and nondiscrimination in the spirit of the UDHR, social economic rights particularly social protection and assistance must be enforceable and extended to cover disadvantageous population.

The debate on justiciability of economic and social rights was revisited discussing the arguments for and against justiciability of economic and social rights basing on the positivity and negativity nature of civil and political rights on one side and economic and social rights on the other. Other assumptions such as resources constraints and courts legitimacy to the enforcement of socioeconomic rights were also discussed.

The discussion ended by the position adopted by the post-apartheid 1996 constitution of South Africa which provided for justiciable economic and social rights in the Bill of rights. In the *Recertification case*, the South African constitutional court affirmed the possibility of enforcing economic and social rights despite of budgetary issues. The court said that even civil and political rights attract budgetary issues hence courts intervention to protection of social rights is not a jeopardy to separation of powers doctrine. The conclusion was therefore that both the 1996 South African constitution and constitutional court provided a solution for protection of social rights even in young economies.



The concept of the right to social security, its content and relationship with other human rights was also examined. It was concluded that, although the ILO conventions are very important to setting of standard on the right to social security, still the ICESCR is very important in interpreting violations to states obligation to the realization of the right to social security.

The ICESCR provides for states obligation to the realization of the right to social security and other economic and social rights. The convention has taken into consideration the issue of resources scarcity hence giving a leeway for states to realize progressively the rights set therein. The analysis of constitutional jurisprudence for both Kenya and South Africa has been very useful to interpreting states obligation to the realization of social economic rights provided for in the ICESCR. Issues of obligation to take step, budgetary issues and nondiscrimination to the enjoyment of the right to social security has been very useful to undeveloped Tanzania jurisprudence which do not provide for enforceable socioeconomic rights.

The thesis has ended by recommending that the international community, states and courts should neglect the fallacious classification into positive and negative rights of civil and political rights on the one hand and economic and social right on the other. This is because relying on the spirit of the UDHR all rights are universal, indivisible and interrelated hence the enjoyment of one set of rights depend on the other. The most important recommendations especially to Tanzania has been explained to be the adoption of a transformative constitution like South Africa and Kenya the commitment to build egalitarian social justice society . The judiciary has been also advised to adopt good practices of constitutional rights interpretation from the Indian Supreme Court which despite of unenforceable socioeconomic rights in the 1949 constitution, the right to life has been used as a catalyst towards realization of these social rights under the inverted right to live in dignity.

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